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⁴ Elected and succeeded McWhorter, J., January 1, 1909.

⁵ Ceased to be President January 13, 1909.

⁶ Became President January 13, 1909.

⁷ Term expired December 31, 1908.

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[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

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FORD v. STROUD.

(Supreme Court of North Carolina. March 24, 1909.)

1. TRIAL (§ 164*)—NONSUIT—EFFECT OF MOTION.

A motion by defendant for nonsuit at the close of plaintiff's testimony admits his testimony to be true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 372; Dec. Dig. § 164.*]

2. FRAUDS, STATUTE OF (§ 71*)—PURCHASE OF LAND—VALIDITY OF PAROL CONTRACT.

A parol contract for the purchase of land is void.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 118; Dec. Dig. § 71.*]

3. FRAUDS, STATUTE OF (§ 138*)—EFFECT—CONTRACTS IMPLIED ON PART PERFORMANCE—RECOVERY OF MONEY PAID.

Where plaintiff paid defendant a part of the price under an oral contract to convey and entered upon the land and made improvements thereon, but defendant did not convey because of his failure to complete his own title thereto, plaintiff could recover the amount paid and compensation for his improvements to the extent of the increased value of the property, less his profits while in possession, even though defendant denied the validity of the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 328, 338; Dec. Dig. § 138.*]

4. VENDOR AND PURCHASER (§ 215*)—RIGHTS OF THIRD PARTY.

Where plaintiff purchased part of land from defendant which the latter had agreed to purchase from another, plaintiff was under no obligation to defendant's vendor, and hence a contention that plaintiff should have tendered the latter the price of all of the land he sold defendant in order to entitle plaintiff to a conveyance of that actually purchased from defendant was untenable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 452; Dec. Dig. § 215.*]

5. TENDER (§ 16*)—SUFFICIENCY—EXCUSE FOR FAILURE TO PRODUCE ACTUAL CASH.

In an action to recover money paid under a parol contract to convey because of defendant's failure to complete his own title by complying with his contract with his own vendor, if plaintiff offered to comply with his contract with defendant and tendered the latter's vendor the price of the land, which he refused to receive unless plaintiff would take and pay for more land than he had agreed with defendant to purchase, it was not necessary for plaintiff to tender the actual cash to defendant's vendor.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 53; Dec. Dig. § 16.*]

6. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS—FACTS NOT CONTAINED IN RECORD—INSTRUCTIONS.

That part of the charge not contained in the record is presumed to be correct on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749, 3750; Dec. Dig. § 928.*]

7. VENDOR AND PURCHASER (§ 341*)—RECOVERY BY PURCHASER OF MONEY PAID—SUBMISSION OF ISSUES.

In an action to recover partial payments made under an oral contract to convey, as well as the value of improvements made while in possession, issues submitted *held* to cover the matter in controversy.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1015; Dec. Dig. § 341.*]

Appeal from Superior Court, Columbus County; Lyon, Judge.

Action by Charles Ford against A. Stroud. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff sues for the recovery of money paid defendant on account of the purchase money of a tract of land under a parol contract to purchase, and for compensation for improvements put upon the land while in possession under the contract. He sets out in his complaint the contract, alleges the payment of the money, and that he put the improvements on the land, and the refusal of defendant to make a deed. Defendant does not specifically deny these allegations, but sets up new matter, by way of avoidance, etc. Plaintiff testified: That defendant proposed to sell him the land, and he agreed to buy it for \$750. He paid defendant \$200 on account of the purchase money and went into possession. The contract was not reduced to writing. Plaintiff paid an additional \$200, stayed on the land two years making valuable improvements, buildings, etc., and "had to leave." Defendant returned \$80 of the amount paid. When plaintiff demanded of defendant a deed for the land, he told him to call on Mr. D. L. Gore, who would make the deed. That he went to Mr. Gore to get a deed, and he refused to give him one. "I told defendant that I wanted him to give my money back, and he refused to do so. Mr. Gore said he would not make me a deed un-

less I would take all of the land. I offered to pay Mr. Gore the balance of the money on the piece of the land as defendant told me to do. * * * Defendant said he had a bond for title. I could not get a deed from Gore, nor from defendant for the land, although I was ready to pay the money and offered to do so." Defendant objected to this testimony and duly excepted to its admission. Plaintiff testified, without objection, that he put improvements on the land, giving estimate of value. Defendant offered no evidence, but moved for judgment of nonsuit, which was denied, and he excepted. Defendant tendered issues which his honor refused to submit. Exception. The following issues were submitted to the jury: "(1) Did defendant contract with plaintiff to sell plaintiff the tract of land described in the complaint? (2) Is the defendant indebted to plaintiff on account of money paid to him on purchase price of said land, and, if so, what amount? (3) Is the defendant indebted to plaintiff on account of improvements of said land, and, if so, what amount?" Defendant excepted. The only portion of his honor's charge to which exception was taken, and which is set out, is as follows: "If they found from the evidence and by the greater weight thereof, the burden being on the plaintiff, that the plaintiff complied with his part of the contract or offered to comply with said contract, and that he tendered D. L. Gore the amount for said land under the contract, and that Gore refused to receive same and make title to the plaintiff, unless plaintiff would take it and pay for more land than he had contracted for, the court charges you that it was not necessary for the plaintiff to tender the actual cash to the said Gore." There was a verdict for plaintiff on all of the issues. Judgment and appeal.

H. McClammy, for appellant.

CONNOR, J. The defendant's motion for judgment of nonsuit presents the merits of the appeal. The motion admits the plaintiff's testimony to be true. If, upon these facts, he is entitled to maintain the action, the rulings, in regard to the admission of evidence and the instructions, are correct. While the answer does not specifically admit the allegation in the complaint in regard to the contract, it does not contain a general or specific denial, as required by the Code of Procedure. We think that, upon both reason and authority, the plaintiff is entitled to maintain his action and recover the amount paid on account of the purchase money and compensation for his improvements to the extent of the enhanced value of the land, less profits made by him while in possession. It is true that the contract of purchase, being in parol, is void. It appears that defendant was not able to make title until, by complying with the terms of a bond which he

held from D. L. Gore, he acquired one himself, and this he has failed to do, resulting in plaintiff's losing the land. In *Ellis v. Ellis*, 16 N. C. 402, it was held that a party who had paid the purchase money for land, under a parol contract which was repudiated by the vendor, was not entitled to maintain a bill in equity, either for specific performance because of the statute of frauds, or for the amount paid on the purchase price. The reason given by Ruffin, C. J., is: "Because so far as concerns the land the contract is merely void, and the money can be recovered at law in an action for money had and received." There is, in such cases, a total failure of consideration, and, as it would be inequitable to permit the vendor to repudiate his contract and retain the money paid upon it, the law gives to the vendee an equitable action, based upon an implied assumpsit for money had and received. The right to be reimbursed for the payment of the purchase money on a parol contract, for the purchase of land, repudiated by the vendor, and have compensation for betterments made while in possession under the contract has, in many cases, been enforced by courts of equity, by enjoining the eviction of the vendee until the money paid on the purchase price has been repaid and compensation for improvements made. In *Albea v. Griffin*, 22 N. C. 9, the bill was for specific performance of the contract. The defendants relied upon the statute of frauds; the contract being in parol. Gaston, J., said: "We admit this objection to be well founded, and we hold, as a consequence from it, that, the contract being void, not only its specific performance cannot be enforced, but that no action will lie, in law or equity, for damages because of nonperformance. But we are nevertheless of the opinion that plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and, by the act of God, or the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury." *Baker v. Carson*, 21 N. C. 381. In *Dunn v. Moore*, 38 N. C. 364, relief was denied because the contract set up in the bill was denied. Nash, J., said that, if defendant had admitted the contract, the court would not have permitted him to put plaintiff out "without returning the money he had received and compensating him for his improvements."

While, in the case at bar, the contract is not denied, if it had been we should not hesitate to follow the decision in *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R.

A. 337, 80 Am. St. Rep. 783, in which Mr. Justice Furches reviews this and all of the other cases and shows conclusively that the right to relief cannot be defeated by a mere denial of the contract. See the very able and, the writer thinks, conclusive opinion of Smith, C. J., in *McCracken v. McCracken*, 88 N. C. 272. Certainly this cannot be done where the action is for the recovery of the purchase money, as upon an implied assumpsit for money had and received, or for money paid for a consideration which has failed. In *Daniel v. Crumpler*, 75 N. C. 184, Rodman, J., says that the right to recover the purchase money and compensation for improvements against one who has repudiated his parol contract to convey land "stands on general principles of equity." As said by Judge Furches in *Luton v. Badham*, supra, all of the cases are based upon this theory. It is doubtful whether, prior to the abolition of the distinction between actions at law and suits in equity, an action could have been maintained, at law, for compensation for improvements put upon land by the vendee. The court of equity had granted relief by enjoining the eviction of the vendee by the vendor, who had repudiated his contract until he had made compensation for improvements. Whatever difficulty was encountered because of technical rules of pleading disappears when forms of action are abolished and a plaintiff recovers upon the facts stated in his complaint and proven upon the trial. The careful review of the authorities and satisfactory discussion in the opinion in *Luton v. Badham*, supra, and the dissent of Smith, C. J., in *McCracken's Case*, supra, relieves us of the duty of doing more than to refer to them. It is interesting to observe the trend of thought upon the subject as illustrated in the decided cases, showing how the law "works itself pure" and enforces the maxim "that there is no wrong without a remedy." If, as said by Judge Gaston, it is inequitable for a man to make a parol contract to sell land, receive the purchase money, and encourage the vendee to make improvements on it, and, by repudiating the contract, retain the money and take the land, with its enhanced value, certainly the court must find some way, either preventive or remedial, to make him "do equity." We think that it has done so. We cannot perceive any good reason for saying that, so long as the vendee retains possession under the contract, he will be protected in his right, but if, seeing that he can get no title, he surrenders possession, he is without remedy. His honor correctly denied the motion for judgment of nonsuit and admitted the evidence of the contract. It seems that defendant had purchased a body of land from Gore, of which he sold plaintiff only a portion, and that he owed Gore on account of the purchase money more than plaintiff owed de-

fendant. Plaintiff was under no obligation to pay Gore any more than he owed defendant. Hence the contention about the validity of the tender to Gore by plaintiff is without merit. Plaintiff was under no obligation to Gore—had made no contract with him. Defendant was in default in not perfecting his title and conveying to plaintiff according to his contract. We find no error in the portion of the charge set out in the record. The remainder is presumed to be correct. The issues submitted present the matter in controversy.

Upon an inspection of the entire record, we find no error.

(150 N. C. 327)

CAULEY v. SUTTON et al.

(Supreme Court of North Carolina. March 24, 1909.)

1. MORTGAGES (§ 137*)—EFFECT—TITLE OF MORTGAGEE.

A mortgage passes the legal estate to the mortgagee, who holds it in trust for himself and for the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 270-276; Dec. Dig. § 137.*]

2. MORTGAGES (§ 144*)—ACQUISITION BY MORTGAGEE OF OUTSTANDING TITLE—EFFECT.

The title acquired by a mortgagee purchasing an outstanding title superior to his own inures to the benefit of the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 289; Dec. Dig. § 144.*]

3. MORTGAGES (§ 144*)—ACQUISITION BY MORTGAGEE OF TAX TITLE—EFFECT.

Though under Revisal 1905, § 2858, a mortgagee may pay the taxes on the premises and acquire a lien on the land therefor, his purchase of the land at a tax sale gives him only an incumbrance, not the equitable estate of the mortgagor, which still exists, and the mortgagee cannot assert any right under the tax deed in conflict with the equity of redemption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 289; Dec. Dig. § 144.*]

4. MORTGAGES (§ 143*)—REDEMPTION—POSSESSION BARRING REDEMPTION.

A mere constructive possession by a mortgagee arising from the fact of his being the owner of the legal title without actual possession for the required length of time does not bar the equity of redemption under Revisal 1905, § 391, barring an action for the redemption of a mortgage where the mortgagee has been in possession for a specified time.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 281-284; Dec. Dig. § 143.*]

5. TAXATION (§ 805*)—SUIT TO SET ASIDE TAX DEED—LIMITATIONS.

An action under Revisal 1905, § 1589, to cancel a tax deed is not an action to recover real estate sold for taxes within the three-year statute of limitations provided for such actions.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

Appeal from Superior Court, Lenoir County; Lyon, Judge.

Action by W. R. Cauley against J. R. Sutton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Loftin, Varser & Dawson and Murray Allen, for appellants. G. V. Cooper and Y. T. Ormond, for appellee.

WALKER, J. This action was brought for the purpose of having canceled a tax deed executed by the sheriff to Ben Sutton, and also a mortgage on land executed by the plaintiff to Ben Sutton, which he alleged had been satisfied. The defendants are the heirs of Ben Sutton, who is dead. The plaintiff alleged, and there was evidence tending to prove, that the mortgagee bought the land at a tax sale, and received a deed from the sheriff therefor. The defendants averred that the tax sale was in all respects valid, and passed the absolute title to their ancestor, and that he had been in adverse possession of the land after the execution of the mortgage for a sufficient length of time to bar the plaintiff's cause of action under the statute of limitations. The court restricted the issues to the effect of the tax deed as a cloud upon the title, and refused to pass upon the question as to the payment of the debt secured by the mortgage; the administrator of Ben Sutton not being a party to the action. The jury found in response to issues submitted to them that Ben Sutton acquired no title to the land by the tax sale and the deed of the sheriff to him, and therefore that the plaintiff is the owner of the land in controversy. In other words, that the tax deed did not deprive the plaintiff of his equity of redemption by conveying an absolute or unconditional estate to the ancestor of defendants. They further found that the plaintiff's cause of action was not barred by the statute of limitations. The court rendered judgment upon the verdict, and left all matters of account between the parties, with reference to the mortgage debt, to be determined in an independent action, without prejudice by reason of the proceedings and judgment in this suit. The defendants excepted and appealed.

The only question involved in this case is whether the mortgagee, by his purchase at the tax sale, acquired title to the land, and thereby extinguished the plaintiff's equity of redemption. This question must be answered in the negative. In some states, where a mortgage is regarded only as a security for the debt and the legal title is not considered as in the mortgagee, it has been held that a mortgagee who is not in actual possession of the land may acquire the title by purchase at a tax sale as against the mortgagor. But this is not the rule with us. The legal estate passes to the mortgagee, and he holds it not only in trust for himself, but also for the mortgagor. *McLeod v. Bullard*, 86 N. C. 210-216; *Capehart v. Dettrick*, 91 N. C. 844. We have held that, if he pays off an incumbrance or buys in an outstanding title superior to his own, he cannot hold it for his own benefit, but the act inures to the benefit of him for whom he holds as trustee, and fur-

ther, "if he buys at a sale made under a prior mortgage, he does not acquire the title for his own personal benefit, but merely removes an incumbrance and the charges of it, as a prior lien, upon the property itself; and this is so, because he cannot take advantage of his position to the injury of those whose interests are committed to his protection." *Taylor v. Heggie*, 83 N. C. 244. The taxes assessed were a lien upon the land, and, when the mortgagee bought at the sheriff's sale, he purchased only an incumbrance, the cost of which he is entitled to have added to the debt secured by the mortgage, and it is, therefore, an additional lien upon the land. The mortgagee could have paid the taxes and acquired a lien upon the land to the extent of the amount so paid by him. Code, § 3700 (Revisal 1906, § 2858). He did not acquire the equitable estate of the mortgagor, which still exists, notwithstanding his purchase at the tax sale, and he cannot use his deed for the purpose of asserting any right in conflict with the mortgagor's equity of redemption.

We find no error in the rulings of the court to which the numerous exceptions were taken. There was no evidence that the mortgagee had occupied the land for a sufficient length of time to bar the equity of redemption under the statute of limitations. A constructive possession by him, arising from the fact of his being the owner of the legal title, without actual possession for the required length of time, did not effect that result. *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495; *Parker v. Banks*, 79 N. C. 480; Code, § 152 (4); Revisal 1906, § 391 (4). The statute requiring actions to recover lands sold for taxes to be brought within three years after the execution of the sheriff's deed has no application to this action, as it was not brought for the recovery of the land. *Beck v. Meroney*, 135 N. C. 532, 47 S. E. 618. It was brought under Acts 1893, p. 37, c. 6 (Revisal 1906, § 1589). The plaintiff alleged that the debt had been paid, and asked for a cancellation of the mortgage and for general relief. It would have been a more correct procedure if the court had ascertained what amount, if any, is due upon the mortgage debt, proper parties being made for that purpose, so that the plaintiff could redeem or the mortgage be foreclosed by sale under the order of the court and all matters in controversy between the parties settled in one action. As it is, only a part of the case has been tried.

We do not commend the course pursued, and, if the plaintiff or the defendants so desire, the court may proceed further in the cause for the purpose herein indicated; otherwise the present judgment will stand as a final and not merely an interlocutory judgment in this action, without prejudice to the right of either party to proceed by an independent action to have determined the other matters of difference between them.

No error.

(150 N. C. 333)

MIDGETTE v. BRANNING MFG. CO.

(Supreme Court of North Carolina. March 24, 1909.)

1. NEW TRIAL (§ 41*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where witness, in answer to a question calling for a fact, responded by the expression of an opinion or conclusion, it cannot be held sufficiently prejudicial to call for a new trial, where the objecting party did not request to have the answer stricken out, and the witness afterwards gave the fact on which the jury were enabled to draw their own conclusion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 68; Dec. Dig. § 41.*]

2. APPEAL AND ERROR (§ 1078*)—EXCEPTION TO TESTIMONY—ABANDONMENT IN BRIEF.

An exception to testimony not referred to in appellant's brief will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4259; Dec. Dig. § 1078.*]

3. MASTER AND SERVANT (§ 315*)—WORK OF INDEPENDENT CONTRACTOR—LIABILITY FOR NEGLIGENCE.

Where a contract is for something that may be lawfully done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control is reserved as to the manner of doing the work or the agents to be employed, and the person for whom the work is done is interested only in its ultimate result, and not in the several steps in its progress, the latter is not liable to a third person for the negligence of the contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1241; Dec. Dig. § 315.*]

4. MASTER AND SERVANT (§ 88*)—INJURIES TO SERVANT—RELATION OF PARTIES—EMPLOYÉS OF INDEPENDENT CONTRACTOR—LIABILITY FOR NEGLIGENCE.

If one leased a mill of a manufacturing company under contract, whereby he was to employ the work and bear all the expense of running it and was to receive logs from the company from trucks, manufacture them into timber, and deliver it aboard cars for shipment at so much per 1,000, with a guaranty that he was to make a certain sum per month, and the company retained no right to control his conduct, and was interested only in the ultimate result of the work, the company is not liable for the death of a workman therein due to his negligence; but, if it reserved a general control of the operation of the mill, it would be liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 146; Dec. Dig. § 88.*]

5. MASTER AND SERVANT (§ 265*)—ACTION FOR DEATH OF EMPLOYÉ—BURDEN OF PROOF—RELATION OF PARTIES.

In an action for the death of an employé killed in a mill claimed by defendant to have been run by an independent contractor, the burden was on plaintiff to show that his intestate was defendant's employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 894; Dec. Dig. § 265.*]

6. TRIAL (§ 142*)—QUESTIONS FOR JURY—TRUTH OF TESTIMONY AND INFERENCES THEREFROM.

The truth of the testimony, together with the reasonable inferences to be drawn therefrom, is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

7. MASTER AND SERVANT (§ 284*)—ACTION FOR DEATH OF EMPLOYÉ—RELATION OF PARTIES—QUESTION FOR JURY.

Evidence, in an action for the death of an employé, held to present a question for the jury as to whether plaintiff's intestate was employed by defendant or by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1004; Dec. Dig. § 284.*]

8. MASTER AND SERVANT (§ 293*)—ACTION FOR DEATH OF EMPLOYÉ—INSTRUCTIONS.

In an action for the injuries to an employé, an instruction as to what would constitute negligence in an employer in providing a safe place to work for his employés held to correctly state the law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1150; Dec. Dig. § 293.*]

9. MASTER AND SERVANT (§ 294*)—ACTION FOR DEATH OF EMPLOYÉ—REFUSAL OF INSTRUCTION—FELLOW SERVANTS.

In an action for the death of an employé, there was no error in refusing a requested instruction that intestate and his brother were fellow servants, in view of the latter's testimony that he directed him and had a right to, that he was under his direction, and that he had sent him up to a certain machine to put a piece of belting back at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1162, 1165; Dec. Dig. § 294.*]

10. MASTER AND SERVANT (§§ 295, 296*)—ACTION FOR DEATH OF EMPLOYÉ—INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an employé, instructions on the issues of assumed risk and contributory negligence held to be correct in themselves and to present every phase of the controversy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168, 1180; Dec. Dig. §§ 295, 296.*]

Appeal from Superior Court, Tyrrell County; Ward, Judge.

Action by B. S. Midgette, administrator of W. S. Leary, against the Branning Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff, administrator, alleges: "That plaintiff's intestate, Leary, as he is informed and believes, was employed and working in the mill of the defendant company under its direction as assistant engineer on and before the 18th day of December 1900. That on the 18th day of December, 1900, the said W. S. Leary was killed in the mill of the defendant company by reason of the negligence of said company, in that its machinery and belts were not safe and were in a rotten and unsecure condition and unfit for the operation of the said mill. That the said mill of the defendant company was not in a safe condition. Its machinery was in bad condition, unsafe, and dangerous. That the same was old and secondhand, having been carried from another old mill and placed in the mill at Columbia. That the building was badly and negligently arranged, with not sufficient room for operating said machinery and repairing same, which facts were known to the defendant company. That the plaintiff's in-

testate, Leary, while in the employ of the defendant company, and under its directions, was ordered to repair one of the belts running the machinery of the said mill which had broken, and he was required to do this work while the mill was running, which was dangerous and unsafe." That while so engaged in discharging the duties imposed upon him by his employer, to wit, "mending one of the belts," one of them broke, and intestate was killed. Defendant denied that it was, in any respect, negligent, or was guilty of any breach of duty to intestate in the premises. It alleged that plaintiff's intestate was guilty of contributory negligence. It also alleged that intestate well knew of the condition of the machinery when he entered upon the employment there a month before his death and assumed the risk incident thereto. The following issues were, without objection, submitted to the jury: "(1) Was the death of plaintiff's intestate caused by the negligence of the defendant, as alleged? (2) Did said intestate, by his own negligence, contribute to his death? (3) What damage, if any, is plaintiff entitled to recover of defendant?"

There was evidence tending to show: That the mill was running at night—8 or 9 o'clock—to make up lost time, when intestate was killed. That it was in bad condition. That it could not make time without running on "and stopping often." That it was an old secondhand mill. That the "hog," a machine which grinds up slabs, runs by 2 belts having a cylinder, with 12 knots, making 1,600 revolutions a minute. It was in bad condition, out of balance, had poor foundation, and was, on that account, shaking. There was evidence, on the part of defendant, tending to contradict this evidence. The direct testimony in regard to the manner in which intestate came to his death comes from C. H. Leary, who testified: "That on the day intestate was killed, we had worked part of the time and started up again at 7 o'clock at night to make up lost time. He was killed between 8 and 9 o'clock that night. I was upstairs talking with the sawyer, and he said to me that one of the 'hog' belts was broken; there being a belt on each side of the cylinder. I went down to repair the broken belt. I found it torn in two and took it off, putting a piece of edging between the belt and pulley. I then went down to work on the belt, but soon found that the edging which I had put in had shaken out. Had the 'hog' been in place, it would not have shaken, and the piece would not have come out. It came out because it was shaken so bad. Deceased was helping me to fix the belt. I directed him, and had the right to direct him. He was under my direction. I sent him up to the 'hog' to put the piece back. The 'hog' was eight feet higher than where we were standing. He walked up on conveyor box, which conveyed

sawdust to the platform. This was the only way he could get up to it without going over conveyor box and through belts. I did not see him after he got up. It was not more than a minute. When he got up, the belt got foul around the pulley. It was slipping. It struck him on the hand. When it first got foul, the sawdust was so thick I could not see him until engine was slowed down. I saw him then hung up in the belt that caused his death. If the engine had been shut down when he went up to repair the belt, there was no danger. There would have been no danger if the 'hog' had been balanced. The pulley was badly worn, about played out. The belt was unsound and had been burned. It was two feet between where I was working and the conveyor belt." Witness was here asked by plaintiff what was the space condition of the room where he had to work. Defendant objected to this question and to the answer to the same. Objection overruled. Witness answered: "Did not have room. If there had been more room, could have gone around." To the admission of this question and answer defendant excepted. Witness said on cross-examination: "When machinery ought to stop, it was the duty of both myself and my brother to stop it. My brother had been at the mill some little time. W. T. Campen employed us both and paid us both. The 'hog' was approached by a ladder. To get to the ladder my brother had to come out underneath the belt or go through it. After he got out he could have gone up the ladder. After he got up to pulley, he would have been safer going up by the ladder which was provided by the company. If the engine had been stopped, there would have been no danger. The cause of danger was that my brother went up there when the engine was in motion. When I was there, it was my duty to stop the engine. When we were at work on the pulley the safer was to go up by the way he went."

Plaintiff was permitted, over defendant's exception, to show by one Walker: That the "hog" would shake a great deal, that the mill broke down often, and that "we could seldom make a day." The breaking of the conveyor chain was the cause of the delay. That there was no safe way to go up into this machinery while the mill was running. Witness had worked at the mill, but had not seen the "hog" for three months before the accident. Leary was recalled and testified that "to go around the shaft there was only 12 inches space, and that he would have to go all around the mill."

Defendant introduced W. T. Campen, who had charge of the mill. He testified upon the question of negligence and contributory negligence that: "I instructed the hands never to repair the mill unless it was shut down. I gave this instruction to the deceased and his brother, Howard Leary. * * * There

was greater danger going up the way the deceased went than if he had gone up the steps which were provided by the company. Deceased had been working with the company six weeks when he was killed. Brother of the deceased said it was his own fault that he was killed." There was contradictory evidence upon this point. Witness also testified that: "The mill and machinery were in as good condition as mills generally are, and was kept in good condition. No 'hog' could be run for 20 hours in balance, owing to the great strain upon them, but this 'hog' and machinery were in a condition usual with mills." Defendant introduced other testimony to same effect. It was admitted that the mill belonged to defendant. For the purpose of showing that plaintiff's intestate was not employed by it, defendant introduced W. T. Campen, who testified: "That in December, 1899, he was employed by the Branning Manufacturing Company to take this mill and run it. By the contract he was to keep up all repairs and do all the work. He was to receive the timber from the log cars of the Branning Manufacturing Company, cut the logs into lumber, and deliver it to the Branning Manufacturing Company, thus manufactured for shipment on its cars, for which the Branning Company was to pay him \$1.75 per 1,000 feet. We were to give each other 30 days' notice before either could give up the contract. I took charge on the 15th day of January. Later, and before the accident, I became dissatisfied with the contract and gave notice that I would quit. Whereupon Mr. Branning, president of the company, had an interview with me, and told me he would pay me what I could make, and he indemnified me that I should make \$150 per month. Under the contract I was to have entire charge of the mill. I was to hire the hands and to discharge them, and no one else had anything to do with them. I remained in charge two years and one month. If I made more than \$150 per month which he guaranteed I should make at \$1.75 per 1,000, I was to have it. * * * I kept no office and kept no books. I made out the pay rolls and sent them to Edenton, and the money was charged to me. The Branning Company employed an inspector to keep the amount of lumber I cut. This was agreed upon when I made the bargain, and this was the only person about the mill that the Branning Company hired or paid. It was also agreed, when the contract was made, that the Branning Company should keep the books and should furnish the cash for the purpose of paying the hands upon the pay rolls furnished by me. This was done because I had no facilities for bookkeeping, and because there were no banks in Columbia from which I could get money. There was some trading done by my laborers at the store of the Branning Manufacturing Company. This credit was given them at my request. State-

ments were sent to me, and I was responsible to the amount of the wages due the hands. The amounts so advanced were charged to me on the books. The company agreed to pay me 5 per cent. of the net profits for the trade of my men at their store. This agreement was not made until after the guarantee by Branning Company referred to above. I hired intestate, paid him, and directed him, and no one but me had the right to discharge him. I would not have kept a man as assistant engineer who was disagreeable to the chief, and would have dismissed him upon complaint of the chief; but he could not be removed without my consent. My name did not appear upon the pay roll at all, only the hands employed by me. Bills for material furnished the mill and for repairs upon the mill were charged against me, and I would send them to the Branning Company, which would put them to my account. That company had nothing to do with the work, except to give me any special sizes they would want to cut. Generally the timber was cut in 16 and 12 foot lengths, but if defendant wanted special bill I would cut them for them." This testimony was corroborated by Horton Corwin, Jr., president of defendant company. Plaintiff's witness Walker, upon this branch of the case, testified that while he was employed at the mill (1900) he saw Mr. Branning come to the mill often. "He would talk with Campen; were walking around the plant together once or twice a month." There was other evidence to same effect. Defendant owned a plant in Edenton, N. C. The mill in which plaintiff's intestate was employed was located at Columbia, N. C. The lumber cut there belonged to defendant. It was shipped to Edenton. Defendant, at the appropriate stages of the trial, moved for judgment of nonsuit, which was refused, and defendant excepted. Defendant made a number of requests for special instructions, which are noticed in the opinion. The instructions given, to which exceptions are taken, are noted and discussed in the opinion. There was a verdict for the plaintiff upon both issues, and damages assessed at \$2,000. Motion for new trial. Denied. Exception. Judgment upon the verdict. Defendant assigned errors and appealed.

Pruden & Pruden, Shepherd & Shepherd, and W. M. Bond, for appellant. J. B. Leigh and Aydlott & Ehringhaus, for appellee.

CONNOR, J. (after stating the facts as above). No issue being tendered in regard to the alleged assumption of risk by plaintiff's intestate, that defense is eliminated from the case. We presume that the learned counsel treatise that phase of the case as involved in the issue directed to the alleged contributory negligence of plaintiff's intestate. We have set out the testimony at some length, because the requests for special in-

structions and the exceptions to the instructions given present every possible question which could arise upon the record. We will first dispose of the exceptions to his honor's admission of testimony. The first is directed to the answer given by the witness as to the "space condition," etc. It will be observed that the answer is not responsive to the question. He was not asked for an opinion or conclusion, but for a fact. If his honor had been so requested, he would doubtless have stricken out the answer and directed the witness to give one responsive to the question. This the witness did later on by saying that "there was one 12-inch space to go around the shaft." While the first answer may have been, and probably was, subject to the criticism made by defendant, it was, in the light of the subsequent answer giving the fact upon which the jury were enabled to draw their own conclusion, not prejudicial to defendant—certainly not sufficiently so to call for a new trial. It is frequently difficult to draw the line between testimony which is a statement of fact and that which is a conclusion of the witness. The testimony, upon which the next two exceptions are based, is, at the most, irrelevant and harmless. The exception to the testimony of Walker, in regard to the condition of the mill three months before the death of plaintiff's intestate, is not referred to in the brief and is to be treated as abandoned. The motion for judgment of nonsuit was properly denied.

The contention of the defendant, in regard to the question of Campen's being an independent contractor, which, as said by his honor to the jury, lay at the threshold of the case, is presented by the prayer for an instruction that, "Upon all of the evidence in this case, the jury shall find that Campen was an independent contractor, that defendant owed no duty to the intestate, and they shall answer the first issue, 'No.'" This his honor declined, but said to the jury "that this would be the first inquiry, and, if they found that Campen was an independent contractor, that ends the case." He further instructed the jury: "It is contended by the defendant that it had contracted its mill to Campen. It is accepted law that where a contract is for something that may be lawfully done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with, in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is done is interested only in the ultimate result of the work, and not in several steps as to progress, the latter is not liable to a third person for the negligence of the contractor; but liability of the superior master depends upon his right to control the conduct of the person with whom he contracts in the prosecution of the work. If you find from the

evidence that Campen leased the mill of the Branning Manufacturing Company under contract that was to employ the labor and bear all the expense of running the mill, was to receive the logs of the company from the trucks, manufacture the same into timber, and deliver it aboard cars for shipment at \$1.75 per 1,000 feet, with guaranty that he should make as much as \$150 per month, and that it did not retain the right to control the conduct of Campen and was interested only in the ultimate result of the work, then the defendant is not liable, and you will answer the first issue, 'No.' But if you find from the evidence that there was a general control of the operation of the mill reserved by the defendant company in respect to the general operation of the mill, then go further and consider the question of negligence raised."

To these instructions defendant excepted. We think that the charge is in accordance with the decisions of this court. The language used by his honor in defining an "independent contractor" is identical with that of Mr. Justice Walker in *Craft v. Lumber Co.*, 132 N. C. 151, 43 S. E. 597, quoted with approval in *Young v. Lumber Co.*, 147 N. C. 26, 60 S. E. 654. If his honor correctly declined the instruction which practically took the question from the jury, there can be no valid criticism of the charge given. Plaintiff suggests that the burden of showing that Campen was an independent contractor was on the defendant. The burden was upon the plaintiff to show that his intestate was in the employment of defendant. It would seem that, when he showed that the mill was the property of the defendant corporation, that at the time of his employment it was being operated in sawing the logs of the defendant, and that the sawed lumber was shipped to defendant at Edenton, near by, where it was operating a plant, plaintiff was entitled to go to the jury on the issue. "Where the plaintiff has suffered an injury from the negligent management of a vehicle, such as a boat, car, or carriage, it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor or other person, for whose negligence the owner would not be answerable." 1 Sherm. & Redf. Neg. 71. Any other rule, especially where persons are dealing with corporations, which can act only through agents and servants, would render it almost impossible for a plaintiff to recover for injuries sustained by defective machinery or negligent use of machinery. The

plaintiff's intestate may be taken to have known that the mill was the property of defendant—that it was being used for the purpose of sawing defendant's logs. One witness said that "defendant owned much timber on this side of the Sound, and a railroad." Campen said, "there was some trading done by my laborers at the store of the Branning Manufacturing Company." All of this was well calculated to cause intestate to suppose that Campen was operating the mill for defendant company, and, in the absence of any testimony to the contrary, would be sufficient to carry the case to the jury and sustain a verdict. Without entering into the debatable domain of the burden of proof, it is sufficient to say that at least in this case the plaintiff had put upon defendant the duty of "going forward" or "persuading" the jury that Campen was not operating the mill for the owner, but as an independent contractor. The instruction asked by defendant involves the proposition that, taking all of the evidence as true, it has shown, as a matter of law, that Campen was an independent contractor.

An examination of the authorities and decided cases discloses much confusion and uncertainty in respect to what constitutes an independent contractor. The question underwent an exhaustive discussion in *Wiswall v. Brinson*, 32 N. C. 554, in which Pearson, J., and Ruffin, C. J., differed in opinion. The opinions are "mines of learning" and "arsenals of argument." Pearson, J., begins the discussion by saying that "the question is one of serious difficulty," that the cases "are numerous," and that "many of them turn upon nice distinctions." He states the fundamental principles "that one should so use his own as not to injure another," and "that which you do by another, you do by yourself"; and from these two maxims he says: "The general rule results where one procures work to be done, if a third person is injured by the negligence or want of skill of the persons employed, the person for whose benefit and at whose instance the work is done must make compensation. * * * The rule is founded upon justice, and exceptions to it should be allowed with caution and only to the extent called for by public convenience." He then proceeds to discuss the recognized exceptions, as established by decided cases. We would not undertake to add anything to the discussion in the opinion, concurred in by Nash, J., and the dissenting opinion of Ruffin, C. J. It is conceded that where the person employed to do work carries on an independent employment and does the work in his own way, by his own means, and free from the right of control by the person for whom the work is done, he is an independent contractor. This exception is based upon public convenience and sound policy. It is said: "The true test, as it seems to us, by which to determine whether one who renders service to another does so as a

contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished." Such was the leading case of *Milligan v. Wedge*, 12 Adol. & E. 737, cited by *Sharpenstein, J.*, in *Bennett v. Truebody*, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117. There the injury was caused by the negligence of a plumber who "exercised an independent and distinct employment." It was held that the owner of the premises was not liable. In *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 706, the party employed was engaged in the "roofing and cornice business." *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63; *Manasfield Coal Co. v. McEnery*, 91 Pa. 185, 38 Am. Rep. 662. It would seem that where the person employed to do the work in his own way, and free from the control of the employer, is engaged in an independent calling, it is but just that persons who contract with him, either as employes or otherwise, should look to him for compensation. We do not mean to say that the exception is confined to work done by one engaged in an independent calling. It is certainly much more difficult to fix the limits of the exception when this element is absent. In *Waters v. Fuel Co.*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564, the employe of defendant was engaged in delivering coal at a stipulated price per load. Held, that he was the servant of the company. The court said: "It is not easy to frame a definition of the term 'independent contractor' that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts." *Speed v. Railroad Co.*, 71 Mo. 303, was an action for personal injuries sustained by plaintiff while engaged in unloading a car belonging to defendant. It appeared that the defendant had entered into an agreement with one Merry, by which he was to take entire charge and control of the business of loading and unloading freight to and from its cars at St. Louis station. By the terms of the agreement Merry was to have authority and control over the grounds, yards, and building at the station, including engines and cars to enable him to properly discharge his duties under the agreement. Merry was to be paid 15 cents per ton for each ton shipped to or from the yard. All the business was to be transacted by Merry in a manner satisfactory to the superintendent of defendant and subject to his control. Plaintiff was employed by Merry and was injured while in such employment. Defendant set up the defense that Merry was an independent contractor. *Henry, J.*, said: "There is an irreconcilable conflict in the adjudications upon this subject. The general principle is recognized everywhere that one is only liable for damages occasioned by the act of another when he stands in the relation of master to that other. It is

an easy matter to state the general principle, but it is often extremely difficult to determine, from the facts in a given case, whether the relation of master and servant exists." It was held in that case that the relation existed, and defendant company was liable. The value of the decision is weakened by the fact that the court attached importance to the character of the business in which defendant was engaged—a common carrier. Probably all that can be done, after an examination of the decided cases, is to adopt the conclusion of Judge Bailey that: "There is much confusion in the authorities, and much depends on the exact conditions of the employment and particular circumstances attending each case. The mere fact that one works by the piece or job, and not by the day or week, is not a conclusive test of the character of the employé, whether a servant or an independent contractor." *Personal Injuries*, 470.

The plaintiff having shown conditions entitling him to go to the jury, it became the duty of defendant to show, or at least introduce, evidence to repel the plaintiff's proof. The truth of the testimony, together with the reasonable inferences to be drawn therefrom, was for the jury. There was much in the testimony to justify them in rejecting the defendant's contention. As we have pointed out: The mill belonged to defendant. The logs being cut were its property. The hands were paid by orders on the defendant. Some of them traded at defendant's store. The defendant kept an inspector at the mill to take an account of the lumber. The defendant guaranteed that Campen should make at least \$150 per month. The contract was for no definite time. There is no suggestion that Campen carried on any independent employment. Mr. Branning came to the mill often. It is true that defendant's testimony was to the effect that the company had nothing to do with the work, except to give special sizes it wanted cut, and tended to explain many of the circumstances and conditions relied upon by plaintiff. It is significant that Campen uses the expression that he was employed by the Branning Manufacturing Company to take the mill and run it. In *Young v. Lumber Co.*, *supra*, the contract, under which the logs were cut in the woods, was in writing. We held that his honor erroneously submitted the question, as to its legal signification, to the jury; but held that he should have submitted the question whether the contractor was cutting the logs in good faith under the contract. Merely calling a man an "independent contractor" cannot make him so. We should hesitate to hold that a person or corporation could, under the form and semblance of an independent contract, operate a secondhand mill in bad repair, dangerous to employés, for the purpose of having its logs cut into lumber, and escape liability for injuries sustained

by the employés who, in good faith and upon reasonable grounds, supposed that they were employed by and were working for the owner of the mill. Such an exception to the general rule stated by Chief Justice Pearson in *Wiswall v. Brinson*, *supra*, would not be founded upon public convenience or sound policy. In *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492, we held that, where the character of the work to be done was essentially dangerous, the duty to use due care could not be delegated to an independent contractor by the owner of the property. We also discussed the question in *Young's Case*, *supra*. This is a recognized exception to the rule. How far this exception to the nonliability of the owner of the property is applicable to a case like this we do not undertake to say. It is well worthy of consideration whether the owner of machinery, unsafe for use and dangerous to employés, can, by contracting with an insolvent person to operate it to do the owner's work and by simply surrendering control of the manner of doing the work, avoid liability for injuries sustained by employés. It may be that liability would be based upon a different legal foundation, falling within the domain of tort, rather than breach of contract. *Railroad v. Madden*, 77 Kan. 80, 93 Pac. 586.

Upon the question of negligence the court instructed the jury: "In order to establish actionable negligence, it is necessary for the plaintiff to show to the jury, by the greater weight of evidence, that there has been a failure by the defendant in the exercise of reasonable care to discharge some duty which it owed the plaintiff under the circumstances in which they were placed, 'reasonable care' being that care which a prudent man would exercise under similar circumstances, when surrounded by like conditions; and not only this, but he must also show that such failure of duty was the proximate cause of the result, 'proximate cause' being that which produces the result in a continuous sequence, and one without which the result would not have happened, and one from which a man of ordinary prudence could foresee that such result would likely happen. It is the law in North Carolina that an employer of labor, to assist in the operation of mill and plants, where the machinery is more or less complicated, is required to provide his employés, in the exercise of reasonable care, a reasonably safe place to work, and to supply them with machinery reasonably safe and suitable, and he is also required to keep such machinery in such condition as far as can be done in the exercise of reasonable care and diligence."

We perceive no error in this instruction. It is in accordance with the decisions of this court and the well-settled principles of the law prescribing the duty of employers to their employés. The record states that his honor charged the jury in respect to fellow

servants to which there was no exception other than his refusal to instruct the jury, as requested, that intestate and his brother, Howard Leary, were fellow servants. This, in the light of the testimony of Howard: "I directed him and had a right to direct him. He was under my direction. I sent him up to the 'hog' to put the piece back"—he could not have given. Defendant asked a number of instructions upon the second issue, some of which embodied correct propositions of law. Some of them could not have been given as asked, because they practically took the question from the jury. His honor instructed the jury upon this issue: "While the law imposes a duty upon the master, it also imposes a correlative duty upon the servant. It requires him to exercise ordinary care for his own safety, to use his intelligence and his senses, and it holds him responsible if he is injured by his failure to exercise such care. It requires him to observe the machinery at which he is working and the appliances used to discover those dangers which a man of ordinary prudence would discover, and, if he fails to perform his duty and is injured thereby, he cannot recover damages, for, while the plaintiff assumes the risk incident to the working in the mill, he did not assume the risk resulting from defective machinery or from defective place or appliances to do his work, and if the plaintiff knew of the danger of the machinery when he went up to fix the 'hog,' and if in consequence thereof the danger to himself was so obvious that any man of ordinary prudence would not have gone up the way plaintiff went, then the plaintiff would be guilty of contributory negligence, and you should answer the second issue, 'Yes.' If, however, the plaintiff was not guilty of contributory negligence, you will answer this issue, 'No.' If there was a safe way to go to the 'hog' provided by the company, which intestate knew, or ought to have known, and he chose another way which was unsafe, and this was the proximate cause of the hurt, the jury shall answer the second issue, 'Yes.' That if the jury shall find that it was clear in the mind of one of ordinary intelligence that it was dangerous to go into the machinery as deceased did, and that the danger was obvious and imminent, and notwithstanding he undertook to do so, and his doing so was the proximate cause of his hurt, the jury will answer the second issue, 'Yes.'" These instructions are correct in themselves, and we think present every phase of the controversy. The exception to the refusal to dismiss the case, because not brought in one year, was not pressed in this court. It is settled by *Meekins v. Railroad*, 131 N. C. 1, 42 S. E. 333.

We have examined the entire record, in the light of the exceptions made to his honor's rulings and the briefs of counsel. The

case was carefully tried and fairly submitted to the jury. The evidence, while in some respects conflicting, sustains the plaintiff's contention that the machinery was in bad condition, unsafe, and certainly dangerous when being operated at night.

There is no error.

(150 N. C. 318)

WILLIS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. March 24, 1909.)

1. PLEADING (§ 129*)—ADMISSIONS BY FAILURE TO DENY.

In an action against a telegraph company for failing to deliver a message, where defendant in its verified answer did not deny an allegation of the complaint that it owned and operated the line on which the error in transmission occurred, the answer was evidence in the nature of an admission that defendant was the owner of the line.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 270; Dec. Dig. § 129.*]

2. EVIDENCE (§ 208*)—ADMISSIONS—SUPERSEDED PLEADING.

The fact that defendant on leave filed an amended answer denying ownership did not affect the competency of the original as evidence, but merely affected its weight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 718; Dec. Dig. § 208.*]

3. TELEGRAPHS AND TELEPHONES (§ 74*)—OPERATION—ACTIONS FOR DAMAGES—INSTRUCTIONS.

A charge in an action against a telegraph company for failure to deliver a message, stating that if defendant's servants failed to exercise ordinary care in attempting to deliver it, and if, by the exercise of such care, the message could have been delivered in time for plaintiff to have reached his home, there was negligence, was sufficient on the question of negligence, in the absence of a special prayer for a more specific instruction.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.*]

4. TELEGRAPHS AND TELEPHONES (§ 73*)—ACTIONS FOR DAMAGES—QUESTIONS FOR JURY.

Where there was evidence that defendant telegraph company controlled the line on which the error in transmission of plaintiff's message occurred, and evidence of negligence in handling the message at the delivery office, a motion to nonsuit and a prayer for instructions, based on the assumption that there was no evidence of negligence, were properly refused.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 73.*]

Connor and Brown, JJ., dissenting.

Appeal from Superior Court, Carteret County; O. H. Allen, Judge.

Action by C. S. Willis against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover damages for failing to deliver a telegram. It appears that on July 27, 1907, at 3 o'clock p. m., Elvin Willis, a brother of the plaintiff, delivered to the defendant at Beaufort, N.

C., for transmission to the plaintiff, C. S. Willis, who lived in Richmond, Va., the following message: "C. S. Willis, 923 East Marshall Street, Richmond, Va. Papa died at 10.30 a. m. Elvin." The message was not delivered until 10 o'clock a. m., on July 23, 1907. It was received by the defendant's operator at Richmond at 3:30 p. m. on the day it was sent. The message was sent from Beaufort by way of Newport, and relayed at the latter place. When received by the defendant's operator at Newport, the address had been changed from "923 Marshall Street" to "23 Marshall Street," and the evidence tended to show that this change was made after the message had been received by the operator at Beaufort; in other words, on the line between Beaufort and Newport. The defendant contended that it was not liable by reason of this fact, as it did not own or operate that line, but that it was owned and operated as an independent line by Thomas Duncan, and there was evidence in the case to sustain this contention. It appears, though, that in the complaint, filed at Fall term, 1907, the plaintiff alleged that the defendant owned and operated the said line as a part of its line between Beaufort, N. C., and Richmond, Va., and that it undertook to transmit the message from Beaufort to Richmond. These allegations were made in sections 1, 2, and 3 of the complaint, and they were not denied in the answer filed at Fall term, 1907, though the other allegations of the complaint were. At Fall term, 1908, by leave of the court, the defendant filed an amendment answer in which the allegations as to the ownership and control of the telegraph line from Beaufort to Newport was denied, and evidence was introduced at the trial which tended to show that said line was not owned or controlled by defendant, but by Thomas Duncan. The plaintiff put in evidence the complaint and the first answer for the purpose of showing that the defendant did own and control the line from Beaufort to Newport. The defendant requested the court to charge the jury "that, if they believed the evidence, the line from Beaufort to Newport was not owned and operated by the defendant, and it would not be liable for any error which occurred on that line." This instruction the court declined to give, but charged that "it is a question for the jury to find from the greater weight of the evidence whether the line from Beaufort to Newport was owned and operated by the defendant, and, if the jury found that the line from Beaufort to Newport was not owned or operated by the defendant, it would not be liable for any error that may have occurred on that line, the burden of proof as to who owned the line, from Beaufort to Newport being on the plaintiff." Defendant excepted.

The defendant requested the court to charge the jury that the defendant would not be responsible for any error that may

have occurred in the transmission of the telegram before the same reached its line, and if the jury should find from the evidence that the telegram was delayed by reason of an error in the transmission and change of address before it reached the line of the defendant, then the jury would answer the first issue "No." The court, in response to the prayer, instructed the jury as follows: "The defendant would not be responsible for any error that may have occurred in the transmission of the telegram before the same reached its line. If the jury should find from the evidence that the telegram was delayed by reason of an error in transmission and the change of the address before it reached the line of the defendant, and such delay was the cause of the failure of the plaintiff to receive the message in time to have attended the funeral, then they will answer the first issue 'No.'"

The evidence tended to show that when the message was received at Richmond the operator handed it to a messenger for delivery to the sendee, and that he used a bicycle in delivering messages. The messenger, who had nine other messages to deliver, went to the place described in the message, No. 23 East Marshall street, and also to 23 West Marshall street, and inquired for C. S. Willis, but found that he did not live at either place. He also inquired at each house as to where Willis could be found, but received no information. The messenger returned to the office at 6 o'clock p. m. the same day, as soon as he had delivered the other messages, and handed the message for Willis to the operator, to whom he reported the facts. The operator examined the city directory, and, not finding Willis' name, inquired of other persons by that name about him. Failing to get any information, he wired back for a better address, but his service message was not received at Newport in time to wire to Beaufort and receive an answer before the time for closing the office, which was 9 o'clock p. m. A message was received at Newport from Beaufort giving the correct address that night, but after office hours, and it was not forwarded until the next day. The message from Newport to Richmond had to be sent via New Bern and relayed at that place, as the main, or direct, line to Richmond could not be used, "it being in trouble," as the operator testified. If it had been in order, the corrected message could have been sent to Richmond that night. It could not be sent by New Bern, as the office there had been closed for the night. There was evidence that no inquiry was made at the post office at Richmond for C. S. Willis, who lived at 923 Marshall street, nor was there any further search for him. The night clerk at Richmond mailed a postal card to Willis. The plaintiff could have left Richmond and attended the funeral of his father, if the message had been delivered to him any time before 8 p. m. on the day it

was sent, and would have left by the first train.

The court charged the jury, as to what would constitute negligence in failing to deliver the message after it was received by defendant, substantially as follows: If the defendant did not operate the Beaufort and Newport line, and the jury should find that an error in the message occurred on that line, and at the time the message was received by defendant company it had an incorrect address and the one at which defendant undertook to deliver the telegram, then the jury will consider whether or not the defendant company was guilty of negligence after the telegram reached its line at Newport, and if, in the exercise of ordinary care and diligence, the defendant could have gotten the correct address and delivered the telegram to plaintiff, so that he could have left Richmond on the 27th of July and reached home in time for the funeral, and defendant failed to do so, it was guilty of negligence, and the jury will answer the first issue "Yes." Defendant excepted to this instruction.

There was evidence as to plaintiff's mental anguish and damages. The court having refused to charge, as requested, that there was no evidence of any negligent delay in transmitting and delivering the telegram, and that the jury should answer the first issue "No," the defendant excepted. At the close of the testimony the defendant moved to nonsuit the plaintiff. The motion was refused, and the defendant excepted. There was a verdict for the plaintiff, upon which judgment was entered, and the defendant appealed.

Moore & Dunn, for appellant. Abernethy & Davis, for appellee.

WALKER, J. (after stating the facts as above). The plaintiff alleged in his complaint that the telegram was delivered to the defendant at Beaufort, N. C., for transmission to him at Richmond, Va. This was a clear and distinct allegation that the defendant was, at the time, the owner of the telegraph line between Beaufort and Newport, for this was a part of the line from Beaufort to Richmond, and the pleadings and proof show that this fact was well known to the defendant. It is also alleged that the defendant was engaged in the business of transmitting messages from Beaufort to Richmond, and received the message in question at Beaufort, and undertook to transmit and deliver it to the plaintiff at Richmond. The message, it appears, was actually sent by way of Newport, and over the Beaufort and Newport line. Those allegations, which were made in sections 1, 2, and 3 of the complaint, were not denied in the first answer of the defendant, which was filed January 25, 1908, and no reference was made to them, although the allegations of the other sections of the complaint were specially denied. If there had

been no amended answer, the allegations of the first three sections of the complaint would be deemed to be admitted, and the defendant would consequently be liable for any error in transmitting the message from Beaufort to Newport on its way to Richmond which occurred on that line. The language of the statute is that "every material allegation of the complaint not controverted by the answer shall, for the purposes of the action, be taken as true." Revisal 1905, § 503. When the plaintiff alleged, substantially, though very plainly, that the defendant was the owner of the line from Beaufort to Newport, and also alleged, in so many words, that it received the message at Beaufort and agreed to transmit and deliver it to the plaintiff, the defendant was called upon to deny the allegation, if not true, and, by not doing so, it tacitly admitted the truth of it. One of the fundamental maxims of the law is that silence implies consent. "Qui tacet, consentire videtur." For instance, where there is a duty to speak, and the party upon whom this duty rests does not, an assent may be inferred from his silence. *Russell v. Thornton*, 4 H. & N. 798, per Bramwell, J.; *Broom's Legal Maxims* (8th Ed.) 786. In this case, there was a verified complaint containing the material allegation that the plaintiff owned the Beaufort and Newport line, and had undertaken to transmit the message, not from Newport to Richmond, as now contended and as averred in the defendant's amended answer, but from Beaufort to Richmond. It was the defendant's duty to deny this allegation, if it was not true, as it vitally affected the question of its liability in one aspect of the case. Having chosen to be silent when it had the opportunity to traverse the allegation, we must hold that the complaint and first answer constituted some evidence from which the jury might reasonably infer the ownership by the defendant of the line from Beaufort to Newport. In *Perry v. Mfg. Co.*, 40 Conn. 817, the court say: "Admissions by a party, or by an authorized agent, either in court or out, may be given in evidence. But the circumstances surrounding the admission, the purposes for which it was made, and the conditions attached to it, may be fully shown. It may not infrequently happen that a party will not be bound by an admission, and will not be estopped from denying its truth. And in view of the showing on both sides, allowing each party to prove the whole truth, it will be for the triers to determine how the proof stands on the facts in controversy, on which the admission is claimed to bear. These principles were acted on, substantially, in the court below. They seem to us just and reasonable, and in harmony with the law of evidence." See, also, *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393, where many cases are cited in support of the competency of a pleading in an action as evidence against the party filing it, even where

he had no personal knowledge of the facts alleged, but made his averment on information and belief. The case of *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776, would seem to be directly in point. The fact that the defendant afterwards filed an amended answer and denied that it was the owner of the Beaufort and Newport line does not affect the competency of the evidence, but merely detracts from its weight or its sufficiency to prove the fact now in issue. See, also, 8 Enc. of Pl. & Pr. p. 27, and notes; *McMillan v. Gambill*, 115 N. C. 352, 20 S. E. 474; 11 Am. & Eng. Enc. (2d Ed.) 488. It would seem unreasonable that while the silence of a party, when called upon in a conversation to speak, is receivable in evidence against him, an answer, which is deliberately prepared and verified by the oath of the defendant in response to a demand for the exact truth, should be incapable of probative force. Candor and frankness require the defendant to answer every material allegation well pleaded, and any failure to deny, or evasion by him or suppression of the truth, should be considered as some evidence against him of the truth of the allegation. Such conduct is admissible as evidence, although it may be explained and is not conclusive.

In a case where the defendant in his answer admitted, not expressly but merely by implication, the allegation in the complaint of a payment on a note, and afterwards filed an amended answer denying the payment, this court, by Ruffin, J., said: "We find it difficult to apprehend the exact purport of his honor's rulings as thus given in the statement of the case; to know whether he rejected absolutely, as being incompetent, the evidence of the defendant's implied admission contained in the original answer, or whether, admitting it to be competent, he adjudged it to be in law insufficient to rebut the presumption of payment arising from the lapse of time. But taking it to be either way, we hold it to be erroneous. The fact that the evidence of the admissions was contained in an answer constituting a part of the pleadings in the cause cannot, as we conceive, detract from its competency. A man's own admissions touching the subject of a controversy to which he is a party are always admissible against him, and much more ought they to be so when solemnly made in a proceeding in a court of justice. 2 Danl. Ch. Proc. 977, and *Hunter v. Jones*, 6 Rand. (Va.) 541."

"Neither, as we take it, can its competency be destroyed by the fact that an amended answer was subsequently filed under the leave of the court. As a declaration of the defendant, it can lose none of its vigor because of that circumstance. It is still none the less his declaration, made at a time when he was called upon to disclose the truth, and, as such, may be evidence against him, while neither the original nor amended answer could be evidence for him. Such a declara-

tion has, more than ordinarily, the sanction of the presumption that a man will not untruly speak to his own hurt." *Adams v. Utley*, 87 N. C. 356, at page 358, citing *Isler v. Murphy*, 83 N. C. 215.

Our case is stronger than either of the two cases last cited, as here the plaintiff charged distinctly and clearly in the first two sections of his verified complaint that the defendant controlled the line from Beaufort to Newport and undertook to transmit the message from Beaufort to Richmond. The defendant filed an answer verified by one of its chief officers, and was of course called upon to deny this material allegation in the complaint, if not true, as the truth or falsity of it was within his and its knowledge. The case is strictly within the principle settled by this court in numerous cases. *Radford v. Rice*, 19 N. C. 39; *Nelson v. Whitfield*, 82 N. C. 46; *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3; *Chemical Co. v. Kirven*, 130 N. C. 161, 41 S. E. 1.

We think there was some evidence of negligence in failing to deliver the message after it was received at Richmond. The court charged the jury substantially that, if the defendant's servants failed to exercise ordinary care in attempting to deliver the message, and if, by the exercise of such care, the message could have been delivered in time for the plaintiff to have reached his home and attended the funeral of his father, there was negligence. This instruction is sustained by the case of *Hendricks v. Telegraph Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658. See, also, *Lynne v. Telegraph Co.*, 123 N. C. 129, 31 S. E. 350. The charge of the court was very general, it is true, but it is sufficient in the absence of any special prayer for a more specific instruction.

The motion to nonsuit was properly refused, as there was some evidence of negligence for the consideration of the jury under the instruction of the court. Neither a motion to nonsuit nor a prayer for instructions, based upon the assumption that there was no evidence of negligence, could properly have been granted, as there was not only some evidence that defendant controlled the Beaufort and Newport line, but there was also some evidence of negligence in handling the message at Richmond.

It is not necessary to discuss the other assignments of error. We have carefully examined them, and do not find any error in the rulings to which the defendant excepted. No error.

CONNOR, J. (dissenting). Plaintiff shows, without contradiction, that the telegram was written by his brother, addressed to him at "923 East Marshall Street, Richmond, Va.," and delivered to the operator at Beaufort. He then introduced Miss Lucy Edwards, who testified that "she was working for defendant company and the Beaufort & Newport Telegraph Company at Newport;

that she transmitted a message similar to the one offered in evidence; that she received the message on the Beaufort and Newport line, and when it was received it was addressed to 23 East Marshall street. Mr. Duncan is the owner of the Beaufort and Newport line, and I call it the Duncan line, and I received compensation from him for my services. The Western Union tariff book shows that the Beaufort and Newport line is an entirely different line. At the time the original telegram was received from Beaufort by her, it was addressed to plaintiff at 23 East Marshall street, Richmond, Va. * * * Defendant has no office at Beaufort, as she understood it. There was no Western Union operator at Beaufort." The plaintiff introduced the telegram addressed to and received by him in Richmond, "23 East Marshall street." The message was sent from Newport immediately, and it is conceded that the delay in delivering the message in Richmond was caused by the mistake in the address. There was no other evidence on the part of plaintiff in regard to the place at which the mistake occurred. The evidence of Miss Edwards was corroborated by defendant's witnesses. There is, upon this testimony, no possible room for doubt that the Beaufort and Newport line was entirely independent of defendant company, and that the mistake occurred on that line. There is not a scintilla of evidence to the contrary. Why, then, was defendant not entitled to the instruction asked? Plaintiff had made out a perfect case against the Beaufort and Newport line, exonerating defendant from any liability for the mistake. When the complaint was filed, plaintiff alleged that defendant was conducting the business of receiving and transmitting messages between Beaufort and Richmond, and that on the 27th day of July plaintiff's brother filed with defendant at Beaufort the telegram, etc.; that it negligently failed to deliver the message in time for plaintiff to attend his father's funeral, etc. Defendant, at the return term, answered, denying the allegations in regard to negligence, etc., and omitted to make answer to the other allegations. At the next term, defendants obtained from the court leave, upon terms, paying cost, etc., to file an amended answer. Pursuant to said permission, defendant filed an answer denying that it had any office at Beaufort, or that it received any message at that place for transmission. The amended answer, in this respect, was in exact accord with plaintiff's proof. The original answer was introduced as evidence to show that, in truth, notwithstanding plaintiff's evidence, defendant did receive the message at Beaufort, and the jury were permitted to find the fact. The plaintiff recovers a verdict and

damages in direct contradiction of his own proof, because the counsel for defendant omitted, in the original answer, to deny the allegation. It was permitted to file the amended answer, and did so, alleging just what plaintiff proved. I do not deny that admissions in an answer, although afterwards cured by amendment, may be introduced in evidence when the truth of the matter alleged in the answer is in controversy. Here the truth of the matter alleged in the answer was not only not in controversy, but was established, beyond controversy, by plaintiff's witness. His honor instructed the jury that if they found that the mistake in the address occurred at the Beaufort office they should answer the issue for defendant. The plaintiff showed by his own witness that it did occur at that office. As frequently occurs, counsel inadvertently failed to answer an allegation, and, as matter of course, is permitted to put in a denial. This is very far from being a "solemn admission," as if defendant had admitted the allegation. The purpose of a judicial trial is to ascertain the truth and administer the law as applicable to the facts. Rules of pleading and practice are made to promote this end. The plaintiff may show the fact to be different from the testimony of his witness, but he cannot impeach his witness and ask the jury to discredit her. In this case he did neither, but he fixed liability upon one company and recovers damages from another. It is not suggested that there was any connection between the two lines fixing liability upon defendant company for the mistake of the Beaufort and Newport line. Plaintiff shows that the telegram was delivered to the Beaufort and Newport operator, addressed to "923 East Marshall Street," that it was received by defendant's operator, addressed to "23 East Marshall Street," transmitted and delivered to the plaintiff in Richmond addressed to "23 East Marshall Street," and yet for injury, conceded to result from the mistake made at Beaufort, the defendant is made to pay damages, and this because counsel inadvertently failed to answer an allegation of the complaint, which by permission it did answer and deny. I think that his honor should have told the jury that, upon the uncontradicted evidence, the mistake occurred on the Beaufort and Newport line, for which defendant was not responsible. There is no denial that defendant delivered the message promptly when the correct address was given it. The only suggestion of negligence is that there was delay in sending the office message calling for a better address. This was, in the light of plaintiff's evidence, the only question for the jury.

BROWN, J., concur.

(150 N. C. 312)

GRIFFIN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. March 24, 1909.)

1. RAILROADS (§ 58*)—UNION STATIONS—CORPORATION COMMISSION—POWER.

A statute authorizing the corporation commission to order the establishment of a union passenger station impliedly empowers the commission to do whatever is reasonably necessary to execute such order.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 136; Dec. Dig. § 58.*]

2. MUNICIPAL CORPORATIONS (§ 680*) — STREETS—MUNICIPAL AUTHORITY.

Under Revisal 1905, § 2567 (5), authorizing railroad companies to use streets with the assent of the city, a city could assent to the use of a street by a railway company in connection with a union passenger station established under an order of the corporation commission; the designation of the street to be used being a matter to be determined by the city council with a view to the general welfare.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1464; Dec. Dig. § 680.*]

3. EMINENT DOMAIN (§§ 271, 273*)—USE OF STREETS BY RAILROAD—RIGHTS OF ABUTTERS.

When the use of a street by a railroad company constitutes an additional servitude, an abutter's remedy is by action for damages, and not for an injunction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 729-736, 741, 744-749; Dec. Dig. §§ 271, 273.*]

4. INJUNCTION (§ 24*)—PROPRIETY OF REMEDY.

Industries tending to develop the country and its resources should only be restrained in extreme cases.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 24.*]

5. RAILROADS (§ 58*)—LOCATION OF STATION—INJUNCTION.

One owning land abutting on a remote street for 420 feet cannot enjoin use of the street by a railroad company in connection with a union passenger station established by order of the corporation commission where the city has assented to such use, as expressly authorized by Revisal 1905, § 2567 (5).

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.*]

6. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CAUSE—RENDITION OF JUDGMENT.

Under Revisal 1905, § 1542, authorizing the Supreme Court to render such judgment as the record warrants, the Supreme Court will dissolve an order restraining the use of the street by a railroad company in connection with a union passenger station, where the order establishing the station was made by the corporation commission at the request of the town authorities, and for public convenience and comfort, and the railroads were about to begin the use of the station and tracks when the injunction was granted.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1175.*]

Appeal from Superior Court, Wayne County; Lyon, Judge.

Action by W. H. Griffin against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. B. Rodman, J. H. Pou, and I. F. Dorch, for appellant. F. A. Daniels, Aycock & Winston, and W. T. Dorch, for appellee.

CLARK, C. J. On the 5th July, 1905, the board of aldermen of Goldsboro, N. C., petitioned the corporation commission to order the three railroads entering that city to establish a union passenger station. After sundry proceedings, which are set out in *Dewey v. R. R.*, 142 N. C. 394-396, 55 S. E. 292, the three railroads concerned agreed upon a location for said union passenger station on the western edge of the town. The corporation commission, after full investigation, approved the location so chosen, and directed the erection of the building at that spot, as they were empowered to do. Revisal 1905, § 1097 (3). Certain persons being dissatisfied sued out a restraining order which the judge below dissolved, and this court affirmed his action (*Dewey v. R. R.*, 142 N. C. 392, 55 S. E. 292). The railroads have jointly erected said building and all three have laid their tracks to the new union station. The plaintiff, who owns land abutting on Beech street, between James and George streets, a distance of 420 feet, has sued out this restraining order against the Southern Railroad Company to prohibit it from using that part of Beech street (between James and George) and has thus brought the whole matter to a standstill, though the station is completed and the tracks of all three railroads have been graded and laid for the purpose of using said joint passenger station, in compliance with the order of the corporation commission.

Revisal 1905, § 2567 (5), expressly grants to railroad companies the right to use the streets of a town or city with "the assent of the corporation of such city." The assent of the city to the use of Beech street by the defendant railroad company for this purpose has been duly given by resolution of its board of aldermen. Besides, as Hoke, J., well says in *Dewey v. R. R.*, 142 N. C. 401, 55 S. E. 295, when the statute authorized the corporation commission to order the union station, that carried with it the right to do whatever is reasonably necessary to execute such order which the defendant was executing. *Industrial Siding Case*, 140 N. C. 239, 52 S. E. 941; *Corporation Commission v. R. R.*, 139 N. C. 126, 51 S. E. 793. This is also held in *Osborne v. R. R.*, 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155; *Staton v. R. R.*, 147 N. C. 423, 61 S. E. 455. The city clearly possessed the statutory right to assent to the use of the street by the railroad company. This is often a most essential power necessary to be used for the benefit of the people of the city. The plaintiff, however, seeks to show that the defendant might have gone along some other street. If so, some lot owner there could retort that the railroad ought to go along Beech street.

The designation of the street to be used is a matter to be determined by the governing body of the city, with an eye to the general welfare. Besides, there has been a railroad track on Beech street, from James to George (this very locus in quo), since 1873, and the trains of defendant and of the Atlantic & North Carolina Railroad have been using this track daily, for all that time—36 years. It is true it was in use as a "Y," and also more lately for access to an industrial plant, but the plaintiff acquired the property knowing that the railroad tracks were there, and in daily use to any extent the railroad companies saw fit. The plaintiff does not own any interest in the soil of the street. If there is any additional servitude, the plaintiff's remedy is by an action for damages, not for an injunction.

In *Staton v. Railroad*, 147 N. C. 428, 61 S. E. 455, Connor, J., says: "It is clear that the Williamston & Tarboro Railroad Company, or its successors, could, under the grant of the right of eminent domain, have condemned a right of way over Albemarle avenue, and by paying compensation of permanent damages to the abutting owners have acquired the right to construct and operate its road pursuant to the rights and privileges and franchises conferred in the charter. The owners of the property would not have been entitled to an injunction to restrain such condemnation or use. Whatever may have been the rights of the owner of the property in 1870, when the road was constructed along Albemarle avenue, it is clear that the plaintiff, having purchased the property after the road was constructed, and while it was being operated, will not be allowed to enjoin its use in a proper manner. * * * That the public would in many ways be seriously injured is manifest. Courts never enjoin the construction or use of public utilities and improvements at the suit of private individuals, unless the damage is both serious in amount and irreparable in character." *Navigation Co. v. Emry*, 108 N. C. 133, 12 S. E. 900. It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done except in extreme cases, and this is not such a one. It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises, or the progress of works prosecuted apparently for the public good, as well as for private gain. The court will not put the public to needless inconvenience. The court should have dissolved the restraining order. *Walton v. Mills*, 86 N. C. 280; *Dunkart v. Rinehardt*, 87 N. C. 224; *Lumber Co. v. Wallace*, 93 N. C. 22; *Lewis v. Lumber Co.*, 99 N. C. 11, 5 S. E. 19; *Roanoke Lumber Co. v. Emry*, 108 N. C. 130, 12 S. E. 900; *Com'rs v. Lumber Co.*, 114 N. C. 505, 19

S. E. 686; *Railroad v. Lumber Co.*, 116 N. C. 924, 20 S. E. 964; *Land Co. v. Webb*, 117 N. C. 478, 23 S. E. 458; *Merrick v. Ry. Co.*, 118 N. C. 1082, 24 S. E. 667; *Wynn v. Beardsley*, 126 N. C. 116, 35 S. E. 237. The chief street in Goldsboro running through its center, and for the whole length of the town, has been used for over 70 years by one railroad, for 60 years by two, and for half a century by all three, of these same railroads. It is singular that it should now be contended that 420 feet of this remote street, almost on the very edge of the town, cannot thus be used, with the assent of the town, whose charter confers on it the right to change, and even abolish, any street.

As the order to establish this union station was made by the corporation commission, at the request of the town authorities, and for the convenience and comfort of the traveling public, nearly two years ago, and the railroads were on the point of beginning the use of the station and tracks, upon which they have expended considerable sums, in obeying the order of the corporation commission, judgment dissolving the restraining order will be entered in this court, as was done in *R. R. Connection Case*, 187 N. C. 21, 49 S. E. 191, and cases there cited. Revisal 1905, § 1542.

Reversed.

(85 W. Va. 231)

HELMICK v. TUCKER COUNTY COURT.
(Supreme Court of Appeals of West Virginia.
March 2, 1909.)

1. HIGHWAYS (§ 93*)—ROAD SURVEYOR—REMOVAL—POWER OF COUNTY COURT.

A county court cannot remove from office a road surveyor appointed by it, under section 1392, Code 1906.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 93.*]

2. CERTIORARI (§ 25*)—PROCEEDINGS REVIEWABLE—REMOVAL OF COUNTY OFFICER.

The action of a county court in removing from office a surveyor of roads is reviewable by the circuit court upon certiorari.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 88; Dec. Dig. § 25.*]

(Syllabus by the Court.)

Error to Circuit Court, Tucker County.

Certiorari by A. C. Helmick to review the action of the County Court of Tucker County in removing him from the office of Surveyor of Roads. Judgment for Helmick, annulling the order of the County Court, and it brings error. Affirmed.

Cunningham & Stallings, for plaintiff in error. A. Jay Valentine, for defendant in error.

WILLIAMS, J. On the 2d day of April, 1907, the county court of Tucker county appointed A. C. Helmick road surveyor of precinct No. 1, in Fairfax district; and on the 10th day of April, 1908, it summarily re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

moved him from office and appointed another in his place. Helmick brought the matter to the circuit court of Tucker county by writ of certiorari, upon petition. The county court demurred to the petition, and moved to quash and to dismiss the writ, assigning a number of reasons in support of its motion, all of which relate to one question; that is, whether or not the county court has power to remove summarily a road surveyor appointed by it before his term expires. The cause was heard on the 13th day of May, 1908, and the court overruled the demurrer, refused to quash the writ, and annulled the order of the county court removing said Helmick. The county court excepted, and obtained from this court a writ of error to the judgment of the circuit court.

The principal question presented relates to the power of a county court to remove from office summarily, before the expiration of his term, a road surveyor appointed by it. We do not think the law confers upon it such prerogative. The Constitution of West Virginia (article 9, § 2 [Code 1906, p. lxxvii]) says: "Coroners, overseers of the poor and surveyors of roads, shall be appointed by the county court." This would seem to constitute a road surveyor an officer, and not simply an employé of the county court. The Constitution fixes the manner of his appointment. Neither can he be elected or appointed in any other way, because this provision of the Constitution is mandatory. *Ice v. Marion County Court*, 40 W. Va. 118, 20 S. E. 809. But the Constitution does not fix the tenure of his office. The Legislature, however, has done this, and has made his term to extend two years. See section 1392, Code 1906. This section, and the constitutional provision above quoted, constitute a road surveyor a public officer who holds for a fixed term of two years, and provide the only mode of his selection to office, which is by appointment by the county court. The county court, having once exercised its discretion in the appointment of said Helmick as road surveyor, cannot revoke the appointment pending his term. It has no discretion to remove him from office. He can be removed only for cause by the circuit court, and after judicial inquiry, as provided by section 183, Code 1906. *Arkle v. Board of Commissioners*, 41 W. Va. 471, 23 S. E. 804.

If the Legislature had not fixed the duration of a road surveyor's term of office, the county court might have had the authority under the Constitution to appoint him to serve only during its will and pleasure, and in such case might have had the implied power to remove summarily. However, we do not decide this question. But it is clear that by fixing his tenure of office the Legislature has left the county court without any such implied power. *Throop on Pub. Off.* § 354, says: "And it is conceded in all the

cases that, where a fixed term is assigned to the office, the appointing power has no absolute power of removal." To the same effect are the following authorities, viz.: *Mechem on Pub. Off.* § 445; *Collins v. Tracy*, 36 Tex. 546; *Redfield v. Chatburn*, 63 Iowa, 659, 19 N. W. 816, 50 Am. Rep. 760; *People v. Hill*, 7 Cal. 97; *Carr v. State*, 111 Ind. 101, 12 N. E. 107; *State v. Barbour*, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65.

The foregoing authorities are not in conflict with the following cases decided by this court, in all of which the decisions rest upon the fact that the appointee was holding only during the will and pleasure of the power that appointed him, and not for a term fixed by law: *Hunter v. Trustees of Berkeley Springs*, 47 W. Va. 343, 34 S. E. 729; *Town of Davis v. Filler*, 47 W. Va. 413, 35 S. E. 6; *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S. E. 698.

The action of the county court in removing defendant in error from office was reviewable by certiorari. *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956; *Dryden v. Swinburne*, 20 W. Va. 89; *Swinburn v. Smith*, 15 W. Va. 483.

We find no error in the judgment of the circuit court, and affirm it, with costs and \$30 damages to appellee.

(65 W. Va. 233)

MCKAIN v. BALTIMORE & O. R. CO.

(Supreme Court of Appeals of West Virginia.
March 2, 1909.)

1. CARRIERS (§ 283*)—LIABILITY FOR INJURIES TO PASSENGERS—SPECIAL POLICE OFFICER—"PUBLIC OFFICER."

A special officer, appointed and commissioned by the Governor, at the instance of a railroad company, under the provisions of section 31, c. 145, Code 1899 (section 4281, Code 1906), and paid by such company for his services, is prima facie a public officer, for whose wrongful acts such company is not liable.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 283.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7772, 7773.]

2. CARRIERS (§ 283*)—INJURIES TO PASSENGERS—RELATION OF PARTIES—SPECIAL POLICE OFFICER.

If such an officer is engaged in special service for the company, such as guarding its property or enforcing obedience to its rules and regulations, and does a wrongful act for which the injured party is entitled to damages, and such act was within the scope of such service or employment, the company is liable as in the case of its regular employes, such as conductors and station masters.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 283.*]

3. CARRIERS (§ 283*)—FALSE IMPRISONMENT (§ 15*)—INJURIES TO PASSENGERS—RELATION OF PARTIES—SPECIAL POLICE OFFICER.

But the company is not liable for a false arrest, assault and battery, and malicious prosecution, not directed nor instigated by it, and founded upon an alleged breach of the peace at one of its stations, in no way affecting or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

involving, so far as the evidence discloses, any of its property, rights, or servants, nor growing out of any transaction between the plaintiff and the company, although the plaintiff was rightfully in the station having a ticket and awaiting the arrival of a train, and the alleged breach of the peace, arrest, and assault and battery occurred on the premises of the company.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 283; * *False Imprisonment*, Dec. Dig. § 15.*]

4. RAILROAD COMPANY NOT LIABLE.

Evidence disclosing the facts and circumstances above stated, and nothing more, is insufficient to sustain a verdict against the railway company at whose instance the special officer was appointed, and by whom he was paid for his public services, and the trial court properly set it aside.

(Syllabus by the Court.)

Error to Circuit Court, Marion County.

Action by Charles J. McKain against the Baltimore & Ohio Railroad Company. There was a verdict for plaintiff, and, from an order setting the same aside and granting a new trial, he brings error. Affirmed.

Harry Shaw and C. H. Leeds, for plaintiff in error. U. N. Arnett, Jr., and John Bassel, for defendant in error.

POFFENBARGER, J. Charles J. McKain complains of an order, made by the circuit court of Marion county, setting aside a verdict in his favor for \$300, and awarding the defendant, the Baltimore & Ohio Railroad Company, a new trial in the case. The action is for damages for false arrest and imprisonment and assault and battery, alleged to have been committed by the defendant through its agents, and refusal to carry and transport the plaintiff, as it had contracted to do by selling him a ticket. The arrest was predicated on an alleged assault committed at the Fairmont station of the defendant upon Mrs. J. H. Downey, wife of the special officer who made the arrest. The evidence bearing on the question of probable cause therefor is highly conflicting, and renders it one clearly proper for jury determination. The plaintiff denies having molested the lady in any way, and she, her husband, and another man stoutly assert the contrary, saying he rudely pushed or shoved her as he passed them, while they were standing and engaged in conversation. It is hardly necessary to say this made a case proper for jury determination, if the railway company is responsible for the acts done by Downey; the arrest, assault and battery, and imprisonment being regarded, agreeably to the finding of the jury, as having been inflicted without probable cause or justification. Downey was a special policeman, commissioned by the Governor of the state, by virtue of the authority vested in him by section 31 of chapter 145 of the Code of 1899 (Code 1906, § 4281), upon the application of the defendant, and employed and paid by it. He had qualified as such officer and

filed a copy of his oath of office in the clerk's office of the county court of the county in which he made the arrest. His powers are thus defined in the section of the statute above named: "Every police officer appointed under the provisions of this act shall be a conservator of the peace within each county in which any part of said railroad may be situated, and in which such oath or a certified copy thereof shall have been filed with the clerk of the county court or other tribunal established in lieu thereof; and, in addition thereto, he shall possess and may exercise all the powers and authority, and shall be entitled to all the rights, privileges and immunities, within such counties, as are now, or may hereafter be, vested in or conferred upon the regularly elected or appointed constables of said county." The statute also authorizes any railroad company at whose instance such an appointment has been made to dispense with the services of the officer by filing a notice to that effect, and thereupon his powers "cease and determine."

The reported decisions indicate that statutes similar to ours, providing for the appointment of special police officers at the instance of corporations and payment by them for their services, have been passed in many of the states and construed by several of the courts. While no decision of this court deals with the identical questions presented, namely, the status of such an officer and the extent to which his employer is liable for his acts, the numerous decisions of other courts having persuasive authority with us render it comparatively easy to solve these questions. Such officers act in the opinion of the courts sometimes as servants of the company employing them, and sometimes as officers of the state. *Deck v. Balt. & O. R. R. Co.*, 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; *Foster v. Grand Rapids Ry. Co.*, 140 Mich. 689, 104 N. W. 380; *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440; *Sharp v. Erie Ry. Co.*, 184 N. Y. 100, 76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250; *Tyson v. Bauland Co.*, 186 N. Y. 397, 79 N. E. 8, 9 L. R. A. (N. S.) 267; *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540; *Tucker v. Erie Ry. Co.*, 69 N. J. Law, 19, 54 Atl. 557; *Cordner v. Railway Co.*, 72 N. H. 413, 57 Atl. 234; *Thomas v. Can. Pac. R. R. Co.*, 14 Ont. L. Rep. 55, 8 Am. & Eng. Ann. Cas. 324; *Daniel v. Railroad Co.*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Am. & Eng. Ann. Cas. 718. The import of these decisions is that such appointees, although paid for all their services by the persons at whose instances they are appointed, are not servants of such persons in respect to all the acts they perform by virtue of their offices; but only in respect to services rendered the company, such as defending or preserving its property. The line of distinction, sometimes hard to rec-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ogulze under the circumstances of the particular case, marks the point at which the act ceases to be one of service to the employer, and becomes one of vindication of public right or justice, the apprehension or punishment of a wrongdoer, not for the injury done to the employer, but to the public at large. Perhaps the clearest and best statement of it is that given by the eminent English Jurist Blackburn in *Allen v. London, etc., Ry. Co.*, L. R. 6 Q. B. 85, as frequently quoted by the American courts: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual. If the law were that the defendants are responsible for the act of their booking clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman." In order to make the employer liable, he must have directed the injurious and wrongful act to be done. Thus in *Tolchester, etc., Co. v. Steinmeier*, 72 Md. 813, 20 Atl. 188, 8 L. R. A. 846, one of the earliest cases on the subject in this country, the court held as follows: "(1) That the defendant was not bound for the policeman's acts simply because he was appointed by the Governor at its nomination or request, and because it paid his salary. (2) That the act of the policeman was that of a state officer in the exercise of his common-law powers as such officer, and not executing the orders of the defendant. (3) That the act of arrest, to be effectually ratified by the defendant, must have been the act of its agent authorized to commit it." In *Tucker v. Erie Ry. Co.*, 69 N. J. Law, 19, 54 Atl. 557, the court held as follows: "In order to render a company responsible for an unwarranted arrest made by one of such policemen, and a subsequent malicious criminal prosecution by him, it is necessary to show that his action was instigated by the company or some of its officers or employees." In *Foster v. Grand Rapids Ry. Co.*, 140 Mich. 689, 104 N. W. 380, the following proposition is asserted: "Where a special deputy sheriff paid by a street railway company acts solely in his capacity as an

officer in assaulting a passenger, and not by the direction of the conductor in charge of the car, the street railway company is not responsible for the act."

But the direction or instigation need not be in express terms. It suffices that the officer in the employment of a private person or corporation had implied authority or direction from the employer to do the act. In other words, if the act done was within the scope of the duty imposed upon him in favor of the employer by his contract of service, the principle of respondeat superior applies. "In an action against a corporation for a malicious prosecution instituted by one of its servants, where it is not shown that the servant had any express authority to institute the prosecution, the burden is upon the plaintiff to show that the servant from the nature of his duties had implied authority to prosecute the plaintiff." *Thomas v. Can. Pac. Ry. Co.*, cited supra. This principle is recognized in nearly, if not quite, all of the cases above cited. Others, further illustrating it, may be found in the valuable notes to *Sharp v. Railway Co.*, 184 N. Y. 100, 76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250, and *Thomas v. Railway Co.*, 14 Ont. L. Rep. 55, 8 Am. & Eng. Ann. Cas. 324. No such implication arises from the fact that the officer is paid by the person at whose instance he was appointed. Although so paid, he is prima facie a public officer, and not a private servant. *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540; *Tucker v. Erie Ry. Co.*, 69 N. J. Law, 19, 54 Atl. 557; *Cordner v. Railway Co.*, 72 N. H. 413, 57 Atl. 234; *Foster v. Railway Co.*, 140 Mich. 689, 104 N. W. 380; *Tyson v. Bauland Co.*, 186 N. Y. 397, 79 N. E. 3, 9 L. R. A. (N. S.) 267. But such officers frequently perform acts or services directly, immediately, and primarily beneficial to their employes, and at their instance and under their direction. Such special employment may include an express direction to arrest or prosecute all persons whom the officer may suspect of offenses against the property or rights of his employer. If there is no such express direction, it may be inferred from the nature of the duties imposed or the services to be rendered, and, if so, the authorization or instigation is established by way of implication. In such cases the relation of master and servant is made out, and then the question is whether the act done was within the scope or course of the servant's or agent's employment, and the principles enunciated in *Gillingham v. Railroad Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827, and *Davis v. Railroad Co.*, 61 W. Va. 246, 56 S. E. 400, 9 L. R. A. (N. S.) 993, in which the acts were done by railway conductors, apply. In *Sharp v. Erie Ry. Co.*, 184 N. Y. 100, 76 N. E. 923, the plaintiff's decedent, caught in the act of stealing a ride on a train, had been pursued by a detective employed by the railway company out

of the railway yards on to adjacent lands, and there shot by the latter. There was evidence tending to show that the railway company had employed the detective to protect its track and property, and look after crimes committed against it and its right of way, and the court held that it was for the jury to say, under all the facts and circumstances shown in evidence, whether the detective acted within the scope of his employment, or whether, being a public officer, he acted in that capacity alone. *Deck v. Railway Co.*, 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399, developed facts very similar to those shown in *Sharp v. Railway Co.*, supra, and the court held the case one proper for jury determination. The plaintiff had been stealing a ride on a freight train, and a special policeman, employed by the company, ordered him off, and then shot him when he was a few feet distant from the track. In *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440, the plaintiff had been assaulted and beaten in a theater by a special officer at the time on duty there. The assault and battery grew out of a controversy between the plaintiff and the ticket seller. It was a part of the special officer's duty to maintain order in the establishment, and the ticket seller had demanded the arrest of the plaintiff. The court held the proprietor of the establishment liable for the act of the officer. Speaking of the character of the act, the judge, who delivered the opinion of the court, said: "Even if he were a regular patrol man, called in off the street by appellants or their agents to aid in enforcing the regulations of the theater, he would for such purpose be only the agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible." This view, or process of reasoning, resulted in the following conclusion in *Foster v. Railway Co.*, cited: "Where a special deputy sheriff who was paid by a street railway company, and whose duty it was to preserve order at a resort owned by the company, and ride upon the cars and prevent disturbances, assaulted a passenger on a car in assisting a conductor to eject him for nonpayment of fare, the officer in so doing represented not the public, but his employer, and the street railway company was liable."

If, however, it does not appear that the act done was within the scope of the servant's employment, or that there was any employment or contract of service beyond that by which the person or corporation at whose instance the appointment to the office was made bound himself to pay the officer for his services as a policeman, or that the arrest was made or the person prosecuted at the instance or by the direction of the person who has the appointment made, there is no liability upon such person for the act. In *Healey v. Lothrop*, cited, Mr. Justice

Holmes, delivering the opinion of the court, said: "If the statute had meant to make the officer the servant of the person who applies for his appointment and gives bond for his conduct, presumably it would have said so. But, if it had said so, it would have insisted upon a fiction being treated as a fact. It is true that the defendant asked to have an officer appointed, perhaps asked to have Mead appointed, and that he paid him. But he did not appoint him, could not remove him, and could not control his official conduct, which was governed by the regulations of the police commissioners and his own sense of duty as a public officer. The statute does not call the relation that of master and servant, and goes no further than to make the defendant liable upon his bond 'to the same extent' as for a servant. The words quoted imply that the officer is not one. They mean to the same extent as in another case which does not exist." In *Tyson v. Bauland Co.*, cited supra, the arrest was made in the store of a company that had requested the appointment of the officer and paid him for his services on a charge of theft in the store by a customer, and, it not appearing that the company had directed the arrest to be made, or the plaintiff to be prosecuted, although a floor walker had brought the loss to the attention of the officer, the court held that the trial court should have directed a verdict for the defendant. The subject of the alleged theft was not goods or property of the store, but money of another customer who happened to be in the store at the time. In *Smith v. Southeastern Ry. Co.*, L. R. 5 C. P. 640, there had been a controversy between railway servants and the plaintiff. Incidentally a special officer employed and paid by the company assaulted the plaintiff and others. After the struggle was over, the special officer gave the plaintiff into custody. The court held the company not liable, because the act of giving him into custody was beyond the scope of the servant's employment. One of the rules of the company said any officer or servant sworn as a constable for the district or place where he was on duty might take into custody any one whom he saw commit an assault upon another at any of its stations for the purpose of putting an end to any fight or affray, but not if the affray had come to an end. It appeared from the evidence of the plaintiff that he was not given into custody until after the fight had ended, and the court said: "We are disposed to draw the inference in fact that Antonio in giving the plaintiff into custody was not acting within the scope of his employment by the company, or on behalf of, or for the benefit of, the company." Agreeably to this, the court said in *Dickson v. Waldron*, cited supra: "If, however, after entering the theater, he (the officer) should discover appellee in the act of violating a criminal law of the state or a penal ordi-

nance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made on the officer's own motion, without direction, express or implied, on the part of the appellants, then the appellants would not be responsible."

In view of these precedents and principles, we are of the opinion that the railway company is not liable to the plaintiff for the injuries inflicted upon him. He was not arrested or prosecuted for any act respecting the railway company or its property. The offense with which he was charged was an act done respecting the wife of the prosecuting officer, and did not in any way involve any right of the company. That it was done upon the premises of the railway company is in our opinion immaterial. The motive of the arrest, assault, and prosecution clearly appears to have been either vindication of the law, or a desire on the part of the officer to avenge the insult to his wife or to comply with her wishes, and in none of these aspects of the case would the company be responsible for the acts, however unjustifiable they may have been. Nor is it material that the plaintiff had a return ticket, was lawfully at the station awaiting a train, and was not carried by the railway company. According to the evidence, his losses and injuries were all caused by Downey, not the railway company.

Perceiving no error in the judgment, we affirm it, with costs and damages.

Affirmed.

(65 W. Va. 250)

GOSHORN v. WHEELING MOLD & FOUNDRY CO.

(Supreme Court of Appeals of West Virginia: March 2, 1909.)

1. MASTER AND SERVANT (§ 191*)—FELLOW SERVANTS—WHO ARE.

A servant, employed to operate in the nighttime a particular machine, is not a fellow servant with a machinist employed to keep the machinery in the plant in good order and condition, nor with other servants employed therein to operate the same machine in the daytime, who on request may have assisted such machinist in installing a new pulley connected with such machine, and which, as observed by them, is cracked, and rendered defective and unsafe in the installation thereof, so as to absolve the master from liability for injuries resulting to such first servant therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 479; Dec. Dig. § 191.*]

2. MASTER AND SERVANT (§ 234*)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DEFECT—IMPUTED KNOWLEDGE.

The knowledge of the servants employed on such day shift cannot be imputed to the servant employed on said night shift, or render him guilty of negligence in continuing in his employment, unless he had knowledge of such defective and unsafe machinery, or it was so plainly manifest that he ought to have known it.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 234.*]

3. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—SAFE APPLIANCES—DELEGATION OF DUTY—FELLOW SERVANT.

A case in which the principles announced in *Madden v. Railway Co.*, 28 W. Va. 610, 57 Am. Rep. 695, *Jackson v. Railway Co.*, 43 W. Va. 380, 27 S. E. 278, 81 S. E. 258, 46 L. R. A. 337, *Vickers v. Kanawha & W. V. R. Co.* (W. Va.) 63 S. E. 367, and *Richards v. Iron Works*, 56 W. Va. 510, 49 S. E. 437, relating to the nonassignable duties of a master, are properly applied as controlling the facts in the case, and the instructions to the jury, given and refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 392-396; Dec. Dig. § 185.*]

4. MASTER AND SERVANT (§ 217*)—RISKS ASSUMED BY SERVANT—KNOWLEDGE OF DEFECT.

A servant has the right to presume that the master has provided him a reasonably safe place to work, and it is only after discovering the place to be unsafe that he can be said to have assumed the extra risk of continuing in his employment; and, though after reasonable time allowed him he will be presumed to be aware of, and have knowledge of, apparent defects, yet, to charge him with notice thereof on this ground, such defects and dangers must be unquestionably plain and obvious, so that, if he did not see them, he must necessarily be in fault.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Generally, whether the continuance in the service and the use of defective machinery amounts to such negligence as to bar recovery ought to be submitted to the jury, under proper instructions from the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1096; Dec. Dig. § 289.*]

6. NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE—"CUMULATIVE EVIDENCE."

Newly discovered evidence of an admission of the same kind, and to the same point, as that given in evidence on the trial by a witness examined, though made to another and different person, and at a different time and place, and under different circumstances, is cumulative in character, and will not be good ground for setting aside a verdict and awarding a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 219, 220; Dec. Dig. § 104.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1783, 1784.]

7. APPEAL AND ERROR (§ 1004*)—REVIEW—AMOUNT OF VERDICT.

In an action by a servant against a master for personal injuries sustained, there is no fixed rule of compensation, as in actions for death by wrongful act; and, unless the verdict of the jury is for an amount so out of proportion to the actual injury as to evince the fact that the jury has been misled, or been influenced by corruption, passion, or prejudice, it will not be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. § 1004.*]

(Syllabus by the Court.)

Error to Circuit Court, Ohio County.

Action by Frank Goshorn against the Wheeling Mold & Foundry Company. Judge-

ment for plaintiff, and defendant brings error. Affirmed.

Russell & Russell, for plaintiff in error. O'Brien & O'Brien and S. O. Boyce, for defendant in error.

MILLER, P. The plaintiff, a machinist of some 18 years' experience, employed by defendant in its foundry at Wheeling on a night shift, in some way had his right arm caught between a belt and pulley on the shafting attached to the machine he was operating, resulting in a severance of his lower fore arm, and so mangling and bruising his upper arm that it had to be amputated above the elbow. For his injuries thus sustained he recovered in the court below a verdict and judgment against defendant for \$16,777.75. The circuit court denied the defendant's motion for a new trial, and the case is now before us upon writ of error.

The circumstances surrounding plaintiff at the time of his accident, as summarized by defendant's counsel, are as follows: The machine at which he was working was an end milling machine, used for grinding the ends of iron and steel castings. The grinding wheel, in front of which plaintiff worked, and toward which on tables he placed the castings to be ground, was turned rapidly by a shaft. When standing fronting this wheel, there were to his left, along the same shaft, three other wheels or pulleys. The first pulley was the one in connection with which the accident occurred. It was made of metal, about eight inches in diameter, the shaft running through its center, and from the center spokes ran out to the rim, about six inches in width, and an eighth or a quarter of an inch in thickness, except where the spokes joined it, and where it was thicker than at the sides. The belt running around this particular pulley was in a vertical position, running around another much larger pulley, immediately over, and several feet above, the one at which the accident occurred. On the same shaft, and to the left of the latter pulley, were two other pulleys, side by side, on which ran belts of considerable length, in a horizontal position, and running to other pulleys some distance away. All of these pulleys and belts ran at a very high speed. As much oil was used in connection with the machinery, and some of it would occasionally get upon the belts, causing them to slip when working against the pulleys, it was necessary, from time to time, to throw powdered chalk upon the inside portions of the belts to take up the oil. The two pulleys west of the pulley at which the accident occurred had in front of them a metal shield, fastened by a screw to a portion of the structure just above these pulleys.

The negligence charged, and on which plaintiff bases his right of recovery, is in the first count: That defendant did not use proper care and caution that he was provided

with good, proper, safe, and suitable machines and appliances, in that it provided for and suffered to be used by him while engaged in operating said "end milling machines," a cracked, insecure, weak, unsafe, and unsuitable pulley, located at the lower left corner of said machines, because of which said pulley broke and parted, and a portion thereof struck plaintiff on the head with great force and violence, whereby he became dazed and thrown down, and his right arm was caught in said pulley and belting, and was torn and cut off, necessitating amputation as aforesaid; and, in the second count, in addition to what is charged in the first, it is alleged to have been a part of the duty of plaintiff, in operating said machine, to chalk the belts and pulleys, and, in addition to the other duties of the defendant charged in the first count, that it was especially its duty to provide plaintiff good, safe, proper, and suitable belting and pulleys to be used by him aforesaid; but, disregarding its duty in this behalf, defendant had provided, and suffered to be used by the plaintiff, a certain unsafe and unsuitable belting, and that, while he was engaged in performing his duty of chalking said belting and pulleys and operating said machine, said pulley broke and parted, and a portion thereof struck the plaintiff on the head with great force and violence, whereby he became dazed, and was thrown down and injured as described in the first count.

On the trial plaintiff relied entirely upon proof of the cracked, weak, and insecure condition of the pulley at which the accident occurred, and of which he testified he had no previous knowledge or information; and on the further evidence of himself and his witnesses, showing, and tending to show, that while engaged in chalking the belts as charged, the pulley broke and parted, a portion thereof striking him, and causing him to fall, and his arm to be caught and injured as alleged. Although defendant controverted the fact that the pulley was in a cracked and insecure condition, its evidence on this question was negative and circumstantial only, and it relied mainly on the theories that plaintiff had negligently contributed to his injuries: First, by selecting the wrong place to chalk the horizontal belts; second, that in attempting to apply the chalk, he had thrust his hand over the pulley and between the sides of the belt in which his arm was caught and severed; and, third, that it was because of the place at which, and the negligent manner in which, he had undertaken to chalk the belts that his sleeve had been caught between the revolving pulley and belts and severed in the manner described, and that the breaking and parting of the pulley was not the cause of plaintiff's injuries, but the result of his arm being caught as described. It is claimed for defendant that the safe and proper way to

chalk the belts was to take off the metal shield referred to, and throw the chalk on the lower inside portion of each belt by throwing it through the space between them; that the plaintiff, instead of doing the chalking in the safe way, had preferred the dangerous method of throwing the chalk over the pulley at which the accident occurred, between the two portions of the belt running around that pulley, and had thus by his negligence contributed to his injuries. The evidence, however, of a number of witnesses who worked at this machine is that the chalking of the horizontal belts was always done from the position occupied by the plaintiff; and there was much evidence tending to show that this was as safe a place as the other, and took less time, and in some respects was less dangerous, than to do the chalking from the other position.

On these controverted and material facts the defendant submitted to the jury three special interrogatories, which were answered and returned by them with their verdict, as follows: No. 1. "Was the pulley which, according to the plaintiff's claim, broke and caused the injury to the plaintiff cracked or in improper condition at the time when it was put into place some weeks or more before the accident?" Answer. "Yes." No. 2. "Was the plaintiff guilty of negligence directly contributing to his injury in the manner in which he acted in chalking the belts just before and at the time when the accident occurred?" Answer. "No." No. 3. "Did the pulley break before the plaintiff's arm was caught?" Answer. "Yes." We must therefore treat these findings of facts by the jury, as well as all other findings of facts controverted, and necessarily involved, in their general verdict as conclusive thereof.

But questions of law are presented: First, it is said that the negligence complained of, if any, was that of Bitner, the machinist, and of Pearl and Hill, his assistants, fellow servants of plaintiff, that Pearl and Hill, who operated on the day shift the same machine, especially were such fellow servants, and that, as they assisted Bitner in putting on the pulley, and knew of the cracked and dangerous condition in which it was left, and had called Bitner's attention to it, their negligence cannot be imputed to the master. While the evidence is that Pearl and Hill assisted Bitner in putting on the pulley, it was no part of their duty to repair or keep the machinery in proper condition. They say they called Bitner's attention to the cracked condition of the pulley, and that he replied that the defect was not material or important. It was his duty to look after the machinery and keep it in repair. As many times announced by this court, there are certain nonassignable duties which a master owes to his servant. The first of these, as announced in *Madden v. Railway Co.*, 28 W. Va. 610, 57 Am. Rep. 695, and repeated in *Jackson v. Norfolk & W. R. Co.*,

48 W. Va. 380, 382, 27 S. E. 279 (31 S. E. 258, 46 L. R. A. 337), is "to provide safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and making proper inspections and tests." And it is there said that all of these duties are included in the one general duty of the master to provide a safe plant. And at page 383 of 43 W. Va., at page 280 of 27 S. E. (31 S. E. 258, 46 L. R. A. 337), it is said: "These duties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation." And the first point of the syllabus is: "The test whether a master is liable to one servant for the negligence of another servant is the character of a negligent act. If it be in the doing of an act incumbent on the master as a duty of the master to the servant, the master is liable; otherwise not." See, also, *Vickers v. Kanawha & W. V. R. Co.* (W. Va.) 63 S. E. 367. These decisions, and many other decisions of this court that might be cited, clearly show that it was one of the nonassignable duties of the defendant to keep the pulley in question in a reasonably safe and proper condition, and that, no matter to whom delegated, or by whom performed, the defendant is nevertheless liable for the negligent performance thereof. *Vickers v. Kanawha & W. V. R. Co.*, supra. A fellow servant can be intrusted with the performance of such nonassignable duty, but not so as to excuse the defendant from liability. This case is not within the rule of *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812, as counsel for defendant argue. The holding in that case that a mine boss, employed in a coal mine, is a fellow servant with the miner employed therein is predicated mainly upon the fact that the statute referred to, properly construed, makes him so. A safe plant or a reasonably safe place to work required the operator of a coal mine, respecting overhanging slate, as in *Williams v. Coal Co.*, and with respect to ventilation of the mine and other duties devolved upon a mine boss or a fire boss, as in *Squillache v. Tidewater Coal & Coke Co.* (W. Va.) 62 S. E. 446, means, in the eye of the statute, that the mine shall be reasonably safe in the first instance. The cases just referred to, involving mining operations, and governed by statute, fall rather within the rule announced in *Jackson v. Norfolk & W. R. Co.*, supra, at page 384 of 43 W. Va., at page 280 of 27 S. E. (31 S. E. 258, 46 L. R. A. 337), that "you cannot make the master liable for an act of mere operation, no matter by what servant done. You cannot exempt him for an act not one of mere operation, but of his personal duty, though done by any servant."

Another proposition urged is that plaintiff assumed all the risks incident to his employ-

ment arising from the nature and character of the machinery and its surroundings, including the danger of putting his hands, or arm, or head, or any part of his body over the pulley, or between the portions of the vertical belt, according to the theory of the defendant. And the argument is that plaintiff must have had knowledge of the crack in the pulley, that it was cracked, and as the crack was visible, as shown in the evidence, that he ought to have been familiar with it, and knowledge thereof must be imputed to him, and that, having undertaken to chalk the belts in the manner assumed by defendants, and having remained in the defendant's employ with such knowledge, he must be regarded as having assumed all risks incident to his employment, and incident to the conditions surrounding him, absolving the defendant from all liability for his injuries sustained. The plaintiff, however, denied all knowledge of the defective condition of the pulley, and the evidence shows that it was not so plainly visible that he could be charged with actual knowledge thereof. Without such actual knowledge he had the right to assume that defendant had discharged its full duty to him in providing him a reasonably safe place to work. The jury by their verdict necessarily found that he had no such actual knowledge, and was not chargeable with actual knowledge of the defective condition of the pulley, and there is no evidence showing, or tending to show, that either Bitner or Pearl, or Hill, his assistant, communicated to plaintiff their knowledge of the condition of the pulley. Having positively denied knowledge thereof, this case cannot be brought within the rule of *Purkey v. Southern Coal Co.*, 57 W. Va. 595, 50 S. E. 755, *Lavery v. Hambrick*, 61 W. Va. 687, 57 S. E. 240, and *Williams v. Belmont Coal & Coke Co.*, 55 W. Va. 85, 46 S. E. 802, as argued by defendant's counsel, and we see no material distinction between the case at bar and the case of *Richards v. Iron Works*, 56 W. Va. 510, 49 S. E. 437. It is said, with respect to the latter case, that the negligence which resulted in the accident there involved was not the negligence of any person with whom the employé injured had been working in the same line of work, as it is claimed was the fact in the case at bar. But, as we have seen, the negligence of a fellow servant intrusted with the performance of a nonassignable duty will not excuse the master from liability for the negligent performance thereof. In the *Richards Case* the death of plaintiff's intestate was due to defective material used in the building of a scaffold. Decedent did not assist in handling the material for, or aid in building, the scaffold, but he was as much a fellow servant with those who did assist therein as the plaintiff here was a fellow servant with Bitner or Pearl, or Hill, and who assisted in installing the defective pulley. In the *Richards Case* the court said of the

deceased: "He is not shown to have had any knowledge of its unsound or unsafe condition. The part which gave way and precipitated him to the ground was a lookout, answering to a joist, which was covered by, and supported one end of, the boards of that platform. While the defendant contends that intestate did not observe, but could have observed, any defects in the materials of the scaffold or in its workmanship by the exercise of ordinary care, this circumstance, connected with the fall of the scaffold, seems to negative that presumption. We do not think that plaintiff's intestate was bound, under the law, to make an examination of the scaffold before going upon it to work."

In the case at bar plaintiff was employed at night. Was he bound to make a critical examination of the pulley and other parts of his machine? We think not. In *Lavery v. Hambrick*, supra, point 2 of the syllabus makes it clear that, a servant entering upon and continuing in service in an unsafe place, he does not waive the performance by the master of the duties imposed upon him by law in respect to the safety of the place in which his services is performed, except where those dangers are known to, and fully appreciated by, him. According to *Purkey v. Coal Co.*, supra, when the servant enters the master's employment, he may presume that the master has provided a safe place for him to work, and it is only after discovering the place to be unsafe that he can be said to have assumed the extra risk of continuing in the employment. In *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 856, 49 S. E. 499, it is said a servant is not presumptively chargeable with notice of a peculiar and unusual state of things. A reasonable time must be allowed for him to learn of the change in the situation; and, although he is presumed to be aware of defects which are perfectly obvious to his sight, and the danger is apparent to any person of his mental capacity, nevertheless, to charge him of notice on this ground, the defect and danger must be unquestionably plain and clear, so that, if he did not see it, he must necessarily have been in fault. And in *Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991, it is said: "Generally, whether the continuance in the service and the use of the defective machinery amounts to such negligence as to bar recovery ought to be submitted to the jury under proper instructions from the court."

In the court below exceptions were saved by defendant to the giving of the six instructions propounded to the jury by plaintiff; but here the exceptions to the second, fourth, and fifth instructions only are relied on. The second contains a statement of the general duty of the master to furnish a reasonably safe place to work, and the nonassignability of that duty; and, if assigned, that the person to whom it is assigned, no matter what his grade or rank in the serv-

ice of the master may be, becomes a vice principal. The criticism of this instruction is that it omits any reference to the crack in the pulley; that it is misleading in omitting any reference to the rule in *Laverty v. Hambrick*, supra; that though the place of labor may be unsafe if the servant, knowing of the dangerous position, continues in the service, he assumes the risks incidental thereto; and also that it omits any reference to the fact that the negligence in installing the defective pulley was that of fellow servant of plaintiff. The fourth instruction propounded to the jury the proposition that, if defendant suffered and permitted the pulley at which the plaintiff was injured from any cause to become unsound, unsafe, insecure, cracked, and defective, and that this condition was known to it, and that by the reasonable and ordinary care and diligence such condition would have become known to it, and that the injuries to plaintiff resulted therefrom, without fault on his part, while he was in the performance of his duty, defendant was liable, and the jury should find for the plaintiff. It is objected to this instruction that it assumes the pulley referred to was cracked, dangerous, and likely to bring about the accident. We do not think it amenable to this criticism. It does not assume the fact, but submits the question to the jury. It is said of it that, if the pulley was in a cracked and dangerous condition, the plaintiff had the same opportunity, by the exercise of like reasonable and ordinary care and diligence, to have learned, as easily and readily as the defendant might have done, of its condition, and that the plaintiff thereby assumed all the risk and danger incident to its condition, absolving the defendant from liability therefor. And, moreover, that it limits to the company alone the duty to take notice of the defective condition of the pulley, and eliminates any such obligation on the part of the plaintiff, contrary, it is claimed, to the rule of *Williams v. Belmont C. & C. Co.*, and *Laverty v. Hambrick*, supra. It is also urged against the fifth instruction that it is also misleading, in the same way and along the same lines as the fourth instruction. It propounded to the jury the proposition that it is the positive duty of the master in all cases to inform the servant of any defects and dangers in the tools, machinery, and appliances, with which he is required to work, and of which he has knowledge, or ought to have knowledge by the exercise of reasonable attention, care, and diligence, but of which the servant is ignorant, and would not discover by reasonable care on his part. We are of opinion that all three of these instructions propounded correct propositions of law, and are in accordance with principles enunciated in the decisions already referred to.

It is represented, also, that the court below erred in refusing defendant's instruc-

tion No. 2 in the form presented, and in modifying it, and thereby materially changing its force and effect, as originally presented, and also in rejecting defendant's instructions Nos. 8 and 9. As proposed, instruction No. 2 was as follows: "In accepting and entering upon a position under the employment of another person or corporation the employé assumes any risk of injury which may result to him from the ordinary conditions and circumstances existing in the place where he is required to do his work." As modified by the court, there was subjoined to it, "but he does not assume extraordinary risks, arising from the use of defective machinery, or by the use of reasonable care should have such knowledge, and then continues in the employment." We think the modification proper. As proposed it was too much restricted. And, as was said by the court below: "It might easily be construed as imposing upon the employé the assumption of the risk resulting from all ordinary conditions in the place where he works, including latent defects and dangers of which his employer is informed, or ought to be informed, and of which the employé is ignorant, provided only that such defects and dangers were part of the usual conditions in that particular place of employment"—which would be contrary to the rule of law as announced in cases already cited. The eighth instruction, rejected, was: "If the jury find from the evidence that the accident and injury to the plaintiff were brought about through the negligent act of the other employé of the defendant, who placed in its position the pulley which is claimed to have broken and thus caused the injury to the plaintiff, then the defendant is not responsible for any such negligence of such other employé, and the jury should not find a verdict for the plaintiff because of such crack in such pulley, and the breaking of such pulley by reason thereof." The ninth instruction, rejected, was a binding instruction, telling the jury that "under the evidence as presented it is their duty to find a verdict for the defendant." We agree with the court below that the eighth instruction was intended to and in effect would have told the jury that Bitner was a fellow servant of Goshorn. Clearly this would have been error under the evidence. The ninth and binding instruction was clearly not justified by the evidence. It would have taken from the jury the question of the negligence of the defendant, and whether or not the plaintiff was guilty of contributory negligence, questions of fact which, under the evidence, were clearly within the province of the jury, and not for the court.

The action of the court below in refusing a new trial is also assigned as error. This motion was based mainly upon two grounds: First, newly discovered evidence; and, second, that the verdict was excessive in amount. The newly discovered evidence re-

lied upon was that defendant had discovered, since the trial, that plaintiff had stated to Dr. Hildreth, at the City Hospital, between June 15, and 30, 1905, that "he did not blame the company, but that his flowing sleeve had been caught between the belt and the pulley, and that was the way the accident happened, and that was his own fault." The evidence shows that Dr. Hildreth was the physician and surgeon employed by defendant to attend plaintiff at the hospital; that he was afterwards active in trying to secure a settlement between plaintiff and defendant; that he was not summoned or examined as a witness on the trial, and it is not shown, by any affidavit or otherwise, that defendant had made any inquiry of Dr. Hildreth about the supposed conversations between himself and the plaintiff in relation to the cause of plaintiff's injuries, or the manner in which they had been sustained, a most natural thing to have done, owing to his professional employment by defendant. Besides plaintiff, in an affidavit filed upon the hearing of the motion for a new trial, positively denied that he had ever had any such conversation with Dr. Hildreth. And, while disclaiming any intention to impute falsehood to Dr. Hildreth, plaintiff further says that in a conversation with Dr. Hildreth, in the month of April of that year, when he sustained an injury to a finger on his left hand, he did state to Dr. Hildreth that he did not blame the company for that injury; that it was due to his own fault. We think this evidence cumulative of the testimony of like character as that given by the witness Yertzell. Yertzell, when on the stand at the trial stated that the plaintiff, about 10 minutes after the accident occurred, had made a similar statement to him as to the manner in which he had sustained his injuries. The defendant failed to show, on his motion for a new trial, that it had brought itself within any of the rules entitling it to a new trial for after-discovered evidence, except only that this evidence had been discovered since the trial. It is argued that, although this evidence of Dr. Hildreth is of the same character as that given by the witness Yertzell, yet, as it relates to a declaration of plaintiff made at another and different time, and under different circumstances, it ought not to be regarded as cumulative. This is not the law. "Cumulative evidence," says Greenleaf, "is evidence of the same kind to the same point. Thus if a fact is admitted to be proved by the verbal admission of the party, evidence of another verbal admission of the same fact is cumulative." 2 Greenleaf on Ev. § 2. See, also, *Grogan v. C. & O. R. R. Co.*, 39 W. Va. 415, 19 S. E. 563; *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721; *Stewart v. Doak*, 58 W. Va. 172, 52 S. E. 95. The motion based on newly discovered evidence, therefore, we think was properly overruled.

But what shall we say as to the amount of

the verdict? This is a most serious question. It is conceded on both sides that the verdict is a large one. On behalf of the defendant it is claimed that it is so excessive as to clearly evidence the fact that the jurors were prejudiced against the defendant. So far as we have knowledge it is the largest verdict ever rendered by a jury in this state for like or similar injuries sustained. In brief of counsel for defendant it is compared to the verdict for \$7,500 involved in *Thomas v. Electrical Co.*, 54 W. Va. 393, 46 S. E. 217, and in which this court is quoted as saying: "For these reasons, with some reluctance as to the amount of the judgment, we affirm it." That was a suit by an administrator for the death of his intestate, due to the negligence of the defendant; our statute, in such cases, limiting recovery to \$10,000. At common law such actions did not survive; and it is only by virtue of the statute (section 3488, Code 1906) that an action for death by wrongful act can be maintained. The statute imposes no limitations on the amount of recovery by the person injured. As was said by the learned judge in his opinion in the court below, quoting from *Trice v. C. & O. Ry. Co.*, 40 W. Va. 271, 21 S. E. 1022: "In actions for personal injuries, and in cases generally where there is no fixed rule of compensation, the theory of the law is that the decision of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion, or prejudice. Unless the verdict finds an amount so out of proportion to the actual injury as to evince such misleading, or the presence of some malign influence, it will be sustained, although it may materially differ from the judgment of the court. But if the amount of the verdict so far exceeds or falls short of what to the court appears to be just compensation as to induce the belief that the jury have not given the case a fair and dispassionate consideration, it will be set aside." And as was said by the circuit judge: Plaintiff was a machinist of some 18 years' experience, and at the time of his injuries was 35 years of age, in good physical health, capable of earning 30 cents per hour, working 12 hours a day. He had depending on him for support a wife and children, the evidence showing that since the loss of his arm, and after much effort, he had been unable to secure any employment. The jury were no doubt influenced, but properly so, by these and other facts and circumstances shown in the evidence. In 6 *Thompson on Negligence*, 365 et seq., this writer, in a valuable note, has collated many cases in which verdicts of this kind, some for larger and some for smaller amounts, and for like or similar injuries, have been sustained. It is unnecessary to do more than refer to the cases there cited for justification of the verdict in the case before us, certainly for our justification in not disturbing it because of the amount of it.

As the judge below who tried the case, and had better opportunity than we to understand the facts, to observe the witnesses, the character of the jurors, and all the facts and circumstances on which the verdict depended, could not find that the verdict had been influenced by corruption, passion, or prejudice, neither can we. We cannot invade or usurp the province of the jury, and substitute our own judgment for the judgment of the proper triers of the facts, and of the amount to which the plaintiff is entitled at their hands, by way of damages for his injuries. The law invests us with no such power. Our jurisdiction, particularly in cases of this kind, is limited to discovering bias, prejudice, fraud, or corruption in the verdict.

Finding no error therein we must affirm the judgment.

(65 W. Va. 296)

HALFPENNY & HAMILTON v. TATE & McDEVITT et al.

(Supreme Court of Appeals of West Virginia. March 9, 1909.)

1. FRAUDULENT CONVEYANCES (§ 11*)—HINDERING AND DELAYING CREDITORS.

The terms "defraud," "hinder," and "delay," as employed in section 3099, Code 1906, are not equivalent terms. To hinder and delay one's creditor, within the intentment of said section, is as much provided against as to wholly defraud him.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 15; Dec. Dig. § 11.*]

2. FRAUDULENT CONVEYANCES (§ 299*)—EVIDENCE.

A case of fraudulent sales and transfers of property governed and controlled by rules and principles announced in many previous decisions.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 876; Dec. Dig. § 299.*]

3. FRAUDULENT CONVEYANCES (§ 241*)—SUIT TO SET ASIDE.

The right of a creditor to subject to the payment of his debt the property of his debtor fraudulently conveyed does not depend on the question of the insolvency of the debtor. In this state the statute gives absolute right to a creditor to a suit in equity to annul a fraudulent conveyance, and he is not compelled to first exhaust other property of his debtor by execution or otherwise.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 715; Dec. Dig. § 241.*]

(Syllabus by the Court.)

4. FRAUDULENT CONVEYANCES (§ 11*)—"HINDER"—"DELAY"—"DEFAUD."

The words "hinder," "delay," and "defraud" are not synonymous, and a purpose to delay and hinder a creditor may be fraudulent, although the debtor may honestly intend that all his debts shall be paid ultimately.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 15; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1947-1950; vol. 4, pp. 3307-3309; vol. 8, p. 7631.]

Appeal from Circuit Court, Randolph County.

Bill by Halfpenny & Hamilton against Tate & McDevitt and others. Decree for plaintiffs for less than the amount claimed as against Tate & McDevitt, and plaintiffs appeal. Reversed, modified, and remanded.

W. B. Maxwell, for appellants. Jared L. Wamsley and W. E. Baker, for appellees.

MILLER, P. The object of the bill is to set aside as fraudulent and void, as against plaintiffs, the sale by Tate & McDevitt to G. H. Gates & Co., and by Gates & Co. to K. H. Stover, of about 950,000 feet of manufactured lumber, and to subject the same to the lien of plaintiffs' attachment sued out in the cause, and levied thereon, and taken into custody by the sheriff. The lumber attached was the same which, by prior contract in writing, dated November 28, 1906, Tate & McDevitt had agreed to sell and deliver to plaintiffs, free on board cars at Kingsville, W. Va., a small station on the Coal & Coke Railroad, in Barbour county, but which, after delivering a small portion thereof, and pending the further execution of the contract, by contract in writing on October 11, 1907, they undertook to sell and deliver, for the purported consideration of \$13,000, cash in hand, to G. H. Gates & Co., and which lumber said Gates & Co., acting through G. H. Gates, on or about October 17, 1907, by a parol contract, pretended to sell to said Stover at the price of \$17,000, to be paid for as delivered by them on cars. At the time of the sale to Gates & Co., about 800,000 feet of this lumber had been already delivered at the railroad by Tate & McDevitt, to be loaded on cars for plaintiffs, and at the time of the sale by Gates & Co. to Stover, about 60,000 feet more had been delivered there, and the residue either remained at the mills, or on stump in the woods to be manufactured. The plaintiffs' claim is for \$3,581.29, the balance, with interest, of \$5,000, advanced by them to Tate & McDevitt on account of said lumber, less \$1,561.12 in lumber delivered on account. In addition plaintiffs claim \$5,000 damages for breach of contract, but the attachment does not cover the damages claimed, and no serious effort seems to have been made to prove actual damages. Tate & McDevitt in their answers also make a counterclaim for damages, on the theory of a breach of the contract on the part of plaintiffs to furnish cars and inspectors; but the contract does not stipulate that plaintiffs were to furnish either cars or inspectors. Besides, Tate in his testimony admits having received orders from plaintiffs, and excused himself to plaintiffs for failure to make shipments on the ground that he could not get cars. There seems to have been some trouble to get cars, but this was due to no fault of plaintiffs. No serious effort was made by Tate & Mc-

Devitt to show damages. While the answer of Tate & McDevitt denies intention to defraud plaintiffs, they do not deny the material facts charged in the bill as constituting the fraud, and in their evidence they admit facts not only constituting fraudulent intent but actual fraud on their part, in the disposition of said lumber and other property. We will not undertake to detail the evidence on this point. It conclusively establishes the fraud charged on their part, and we do not hesitate for a moment to pronounce judgment of conviction against them; but the answers of G. H. Gates & Co. and of K. H. Stover put in issue the question of the bona fides of the purchases of the lumber by them. Both claim to be innocent purchasers for value, without notice of the fraud of Tate & McDevitt. On the hearing the circuit court dismissed plaintiffs' bill as to them, holding the lumber attached not liable to plaintiffs' attachment, but referred the cause to a commissioner to state the condition of the account between plaintiffs and Tate & McDevitt, and decreeing that the People's National Bank, garnishee, should pay to plaintiff the sum of \$21.02, admitted to be due from them to Tate & McDevitt, and from this decree plaintiffs have appealed.

The specific allegations of the bill are not as broad as they might be to cover the case made by the evidence. It does charge that the object and purpose of Tate & McDevitt in making the subsequent sales thereof was to avoid delivery of the lumber to plaintiffs, and to avoid repaying plaintiffs the balance of the advances made by them on said lumber, and that Gates & Co. and Stover had notice thereof. This charge, taken in connection with other allegations, we think equivalent to a charge of intent to wholly defraud plaintiffs; but, as the answers deny this, it would have been better pleading to have charged also that the sales were made for the purpose of hindering and delaying plaintiffs in the collection of their debt, for the terms "defraud," "hinder," and "delay," are not equivalent terms, and to hinder or delay are as much condemned by the statute (section 3099, Code 1906) as to wholly defraud a creditor. *Edgell v. Smith*, 50 W. Va. 349, 355, 356, 40 S. E. 402. And as the court says in the case just cited, quoting, at page 356, of 50 W. Va., at page 404, of 40 S. E.: "But in order to render a deed fraudulent, it is not necessary that the debtor should intend to entirely defeat the creditor in the collection of his claim. Creditors are entitled not only to be paid, but to be paid as their claims accrue, and a debtor has no more right to postpone payment simply for his own advantage, than to defeat it altogether. A purpose to delay and hinder a creditor is therefore fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid. * * * The words 'hinder,' 'delay,' and 'defraud' are not synonymous." The allegations of the bill, taken as

a whole, however, we regard equivalent to charging in the terms of the statute intent not only to wholly defraud, but also to hinder and delay plaintiffs.

On the subject of proof not only the evidence of plaintiffs, but that of defendants, also, abundantly establishes intent not only to wholly defraud plaintiffs, but also to hinder and delay them. Both Tate and McDevitt are and were nonresidents. Their nonresidence was the basis of plaintiffs' attachment. McDevitt had been temporarily in West Virginia, superintending their lumbering operations. Tate was rarely here, although he appears to have come to West Virginia to negotiate the sales to Gates & Co., if not to Stover. Tate was also the principal witness for defendants. In attempting to assign a reason for selling to Gates & Co., he professes to have been afraid Halfpenny would go back on him, because, as he claimed, he had gone back on him in the purchase of a tract of timber land for Tate & McDevitt, and on which he had advanced \$4,185 of purchase money and taken title to himself as security. Plaintiffs were to have had the lumber manufactured from this land, but Tate & McDevitt having found a purchaser for the lumber at the price of \$10,000 to \$12,000, which would yield them a large profit, applied to Halfpenny for permission to sell, which Halfpenny agreed to, on condition that he should be paid a bonus for the use of his money, and as compensation for the loss of prospective profits on the lumber which his firm was to have had from the land. Some controversy arose between the two as to what this bonus should be, and on this account Tate professed the belief that Halfpenny, who had been disposed to go back on him in that transaction, might also attempt to "do him" in the other, and, in the language of modern slang, he concluded to try and "beat them to it." This he proceeded to do by the sale to Gates & Co. of all of the lumber on which plaintiffs had made the advances to his firm, and to Gates individually of every species of property owned by his firm, and, so far as the record shows, owned by the individual members thereof in the state of West Virginia, including horses, wagons, harness, and all equipments employed by them in their lumbering operation. The sale of the property to Gates individually was upon the pretended consideration that Gates should assume and pay all the outstanding debts of Tate & McDevitt, an indefinite amount, but estimated by him and Gates at about \$2,000, but not including any indebtedness to plaintiffs. So that nothing remained of the individual or firm assets, not thus sold and disposed of, out of which plaintiffs could realize their money. Tate admits that before selling to Gates & Co. he had made efforts to sell the lumber, first to Capt. Cobb, and then to one C. T. Nelson; but both Cobb and Nel-

son, readily perceiving the flavor of his fraudulent intentions, declined to become parties to the fraudulent scheme. Tate says that he then sought legal counsel, and was advised that he could not make a sale that would stand against plaintiffs, unless he could dispose of the lumber to a bona fide purchaser, for adequate consideration and without notice of his fraudulent intent. Then it was, he says, that he approached Gates, on a Sunday, and proposed to sell to him, giving him no notice, and who, so far as he professes to know, had no notice of plaintiffs' rights or of his purposes in making the sale, and that on the following day he succeeded in selling the lumber to Gates & Co. at the cash price of \$13,000, and a day or two later to Gates individually the other property of his firm. As to this want of notice or knowledge to Gates, Tate, of course, had corroboration in the testimony of Gates himself; but the inculcating facts, shown in the evidence on both sides, satisfy us beyond all doubt, that, whether or not Gates had actual knowledge or notice, the facts and circumstances surrounding him at the time of his purchases were of the character to charge him with full knowledge and notice of the fraudulent purposes of Tate & McDevitt. The fact that Tate sought out Gates on a Sunday night and proposed to sell at a lump sum, and that Gates, who had not seen the lumber, was not acquainted with the market, and agreed to buy almost immediately on the bare representations of Tate, as to the character and quality of the lumber and was so ready and willing to go into so large a transaction, is strongly indicative of fraud; and the further fact that almost immediately thereafter he also agreed to buy the other personal property of this firm, on the terms already stated, also goes to show the bad faith of the transaction.

The following language, which Gates professes to have addressed to Tate at the time of the purchase, is also significant: "I says to Mr. Tate, I says, 'Now put this down good and low so I can buy it and pay cash for it, and you know that beats cats and dogs.' That is the way I said it to him." Men do not usually engage in legitimate transactions in this way. Gates admits having been a creditor of Tate & McDevitt, presumably growing out of their lumbering operations. He was not engaged in buying or selling lumber. He dealt in horses and mules and in lands. He had not the money himself to buy the lumber, but he professes to have had associated with him a friend, M. L. Klock, a banker of Wellsboro, Pa., but whom he had not consulted about this particular transaction, and whom, he says, he never consulted about anything, but from whom he knew the money could be obtained. In payment he claims to have given Tate & McDevitt an order on Klock for \$13,000, and in his testimony in chief says that he sent his son-in-law with Tate to Pennsylvania,

with a copy of the contract in writing, to see Klock and explain to him the nature of the transaction, and to get the money, and at another place, in explanation of his reason for wanting the contract in writing, says, "In the first place, I suppose I had to, and, in the second place, I wanted to satisfy Mr. Klock that everything was right, because I knew he would ask all those questions before he would pay the money." On cross-examination, however, when asked how soon it was after the written contract had been executed that Tate and his son went to Pennsylvania to see Klock, he answered, "I think the next day." And when asked, in the same connection, whether they took the written contract with them, he answered: "I am not sure about that, * * * but I think not." When asked to state whether Klock paid the money, he answered: "Yes, sir; as far as I know. He paid it, and Mr. Tate said he paid it, and that he got it. Of course, I was not there." Neither the testimony of Mann, nor Klock, alleged associate of Gates, was taken. Another significant fact is that, after Gates purchased the lumber and other property from Tate & McDevitt, he left McDevitt in full charge of the property, substantially as he had been before the sale.

But even more convincing, perhaps, is the fact that about October 16th, a few days after these purchases, Gates met Stover in a hotel at Elkins, and sold, or professes to have sold, the lumber to him. Stover had been the agent of plaintiffs in negotiating for them the sale and the purchase of the lumber from Tate & McDevitt and had prepared the contract. On cross-examination Gates says that when Stover came into the hotel he said to him: "Stover, you are just the man I want to see, and I told him that I had bought a million feet of lumber on the Coal & Coke, and as I know Mr. Stover very well, I says, 'I want you to tell me when I have a good deal or a poor deal.' He said, 'I cannot tell you until I hear what you have got.' I told him what I had, and he asked me what I paid for it, and I told him, and he said, if it was log run stock and was on the Coal & Coke, 'you have a good deal, and what you recommend it.' And he says, 'What will you take for it if it is as you recommend it?' I said I would take \$17,000. Mr. Stover figured a bit and said, 'If it is log run stock, and the amount you tell me, I will take it.' 'Well,' I said, 'Mr. Stover, to be fair, we will call it a deal, but you go and look at it, and if you find the stuff there, you will take it, and, if not, we won't deal.' Mr. Sigler was sitting there, and he said, 'That was the quickest deal I ever saw in my life,' and he has been a lumberman for years." Gates professes he sent McDevitt with Stover to the mills to see the lumber. When Stover was asked whether he understood it to be the same lumber sold by Tate & McDevitt to Halfpenny & Hamil-

ton, he answered: "No, not exactly. After telling me that eight car loads had been shipped, it was my impression that the advance had been covered by these shipments." According to their testimony the contract between Gates and Stover was that Gates was to deliver the lumber on board cars, and Gates professes to have employed McDevitt to perform this part of the contract. After Gates had sent out men a time or two to load cars and found the expenses too great, he says, "I went to Mr. Stover and told him it would not do, and he said he could not help it, and I said, 'What will you take and load this lumber yourself?' He asked me \$1 per 1,000 if I remember, but we made the bargain at 75 cents, and then I put a man to tally and paid him myself." Thus Gates & Co. stepped down and out, leaving Stover and McDevitt in charge. If defendants Gates and Tate are to be believed, Gates & Co. had paid cash, but Stover had paid nothing, at the time the lumber was levied on by the attachment in this case, for Stover was to pay only as the lumber was delivered on cars. Afterwards, and after this suit was brought, we find Gates in Philadelphia, where he met J. L. Broadfoot, who had been an inspector of lumber for the plaintiffs, and spoke to him about selling lumber he was interested in. When asked what lumber it was he was interested in, he replied: "Mr. Stover told me that any one I saw that would sell this lumber he would pay for it, and I understood that Mr. Broadfoot said that he was out of work and he would know where to get buyers, and that was the reason I spoke to him about it. Q. Then you were trying to sell Mr. Stover's lumber, were you? A. I was not trying, no, sir, but was trying to help him in selling it." The price which Gates & Co. were to pay Tate & McDevitt was several thousand dollars less than they would have realized at the prices at which it had been sold plaintiffs. Many other inculpatory facts appear, but we have already detailed enough of the evidence to show the baldness of the fraud.

The legal principles applicable to transactions of this character are so well known to the profession, and have been so often declared in the decisions of this court, that it is unnecessary to repeat them here. One proposition, however, may deserve more than this passing notice. Counsel for defendants say that as the bill does not charge insolvency of Tate & McDevitt, and as they appear to have realized in the sale of lumber some \$13,000, and it does not clearly appear that the plaintiffs cannot obtain satisfaction of their debt by legal process against them, they have no legal or equitable right to subject the property attached to the payment thereof. But the rights of a creditor to subject to the payment of his debts the property of his debtor fraudulently conveyed does not depend on the question of the insolvency of the debtor. Insolvency is oft-

en an element going to show fraud, but the creditor's right to pursue the property fraudulently conveyed is not controlled thereby. While a different rule may prevail in some jurisdictions, it is not the law of this state that the creditor must first exhaust the debtor's other property. The statute of this state against fraudulent conveyances gives an absolute right to creditors to a suit in equity to annul a fraudulent conveyance, and they are not compelled first to subject other property of the debtor, by execution or otherwise. *Hoffman v. Fleming*, 43 W. Va. 762, 28 S. E. 790; 14 Am. & Eng. Ency. Law, 329, 330. And, as was held in *Edgell v. Smith*, supra: "If the intent is to either hinder or delay them, or defraud them, by a conveyance which places an obstacle in the way of the prosecution of their legal remedies, it is void under the statute against fraudulent conveyances." There can be no doubt of the fraudulent intent of the debtors in this case to put all their visible property out of the reach of plaintiffs by legal process, and to wholly defraud them. To all intents and purposes they admit it. When attempting to sell the lumber to Nelson, Tate admits having said to him that Halfpenny was trying to do him, and that he was going to see if he could not take care of himself, and when Halfpenny called to see him at Bellefonte, Pa., after the sales to Gates & Co. and to Stover, Tate said to him, "I have my money in my sock, and you can run after me as I ran after you for over six weeks." And when Halfpenny replied, "You are going to do me, Tate," he answered, "No, but I am going to have my own, and I am in position to get it." And when Halfpenny asked him what damage he wanted, he answered, in substance, if your nerves are not strong, hold on to the chair you are sitting on good and tight, for I just want \$10,000 out of you, and that Halfpenny did not say anything for a while and then left.

We are clearly of opinion that the decree below dismissing the plaintiffs' bill as to G. H. Gates & Co. and K. H. Stover, and abating the plaintiffs' attachment levied upon the lumber in controversy, and referring the cause to a commissioner, should be reversed and annulled, and that the decree which the court below should have pronounced should be entered here. Tate & McDevitt, as the record clearly shows, and as they practically admit, were indebted to plaintiffs for advancements made on lumber, as of October 19, 1907, \$3,581.29, which, with interest thereon to July 11, 1908, the date of the final decree appealed from, aggregates \$3,736.14; and, it appearing that the attachment was sued out on good and sufficient grounds, the decree to be entered here in modification of the decree below will be that the plaintiffs recover of the defendants Tate & McDevitt the said sum of \$3,736.14, with interest thereon from July 11, 1908, until paid, together with their costs in this court

and in the circuit court expended, subject to a credit of whatever may be collected on the decree in favor of plaintiffs against People's National Bank, garnishee, and that the property attached and taken in possession by the sheriff be sold to satisfy the same. And the cause will be remanded to the circuit court for further proceedings to be had therein in accordance with the principles announced and directions given herein.

(65 W. Va. 283)

BAKER v. JACKSON.

(Supreme Court of Appeals of West Virginia.
March 9, 1909.)

1. APPEAL AND ERROR (§ 1022*)—REVIEW—COMMISSIONER'S REPORT.

A commissioner's report, based on evidence, has great weight, and should be sustained, unless plainly not warranted by a reasonable view of the evidence. This rule operates with great force in an appellate court, after the report has been confirmed by a circuit court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. § 1022.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—CONFLICTING EVIDENCE.

A decree, based on evidence, especially when conflicting, will not be reversed unless plainly wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8972; Dec. Dig. § 1009.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by Stark L. Baker against William Jackson. Decree for plaintiff, and defendant appeals. Affirmed.

J. B. Ward, for appellant. Lew Greynolds and W. B. Maxwell, for appellee.

BRANNON, J. Stark L. Baker filed a bill in the circuit court of Randolph county against William Jackson to enforce a judgment lien against land of Jackson. The judgment was rendered by a justice in favor of William Reams against said Jackson and H. M. Robinson. Robinson was surety for Jackson in the note on which the judgment was rendered, and Robinson paid the judgment, and Reams assigned it to Robinson by written assignment. Without this assignment equity would keep the judgment alive and virtually assign it to Robinson by subrogating him to its lien. Jackson filed an answer pleading payment of the judgment. Depositions were taken on both sides, and the court made a decree expressing the opinion that the case was for the plaintiff, and referring it to a commissioner to report what land Jackson owned and the liens thereon. The commissioner took some more depositions and reported this judgment as a lien. The court overruled Jackson's exceptions, confirmed the report, and decreed the judgment against Jackson and ordered a sale of the land.

The sole question is one of fact: Had the judgment been paid? Jackson claimed that in a settlement between Robinson and him this judgment was included and paid. Robinson denied this. Upon this test question the evidence is absolutely conflicting. No receipt is produced from Robinson. The judgment proved the lien. The burden was on Jackson to show the payment by preponderant evidence. He has failed to do this, even were it an original question in this court; but there is the commissioner's report confirmed, which brings the case under the well-known rule that where a commissioner reports on facts his finding will be given great weight, and should be sustained in the circuit court, unless plainly not warranted by any reasonable view of the evidence, and this rule operates with peculiar force in an appellate court when the report has been confirmed by the circuit court. *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427. In addition to this we have the old rule that a circuit court's decree on evidence is taken to be right, and will not be reversed, unless decidedly against the weight of the evidence. *Kennewig Co. v. Moore*, 49 W. Va. 323, 38 S. E. 558. Not unless plainly wrong. *Wolfe v. Bank*, 54 W. Va. 689, 47 S. E. 243. Especially when the evidence is conflicting. *Naughton v. Taylor*, 50 W. Va. 233, 40 S. E. 352. It is useless to detail mere evidence. Such is not the mission of opinions. Their purpose is to lay down legal principles.

We affirm the decree.

(100 Va. 261)

BIBB et al. v. AMERICAN COAL & IRON CO. et al.

(Supreme Court of Appeals of Virginia. March 11, 1909.)

1. REFORMATION OF INSTRUMENTS (§ 43*)—PROCEEDINGS—EVIDENCE—BURDEN OF PROOF.

A vendor seeking to reform the written contract because of mutual mistake has the burden of proof.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 154; Dec. Dig. § 43.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—PROCEEDINGS—EVIDENCE—SUFFICIENCY.

Mere preponderance of evidence is not sufficient to justify the reformation of a written contract on the ground of mutual mistake, but the mistake must be conclusively established.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-159; Dec. Dig. § 45.*]

3. EQUITY (§ 296*)—PLEADING—SUPPLEMENTAL BILL.

Where defendant, in a bill to enforce payment of the purchase price of coal land together with a gas well, claimed damages for the defective title of the plaintiffs to the well, which defendant used in connection with the property sold until it ceased to flow, when it was abandoned as valueless, the exhaustion and abandonment of the well, having occurred pending the

litigation, could be introduced by a supplemental bill as a fact affecting the measure of defendants' damages.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 296.*]

4. EQUITY (§ 295*)—PLEADING—SUPPLEMENTAL BILL.

The chief office of a supplemental bill is to bring into the case new events, affecting rights and interests already mentioned, which have arisen since the filing of the original bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 581; Dec. Dig. § 295.*]

5. VENDOR AND PURCHASER (§ 351*)—RIGHTS AND LIABILITIES OF PARTIES—ACQUISITION OF ADVERSE TITLE.

In the absence of fraud in a sale of an interest in land, a vendee in possession who acquires an outstanding title cannot demand from the vendor more than the amount reasonably and fairly paid on that account, and this rule applies to a sale of property of uncertain duration, such as a gas well.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1064; Dec. Dig. § 351.*]

Appeal from Chancery Court of Richmond.

Action by R. M. Bibb and others against the American Coal & Iron Company and others. From a decree for defendants, plaintiffs appeal. Reversed.

Scott, Buchanan & Cardwell, for appellants. H. R. Pollard and Meredith & Cocke, for appellees.

WHITTLE, J. The original bill in this case was filed by the appellants against the appellees in September, 1902, to enforce the payment of \$5,000, the residue of the purchase price of \$35,000, for the sale of their leasehold interest in a tract of coal land located in Mingo county, W. Va., together with the improvements, fixtures, and certain personal property, consisting of a stock of goods, live stock, and unexpired insurance policies, and also "the natural gas well" on the premises, under a contract of December 10, 1901. The contract stipulates that the foregoing property is to be conveyed by deed free from incumbrances.

The bill contests the title of the Mingo Coal Company to the gas well, or, at least, the right of that company to exact compensation for its use, either from the plaintiffs or their assignee, the American Coal & Iron Company. The plaintiffs also assert title in themselves to the property, at least to the extent of their right to use it in connection with their leasehold free of rent. It is, moreover, alleged that it was the intention of the plaintiffs, by the contract of sale, to sell, and of the American Coal & Iron Company to buy, only such interest in the gas well as they acquired from their grantors, Morrison and Walker, and that the insertion of the provision in respect to that property in the fee-simple clause of the contract of sale was the result of a mutual mistake; and the prayer of the bill is that the contract be reformed so as to conform to the true under-

standing of the parties. The answers of the defendants controvert both contentions.

The American Coal & Iron Company in its answer says: That, shortly after the contract of purchase had been executed, it first learned of the claim of the Mingo Coal Company to the gas well; that in order to avoid complications and to continue its mining operations, it was compelled to enter into an agreement with the Mingo Coal Company, by which it was allowed to use the gas from the well upon the payment of an annual charge of \$250; that it had paid all the purchase money due under the contract of December 10, 1901, except \$5,000, which sum it notified the plaintiffs it would hold to indemnify and save itself and its assignee harmless on account of the failure of the plaintiffs to comply with their contract in the matter of conveying the gas well; "that it had repeatedly stated to the plaintiffs that it was ready to pay the residue of the purchase money if they would convey the gas well free of incumbrance and relieve it and the assignee of the annual charge aforesaid."

The correspondence between the defendants and the plaintiffs in relation to the agreement for the use of the gas well shows that the annual stipend of \$250 covered the entire output of the well and the use of the gas for all purposes whatsoever. In a letter, under date of February 8, 1902, the president of the American Coal & Iron Company writes: "We are not raising a frivolous question. It is one of great importance to us. It involves our right to use the gas well free of charge and as our own, and the right of the Mingo Coal Company to demand a compensation of us for the use of the well during the life of our lease." A few days later he says: "In a word, the lease to us from the Mingo Coal Company gives us no greater right than we would have enjoyed if your sale of the well to us had carried with it a good title."

The vendee was never deprived of the possession or use of the well, and all the gas was consumed by it in the use and ceased to flow, and the well was abandoned as valueless August 21, 1904.

Before the hearing the plaintiffs asked leave to file a supplemental bill, which alleged that the vendee took possession of all the property included in the contract of sale, and in connection with its mining operations used the gas from the well until it ceased to flow and the well was abandoned August 21, 1904. But leave to file the supplemental bill was denied; the court being of opinion that, even if its allegations were proved, the plaintiffs would not be entitled to the abatement of damages prayed for. The court also decreed that the American Coal & Iron Company was entitled to retain the \$5,000, the balance of the purchase price of the property sold under the contract of December 10, 1901, as compensation for the failure of the plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiffs to convey to it a good title to the gas well free from all incumbrances, and dismissed the plaintiffs' bill with costs. From that decree this appeal was allowed.

We find no error in the ruling of the chancery court upon the primary contentions of the plaintiffs in regard to their title to the gas well and the alleged mutual mistake in the contract of sale. The burden of proof rested on the plaintiffs in both instances, and, without reviewing the testimony on those issues, we are of opinion that on neither point has it been satisfactorily borne.

The law is well settled that a very high degree of proof is required in a suit to reform a written contract. The mere preponderance of evidence is not sufficient, but the existence of the mutual mistake must be conclusively established.

In *Pomeroy on Specific Performance* (Ed. 1897) § 261, the rule is thus stated: "The defect in the contract must, however, be proved beyond all reasonable doubt, by evidence of the clearest and most satisfactory nature. The burden of proof is on the plaintiff. * * * An alteration of the writing cannot be made upon a conjecture as to the true reading, even though the court is satisfied that the existing instrument does not express the real intention of the parties."

The decisions of this court are in full accord with the statement of the law as to the character of evidence necessary to reform a written contract. *Mauzy v. Sellars*, 26 Grat. 641, 647; *Carter v. McArtor*, 28 Grat. 356, 360; *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7; *S. V. R. Co. v. Dunlop*, 86 Va. 846, 351, 10 S. E. 239; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Moore v. Assurance Co.*, 103 Va. 391, 394, 49 S. E. 499; *Beach v. Bellwood*, 104 Va. 170, 183, 51 S. E. 184.

Putting aside therefore both of these contentions as not proved, we shall address ourselves to the ruling of the trial court on the question of the measure of damages to which the vendee is entitled on account of the defective title of the plaintiffs to the gas well.

In approaching the consideration of that question, we may premise that the record does not show either fraud or misrepresentation on the part of the plaintiffs with respect to their title to the gas well. The acquiescence of the Mingo Coal Company in the use of the well as an incident to the leasehold of the coal property in the past may well have induced belief on the part of the plaintiffs that it would make no charge for the continued use of it by their vendee.

As a question of correct practice, under the evidence in the case, we have no doubt about the propriety of bringing into the record the fact of the exhaustion and abandonment of the gas well by the vendee pending litigation, as affecting the measure of its damages. Even in an action at law on a life insurance policy which had been repudiated by the insurance company, where the insured died before trial, the beneficiary was

permitted to prove the cessation of the life of the insured as an element proper to be considered in fixing the quantum of damages. *Opinion by Burks, J., in Clemmitt and Wife v. New York L. Ins. Co.*, 76 Va. 355, 362.

One of the chief offices of a supplemental bill is to bring into the case new events referring to and supporting or affecting rights and interests already mentioned, which have arisen subsequently to the filing of the original bill. *Story's Eq. Pl.* § 336; 1 Bar. Chy. Pr. 165, 351; *Pleasant v. Logan*, 4 Hen. & M. 489; *Boykins v. Smith*, 3 Munt. 102; *Laidley v. Merrifield*, 7 Leigh, 346; *Glenn v. Brown*, 99 Va. 322, 38 S. E. 189.

Though it is undoubtedly true, as a general proposition, that the test of the value of property sold is to be applied as of the day of sale, the case in judgment does not come within the influence of that principle. In other words, we are not called on here to speculate as to the value of the gas well (the price of which was not fixed by the parties in the contract of sale, and as to which there is no evidence in the record), as an original proposition; but our inquiry is limited to the ascertainment of the quantum of damages sustained by the vendee by reason of the failure of the vendors to convey a good title to the property in controversy.

The well-established rule on that subject is that, in the absence of fraud, where the outstanding title is acquired or the incumbrance removed by the vendee in possession by purchase, such vendee is entitled to the amount reasonably and fairly paid by him on that account, and to no more. That principle is distinctly enunciated by the Supreme Court of the United States in the case of *Bush v. Marshall*, 6 How. 284, 12 L. Ed. 440. Mr. Justice Grier, in delivering the opinion of the court, quotes with approval the statement of the law from the case of *Galloway v. Finley*, 12 Pet. 295, 9 L. Ed. 1079, as follows: "Equity treats the purchaser as a trustee for his vendor, because he holds under him; and acts done to perfect the title of the former, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant. The vendee cannot disavow the vendor's title."

These principles are universally recognized, and firmly established in Virginia. *Hull v. Cunningham*, 1 Munt. 332, 338; *Bryan v. Salyards*, 3 Grat. 181; *Roller v. Effinger*, 88 Va. 645, 14 S. E. 337; *Burnett v. Caldwell*, 76 U. S. 290, 19 L. Ed. 712; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91; *Rawle on Cov. for Title* (5th Ed.) § 192; *Wood's Mayne on Dam.* § 250.

Nor is the application of the rule to this case affected by the circumstance that the American Coal & Iron Company only acquired the use of the gas well. It was dealing in

regard to a species of property of uncertain duration, and prudently adopted a form of contract which rendered the benefits and burdens reciprocal and co-existent; the plan being to set apart a sum of money, the interest on which, at 5 per cent., would yield a sum equal to the annual exaction for the use of the well as long as the gas might continue to flow. That mode of adjustment was chosen by the vendee without consulting the plaintiffs, and the wisdom of it has been demonstrated by subsequent events. The fact that it was satisfactory to the vendee and considered the equivalent of a conveyance by the plaintiffs of the gas well clearly appears not only from the conduct of the parties, but also from the answer and the extract from the letter of the president already quoted.

Subordinating, then, form to substance, our conclusion on this branch of the case is that the American Coal & Iron Company (after having been placed in possession of the gas well by its vendors under the contract of sale) acquired the outstanding title of the Mingo Coal Company to the gas well, and is affected with an equity in favor of its vendors which forbids that it shall demand of them more than its actual outlay in the purchase of such title.

It follows from these views that the decree of the chancery court must be reversed, and this court will enter such decree as that court ought to have entered, awarding to the appellants the balance of their purchase money, with interest, subject to a credit for the amount paid by the American Coal & Iron Company to the Mingo Coal Company for the use of the gas well.

Reversed.

(109 Va. 288)

CHESAPEAKE & O. RY. CO. v. PEW.

(Supreme Court of Appeals of Virginia. March 11, 1909.)

1. STATUTES (§ 226*)—CONSTRUCTION—ADOPTION FROM STATE.

Where a statute has been adopted from another state, it will be presumed that the Legislature likewise adopted the construction placed upon the statute by the courts of the state from which it came.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

2. CARRIERS (§ 108*)—LIABILITY—STATUTES.

The first sentence of Va. Code 1904, § 1294c(24), rendering the initial carrier receiving goods for transportation liable as an insurer for any damage caused by its negligence or the negligence of any connecting carrier to which such property may be delivered, having been taken from the Missouri statute, applies, as construed by the courts of that state, to the English rule of liability as an insurer to the initial carrier only where there is an initial and connecting carrier, and does not affect the liability of a carrier, where the transportation is wholly over its own line.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 108.*]

3. STATUTES (§ 211*)—CONSTRUCTION—TITLE.

This construction of the section of the statute cannot be affected by the insertion by the compiler of the Code, merely as a matter of convenience, of a title in black-faced type immediately before the section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.*]

4. STATUTES (§ 211*)—CONSTRUCTION—TITLE.

In the construction of a statute, the title of an act is of some value as a guide to the intention of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.*]

5. CARRIERS (§ 108*)—CARRIAGE OF GOODS—LIABILITY—STATUTES.

The effect of Va. Code 1904, § 1294c(24), providing that no contract shall exempt a common carrier from the liability of a common carrier, which would exist had no contract been made or entered into, is to relegate the carrier to its common-law liability in cases where no contract relating thereto was made.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 108.*]

6. CARRIERS (§ 218*)—CARRIAGE OF LIVE STOCK—LIMITING LIABILITY.

Under Va. Code 1904, § 1294c(24), providing that no contract shall exempt any common carrier from the liability of a common carrier, which would exist had no contract been made or entered into, a carrier of live stock may not contract to limit its liability for loss or injury to the cattle to less than their true value, whether the loss or injury is caused by its negligence, or not, if it is not caused by the vis major, or the inherent qualities of the cattle or the fraud of the shipper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 218.*]

Error to Circuit Court of James City and City of Williamsburg.

Trespass on the case by J. N. Pew against the Chesapeake & Ohio Railway Company for loss of and injury to cattle shipped. From a judgment for plaintiff, defendant brings error. Affirmed.

R. G. Bickford and S. O. Bland, for plaintiff in error. N. L. Henly, C. B. Garnett, and Braxton, Williams & Eggleston, for defendant in error.

WHITTLE, J. This is an action of trespass on the case to recover damages arising out of an intrastate shipment of cattle, the property of the defendant in error, J. N. Pew, over the road of the plaintiff in error, the Chesapeake & Ohio Railway Company, the initial carrier. Some of the cattle were killed and others injured in course of transportation under circumstances which it is alleged render the carrier liable for the damage sustained.

To a judgment against the company for the value of the cattle, this writ of error was awarded.

The principal assignment of error draws in question the ruling of the circuit court denying the validity of certain stipulations contained in the bill of lading, whereby, in consideration of a reduced rate for transportation of the cattle, the company seeks

to limit the measure of its duty as a common carrier, and the shipper obligates himself to accept an agreed value, less than the true value of the cattle, in the event of loss for which the carrier is responsible.

The company insists that in no event can it be held answerable in damages under a correct construction of section 1294c(24), Va. Code 1904, unless the plaintiff proves that the injury to the cattle resulted from its negligence, and, in that event, that the amount of the recovery must be limited to the agreed value of the cattle.

The trial court resolved both propositions against the contention of the company, instructing the jury that if they believed from the evidence that the defendant company received the cattle for transportation, and that they were killed, lost, or destroyed, they must find for the plaintiff, unless such killing, loss, or destruction was due to the act of God, or the public enemy, or the peculiar nature or inherent qualities of the cattle, or to the act or fault of the shipper.

The court, moreover, told the jury, that the stipulation in the bill of lading limiting the value of the cattle, in case of loss, to an amount less than their true value, was invalid.

The correctness of this ruling depends upon the proper construction of section 1294c(24).

The first sentence of the first paragraph of that section renders the initial carrier, receiving goods for transportation, liable for any loss or damage caused by his negligence or the negligence of any connecting carrier to which such property may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case shall be prima facie evidence of negligence. This provision, except to the extent to which it undertakes to make the initial carrier liable for loss or damage occurring on the lines of connecting carriers, is simply declaratory of the common law. The next provision allows the initial carrier to recover from the connecting carrier the amount of any loss, damage, or injury it may be required to pay to the owner of such property on account of the latter's negligence. Then follows the provision upon which the recovery in this case is founded, namely, that: "No contract, receipt, rule or regulation shall exempt any such carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

This enactment is a composite piece of legislation. The first sentence of the first paragraph was taken from the Missouri statute (Laws Mo. 1879, p. 171; Rev. St. Mo. 1889, § 944), while the concluding sentence of the paragraph was adopted from the Iowa statute (Code Iowa 1897, § 2074).

It is a familiar rule in the interpretation of statutes that where a foreign statute,

which has received the construction of the courts of the state from which it comes, has been incorporated into the statute law of this state, it will be presumed that the Legislature likewise adopted the construction placed upon the statute by the courts of the foreign state. *Doswell v. Buchanan*, 3 Leigh, 394, 410, 23 Am. Dec. 280; *Danville v. Pace*, 25 Grat. 1, 5, 18 Am. Rep. 663; *N. & W. Ry. Co. v. Cheatwood's Adm'r*, 103 Va. 356, 367, 49 S. E. 489.

Applying that rule to the interpretation of the statute in question, we find that the Missouri courts hold that the liability of an initial carrier, with respect to acts done on its own line, remains as at common law. *Hurst v. St. Louis, etc., Ry. Co.*, 117 Mo. App. 25, 94 S. W. 797; *Ball v. Wabash*, 83 Mo. 574; *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110.

So, also, as to the concluding sentence of the first paragraph of section 1294c(24), taken from the Code of Iowa, the courts of that state have uniformly held invalid contracts exempting common carriers from their common-law liability, either with respect to the amount or degree of their liability as insurers. *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa, 412; *McCoy v. K. & D. M. R. Co.*, 44 Iowa, 424; *McCune v. B., O. R. & N. Ry. Co.*, 52 Iowa, 600, 8 N. W. 615; *Lucas v. Ry. Co.*, 112 Iowa, 594, 84 N. W. 678.

In considering this subject, Hutchinson on Carriers (3d Ed.) § 237c, observes: "In some of the states, however, it has been deemed contrary to the true policy of the state to permit the carrier to limit his common-law liability by any contract whatever. Prohibition of such contracts has been declared by statute in Kansas, Iowa, Texas, while in Nebraska and Kentucky they are forbidden by the Constitution."

See, also, a full and valuable discussion by Judge Freeman of "Limitation of Carrier's Liability in Bills of Lading," in notes to *Chicago, etc., Ry. Co. v. Calumet, etc., Farm*, 194 Ill. 9, 61 N. E. 1095, 83 Am. St. Rep. 68, 74, et seq. At pages 129, 130, 83 Am. St. Rep., the learned annotator says: "In a few of the states this has been carried to the extent of prohibiting a common carrier from in any way limiting his liability as it exists at common law. Such prohibitions are to be found in the Constitutions of Kentucky and Nebraska, and by statute in Iowa and Texas."

The Missouri cases, *supra*, show that the liability of the initial carrier for acts done on its own line is that of an insurer, as at common law, and that the object of the Missouri statute, corresponding to the first sentence of the first paragraph of section 1294c(24), is to apply the English rule of liability to the initial carrier, where there is an initial carrier and a connecting carrier, and does not affect the liability of a carrier where the transportation is wholly over its own line.

It follows therefore that the first sentence of the section has no application to the case in judgment, which is controlled by the concluding sentence of the first paragraph, as interpreted by the decisions of the Iowa courts to which reference has been made.

Nor is this view of the enactment influenced by the title in black-faced type found at the head of the section. That title was inserted by the compiler of the Code as matter of convenience.

The original act, which is known as the "Claytor act," was passed May 16, 1903, under the title, "An act prescribing the liability of common carriers, railroads or transportation companies for any loss, damage or injury to property caused by its negligence or the negligence of any other common carrier, railroad or transportation company, to which said property may be delivered, or over whose line such property may pass." Acts Ex. Sess. 1902-03-04, p. 388, c. 258. The Claytor act was carried into the Code by the compiler as section 12941. On January 18, 1904, however, the Legislature passed a new act, entitled "An act concerning public corporations." That statute re-enacts the Claytor act and is embodied in Va. Code 1904 as section 1294c(24). Acts Ex. Sess. 1902-03-04, p. 968, c. 609.

We are not unmindful of the fact that the title of an act is not infrequently of value in the exposition of statutes, as a guide to the intention of the Legislature; but there is nothing in the title to the present enactment to divert us from a meaning plainly to be gathered from the history of the legislation, and more especially as our conclusion is in harmony with the manifest public policy of the state.

Having thus reached the conclusion that the case comes within the control of the provision in section 1294c(24) that "no contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into," the plaintiff in error is necessarily relegated to its common-law liability. It therefore only remains to inquire what the liability of a common carrier is with respect to goods delivered to him for transportation, under the doctrine of the common law, in the absence of all contract whatsoever on the subject.

That question was definitely answered in England in the year 1785, by the decision of the Court of King's Bench, in the case of *Forward v. Pittard*, 1 Term R. 27. In that case the plaintiff delivered to the defendant, a common carrier, 12 pockets of hops to be carried to Andover and forwarded to Shaftsbury by the carrier's wagon. The hops were

consumed by accidental fire while in transit, without negligence on the part of the defendant. Lord Mansfield delivered a notable judgment in the case, in which, among other things, he said: "The question is whether the common carrier is liable in this case of fire. It appears from all the cases for 100 years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence, and for any negligence he is suable on his contract; but there is a further degree of responsibility by the custom of the realm—that is, by the common law, a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies."

This statement of the common-law rule has been followed by this court in *Murphy, Brown & Co. v. Staton*, 3 Munt. 239, and *Friend v. Woods*, 6 Grat. 189, 192, 52 Am. Dec. 119.

The recent case of *C. & O. Ry. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, 8 L. R. A. (N. S.) 183, arose under section 1294c(25), or rather under the corresponding section (1296) of the Code of 1887, and the court held that "a contract with a common carrier, whereby, in consideration of a reduced rate, a shipper agrees to accept an agreed value, less than the true value, of goods lost by the negligence of the carrier, is invalid. * * *"

Our conclusion is that, so far as the rights and liability of an initial carrier with respect to goods lost on its own line is concerned, there is no difference in legal effect between a liability arising under the last sentence of the first paragraph of section 1294c(24) and under 1294c(25), except, of course, that liability under the latter clause is predicated on the negligence of the carrier, while under the former it is not. That is to say, a common carrier can no more exempt itself by contract from liability for loss or injury to goods committed to it for transportation in the one instance than in the other.

There are numerous minor assignments of error, which have received careful consideration, but which need not be noticed further than to observe that the construction which we have placed on section 1294c(24) eliminates the main contentions of the plaintiff in error, that the admissible evidence in the case is plainly sufficient to sustain the finding of the jury, and that no more favorable verdict for the defendant could properly have been rendered. See *Taylor v. B. & O. R. Co. (Va.)* 62 S. E. 798, and authorities cited.

We find no reversible error in the record, and the judgment must be affirmed.

Affirmed.

(109 Va 459)

SOUTHERN EXPRESS CO. v. KEELER.
(Supreme Court of Appeals of Virginia. March 11, 1909.)

1. CARRIERS (§ 147*)—EXPRESS COMPANIES AS CARRIERS—STATUTES—LIMITATION OF LIABILITY—"TRANSPORTATION COMPANY."

An express company, being by Va. Code 1904, § 1294a(2), declared a transportation company, is within the terms of Va. Code 1904, § 1294c(24), providing that no contract shall exempt any common carrier from liability which would exist had no contract been made or entered into.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 637, 647, 648; Dec. Dig. § 147.*

For other definitions, see Words and Phrases, vol. 8, p. 7076.]

2. CARRIERS (§ 147*)—CARRIAGE OF GOODS—LIMITING LIABILITY—STATUTES.

The manifest purpose of Va. Code 1904, § 1294c(24), is to deprive the common carrier of the right to limit his liability by contract and relegate him to his common-law rights and responsibility, independent of contract, though by the common law a carrier could qualify his liability as quasi insurer under certain conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 637; Dec. Dig. § 147.*]

3. CARRIERS (§ 158*)—EXPRESS COMPANIES—LOSS OF TRUNK—FIRE—LIMITATION OF LIABILITY.

Under Va. Code 1904, § 1294c(24), providing that no contract shall exempt any common carrier from the liability of a common carrier which would exist had no contract been made or entered into, an express company is liable for the full value of a trunk destroyed by fire without negligence on its part, without regard to a stipulation in its receipt that, no value being given, it would be liable for only \$50.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 665; Dec. Dig. § 158.*]

4. CARRIERS (§ 129*)—FRAUDULENT CONCEALMENT BY SHIPPER—AFFECTING LIABILITY FOR LOSS OF GOODS.

The agent of an express company, on a request to it to get a trunk for shipment, the contents of which was worth \$400, received the trunk and removed it from an upper to a lower floor, and there left it, and did not return, though notice was given to the company. Thereafter the trunk was sent by an agent of the shipper to the company's office, and the agent truthfully said that he did not know the value of the trunk, and he received a receipt stating that the value was asked and not given. The trunk was then shipped at a cheaper rate than if the true value had been given. *Held*, that there was no fraudulent concealment of the value of the trunk, whereby a cheaper rate was obtained so as to affect the liability of the carrier for the loss of the trunk by fire.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 129.*]

Error to Law and Equity Court of City of Richmond.

Trespass on the case by Margaret Keeler against the Southern Express Company for the loss of a trunk. From a judgment for plaintiff, defendant brings error. *Affirmed*.

Statement of agreed facts in an action of trespass on the case brought by Margaret Keeler against the Southern Express Company to recover damages for the loss of a trunk:

"(1) On the 20th day of January, 1907, the plaintiff in this action was the owner of a certain trunk containing clothing, silverware, jewelry, and other things enumerated below, which, together with the trunk, were of the value of \$400. On the said 20th day of January, 1907, the plaintiff in Petersburg, Va., summoned the defendant by telephone to transport the said trunk to Richmond, Va., but did not inform said company that the trunk was of unusual value. The Southern Express Company sent its agent to the residence whence the summons came, and the said agent removed the trunk from the upper floor to the lower floor of the house and there left it, saying that he would call later and take it away; but no information was asked or given said agent as to the value of the trunk and its contents. Although summoned three times to come for the trunk, the Southern Express Company failed to send its agent back. Thereupon on the 22d day of January, the plaintiff intrusted the trunk to a colored driver to be carried to the office of the express company. The said colored driver, on said 22d day of January, delivered said trunk, which was locked, to the agent of the Southern Express Company at Petersburg. The said agent inquired of the said driver the value of said trunk. The reply of the said driver was that he did not know. Whereupon the agent of the defendant company did receive the said trunk for transportation to Richmond, Va., and did issue to the said agent of the shipper the bill of lading, a copy of which is hereto attached by agreement of counsel, the original being lost by said plaintiff, which said bill of lading was accepted by the said driver, as agent of the plaintiff, and by said driver delivered to said plaintiff, with the words, 'Value asked and not given,' stamped on said bill of lading. At the time of the delivery of the said bill of lading to the agent of said shipper, he paid the agent of said defendant company the sum of 65 cents freight on said trunk, which weighed 155 pounds.

"(2) The contents of said trunk were: Underwear; one black broadcloth suit; one white broadcloth suit; one gray serge suit; one white crepe de chine dress; one black velvet hat (plumes); one white hat; one brown hat; two lace waists; one black silk waist; one dozen shirt waists; one black voile skirt; one black silk underskirt; one white silk underskirt; five pair of shoes; two blankets; five pillows; collection of Sterling silver souvenir spoons, between six and seven dozen; manicure set; toilet articles, brush, silver, mirrors, etc.; one gold chain purse; two fancy combs; gold pins; gold buttons; belt buckles; three chains; and also one case containing the following sterling silver: One dozen dinner knives, one dozen dinner forks, one dozen dessert forks, one dozen dinner knives, one dozen

fruit knives, one dozen teaspoons, one dozen tablespoons, one dozen dessert spoons, one butter knife, one sugar shell, one cream dipper, and one meat fork.

"The rates of freight on packages shipped from Petersburg, Va., to Richmond, Va., then established and in force by the company were: For packages of less value than \$50, the sum of 40 cents per hundredweight; and on packages of greater value than \$50, the same as the above, plus the further sum of 5 cents for each \$100 of the value, or fraction thereof. The State Corporation Commission of the state of Virginia had not yet formally promulgated or established any rates, but upon complaints by shippers as to express rates the Southern Express Company had been summoned before the commission and their rates inquired into, and the commission had not changed the same. In March, 1907, the commission promulgated its rates, which were the same as those formerly promulgated, fixed, and charged by the express company, and these rates are now in force in the state of Virginia.

"Hence if the true value of said trunk and its contents had been declared by the shipper or her agent, the value being \$400, and the weight 155 pounds, the charge would have been 65 cents according to weight, plus 20 cents.

"(3) When the trunk above mentioned was delivered to the company as aforesaid, it was promptly handled and transported from Petersburg, Va., to Richmond, Va., in the manner and way in which packages of the known value of less than \$50 were and usually are handled, and was, on its arrival at the latter place, promptly taken to the warehouse and office of the Southern Express Company, as is customary with such packages.

"(4) On the night of its arrival at the said warehouse, the said warehouse and office were destroyed by fire, together with a great portion of the contents thereof. The said fire was an accidental fire and was in no way caused by the negligence of the carrier nor of any of its servants or agents, and the said carrier, its agents and servants, used every reasonably possible exertion to save from destruction the contents of the said warehouse and office.

"From destruction by said fire were saved all packages delivered to the defendant express company for carriage on which a value of as much as \$50 had been declared by the consignors, and such packages of less value as was possible to save under the circumstances.

"Before the expiration of 30 days from the time when said goods were lost, the plaintiff gave the defendant notice, in writing, of her claim for the loss of said goods and chattels.

"(5) The method of handling packages in use on the lines of the Southern Express Company varies directly as the value of such

packages; it giving more care to packages of great value than to packages of a lesser value.

"All packages shipped from Petersburg, Va., to Richmond, Va., of a declared value of as much as \$50 are handled and transported in the following manner:

"A package being offered to the company in Petersburg, at the company's office, it is weighed, and the shipper is asked the value. The rate of freight is then fixed as above mentioned, according to the published rates, and depends on the weight and on the value.

"The rate being paid (or the package being sent C. O. D.), a receipt, contract, or bill of lading is issued showing the consignor, consignee, destination, origin and rate paid, and the conditions and terms on which the shipment is accepted. The contract, receipt, or bill of lading in this case was in the usual form and contained the usual conditions.

"The package is then taken charge of by the agent of the express company, and, if a value of as much as \$50 has been declared, it is especially noted on an individual waybill showing the consignor, origin, destination, train handled on, consignee, value, rate paid, and the messenger by whom handled.

"This messenger is personally responsible for the package, and is charged with the duty of taking extraordinary care thereof, and with placing it in the safest possible place, if the size permits, in a fire and burglar proof safe. In case of fire, accident, or other unusual danger, he is charged with the duty of saving all valuable packages first, and then other packages if possible. In case a package has been declared of an extraordinary value, a special messenger is sent in charge of the individual package.

"When the messenger in charge of a package of the value of \$50 or more arrives at the destination of such packages, or at the end of his run, he surrenders the package only when he has been given a written individual receipt for the said package; said receipt being signed by the person receiving said package.

"In cases of all packages on which a value of as much as \$50 is declared, every agent and servant of the express company who handles the package knows the value so declared, knows that there is a written proof that the said package is in his hands, and knows that he must not surrender the said package under any consideration unless he has received like written proof of him to whom he delivers it. In case of all packages of the declared value of \$50, every possible precaution is taken for their safety. This necessitates a more costly method of handling by the company of those valuable packages than is used in the handling and transportation of packages of small value.

"Packages of small value are handled in the following more economical manner:

"A package is offered the company, at its office, at point of shipment, and the package weighed and valued as above described.

"The rate is then fixed as above with regard to weight and value. All packages on which a value of less than \$50 has been declared are then noted on the general waybill, which shows point of shipment, consignee, and destination.

"Such packages are not handled individually, in that they are checked only in the general run; that is, when arriving at destination or end of the messenger's run, they are called off by one messenger and checked by the other. Due care is used, but not the unusual and extraordinary care that is expended on packages of greater value. No individual receipt for each package is taken, but a receipt for the general cargo is taken, and the waybills show what articles are included therein.

"In case of fire or of attack or of any extraordinary danger, the messenger's instructions and duty are to care first for the packages of greatest value, then for those of greater declared value than \$50, and then for those of less value.

"Every messenger or other servant or agent can look at his waybills and see exactly what packages are of a value of \$50 or more, and exactly what the value of each of these has been declared to be. All messengers or other agents or servants of the defendant company know that packages on which no value has been declared are of less than \$50 of value, and that the freight rate paid on such packages has been secured on such low value.

"Every messenger knows that it is his duty, as above described, to pay every attention, ordinary and extraordinary, to the safety of the valuable packages, and to use every reasonable care to insure the safety of the packages of low value.

"Every messenger or other servant of the company is chargeable personally with all losses occurring while the package lost is in his custody and control, unless such loss can be properly explained as unavoidable.

"Copy of bill of lading:

"Read This Contract.

"Southern Express Company.

"Domestic Bill of Lading.

"Not Negotiable.

"Petersburg, Va., Jan. 22, 1907.

"Received of Salnn M

"Value asked and not given.

"One trunk, valued at ——— dollars, and for which amount the charges are made by said company, marked

"Miss Margaret Keeler,

"214 E. Main St.,

"(Copy.) Richmond, Va.

"Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation.

"It is part of the consideration of this contract, and it is agreed, that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants, unless specially insured by it and so specified on this receipt, which insurance shall constitute the limit of the liability of the Southern Express Company in any event; and if the value of the property above described is not stated by the shipper at the time of shipment and specified in this receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars, for loss of, or damage to the shipment herein receipted for. Nor shall the said company be held responsible for the safety of said property after its arrival at its place of destination.

"And if the same is intrusted or delivered to any other express company or agent (which said Southern Express Company are hereby authorized to do) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and, as such, alone liable, and the Southern Express Company shall not be in any event responsible for the negligence or nonperformance of any such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event shall the Southern Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office, within thirty days after this date, in a statement, to which this receipt shall be annexed. All articles of glass, or contained in glass, or any of a fragile nature, will be taken at shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage, or detention caused by the acts of God, civil or military authority, or by insurrection or riot, or the dangers incident to a time of war.

"If any sum of money, besides the charges for transportation, is to be collected from

the consignee on delivery of the above described property, and the same is not paid within thirty days from the date thereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property while in its possession for the purpose of making such collection, shall be that of warehousemen only.

"For the Company. Taylor."

In this case neither party demanded a jury, and, the whole matter of law and fact having been submitted to the court, judgment was rendered for the plaintiff for the sum of \$400, the value of the trunk, to which judgment the express company brings error.

W. R. Meredith and Jas. H. Drake, Jr., for plaintiff in error. Garnett & Pollard, for defendant in error.

WHITTLE, J. In its main features this case is ruled by the decision in *Chesapeake & Ohio Railway Company v. Pew*, 64 S. E. 35, in which an opinion was handed down at the present term. Both cases arose under the concluding sentence of the first paragraph of section 1294c(24), Va. Code 1904, which provides that: "No contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

An express company is declared to be a "transportation company" by our statute, and is therefore expressly included in the foregoing enactment. Section 1294a(2).

The fundamental error in the contention in favor of the limited liability of the express company in the present instance consists in assuming that the rights of the parties are as at common law, ignoring the provisions of section 1294c(24). It is well settled that, while at common law a common carrier could not contract against his own negligence, he could qualify his liability as quasi insurer by special acceptance upon such reasonable terms and conditions as might be agreed upon with the shipper, provided they were not incompatible with his duty to the public; but it was the manifest purpose of the Legislature, by the language quoted, to deprive the common carrier of the right to thus limit his liability and to relegate him to his common-law rights and responsibilities independent of contract.

It need only be observed, in conclusion, that the agreed facts do not sustain the remaining contention that the plaintiff obtained a cheaper rate for the transportation of her trunk by fraudulent concealment of its true value.

The agent of the express company received the trunk from the owner, removing it from the upper to the lower floor of the house in Petersburg at which she was staying, and went away promising to return for the trunk later, but without making any inquiry as to its value, or imparting any information on the subject of rates. The company was afterwards three times requested by 'phone to call for the trunk, but neglected to do so, and it was finally sent to the express office by a negro driver. When asked the value of the trunk, the driver truthfully answered that he did not know.

Fraud cannot be predicated of such a state of facts and the mere acquiescent acceptance by the shipper of a bill of lading prepared by the express company with the customary stamp, "Value asked and not given."

We are of opinion that the judgment of the law and equity court of the city of Richmond is without error, and must be affirmed.

Affirmed.

KEITH, P., absent.

(100 Va. 333)

VIRGINIA CEDAR WORKS v. DALEA. †
(Supreme Court of Appeals of Virginia. March 11, 1908.)

1. PLEADING (§ 204*)—DEMURRER TO DECLARATION—NECESSITY OF SUSTAINING AS TO BAD COUNTS.

It is a general rule of practice that if a declaration in tort contains two or more counts, some of which are good and others bad, a demurrer to the whole declaration and each count thereof should be sustained as to the bad counts, else a general verdict and judgment for the plaintiff will, as a rule, be set aside.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 487; Dec. Dig. § 204.*]

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER.

A verdict should not be set aside solely because of a faulty count in the declaration, a demurrer to which was overruled, where the court is satisfied that defendant was not prejudiced by such count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4099; Dec. Dig. § 1040.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER.

If trial is had on the case made by a good count in a declaration containing other insufficient counts, no injustice will be done by refusing to set aside the verdict and judgment for plaintiff for error in overruling a demurrer to the whole declaration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4105; Dec. Dig. § 1040.*]

4. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—PLEADING—SUFFICIENCY OF COUNT.

A count in the declaration for injuries to a servant held not objectionable as failing to show a causal connection between the negligence alleged and the accident, and as not forewarning defendant of the case it was required to meet.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 823; Dec. Dig. § 258.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

† Rehearing denied March 27, 1908.

5. NEGLIGENCE (§ 108*)—STATEMENT OF CAUSE OF ACTION—REQUISITES OF DECLARATION.

All that is necessary in a negligence case is to set forth the facts which constitute the cause of action, so that they may be understood by the defendant, the jury, and the court.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 174; Dec. Dig. § 108.*]

6. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—WARNING SERVANT.

In an action for injuries to an employé whose hand was caught in a circular saw, based on the ground that he was a common laborer and was set to work alone with the saw without instructions and necessary assistance, it was not error to instruct that it was the defendant's duty to use reasonable care not to expose its servant to risks beyond those incident to the service at the time of the contract of employment, and if, while plaintiff was performing his duties with ordinary care, defendant violated its duty in this particular, proximately causing the injury, defendant was liable, unless the risk to which the servant was exposed was so glaring, constant, and imminent that an ordinarily prudent man would have refused to incur it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

7. TRIAL (§ 259*)—REQUESTED INSTRUCTIONS—REDUCTION TO WRITING.

To require a reduction to writing of a requested instruction qualifying or explaining an instruction already given is not unreasonable, and is in accordance with the reasonable and better practice.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 648; Dec. Dig. § 259.*]

8. MASTER AND SERVANT (§ 278*)—ACTION FOR INJURIES — SUFFICIENCY OF EVIDENCE — CAUSE OF ACCIDENT.

Evidence, in an action for injuries to an employé whose hand was caught in a circular saw, held sufficient to show that the injury was caused by defendant's failure to provide an assistant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 977; Dec. Dig. § 278.*]

9. NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE.

In an action for injuries to an employé whose hand was caught in a circular saw, defendant's theory as to the cause of the accident, as testified to by the foreman, was that plaintiff was at the rear side of the saw cleaning the trash away with a stick, and as he turned around he threw his hand on the back of the saw and received the injury. Defendant moved for a new trial for after-discovered evidence of two hands in its factory. Neither saw the accident, but one claimed to have seen plaintiff immediately before it occurred scraping sawdust from under the rear of the saw, and the other stated that he saw him immediately afterward at the rear of the saw. Held, that such evidence, if true, merely corroborated the foreman.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 218-220; Dec. Dig. § 104.*]

10. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

There was no error in overruling a motion for a new trial on the ground of after-discovered evidence, where it does not appear that it could not have been discovered before trial by reasonable diligence.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

Error to Circuit Court, Norfolk County.

Action by Jaun Dalea against the Virginia Cedar Works. There was a judgment for

plaintiff, and defendant brings error. Affirmed.

Loyall, Taylor & White, for plaintiff in error. J. T. Lawless, for defendant in error.

WHITTLE, J. The object of this writ of error is to review a judgment obtained by the defendant in error, Jaun Dalea, against the plaintiff in error, the Virginia Cedar Works, in an action to recover damages for personal injuries imputed to the negligence of the defendant.

The first assignment of error relates to the action of the court in overruling demurrers to the original and amended declarations.

The court overruled a demurrer to the original declaration and to each of the four counts thereof, and thereupon the plaintiff, by leave of the court, amended his declaration by filing a fifth count, the demurrer to which was likewise overruled.

It is a general rule of practice that, "if a declaration in tort contains two or more counts, some of which are good and others bad, and there is a demurrer to the whole declaration and each count thereof, it should be sustained as to the bad counts, else a general verdict and judgment for the plaintiff will, as a rule, be set aside." *Norfolk & Western Ry. Co. v. Stegall*, 105 Va. 538, 54 S. E. 19.

The reason for the rule is that the verdict may have been founded upon an immaterial or faulty count; but, where the court is satisfied that the defendant has not been prejudiced by reason of such faulty count, the verdict ought not, for that cause only, to be set aside. Thus, in the present instance, it is apparent that the trial was had upon the case made by the fifth count, and therefore, if that count be sufficient to maintain the action, no injustice will be done by relaxing the stringency of the general rule; nor need we concern ourselves to consider the alleged insufficiency of the remaining counts. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 834, 47 S. E. 830, 66 L. R. A. 792; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

We shall, accordingly, confine our inquiry to the sufficiency of the fifth count, the essential averments of which are as follows: That the defendant was carrying on the business of manufacturing buckets, barrels, and like products, and employed in connection with its business revolving circular saws and other dangerous machinery. That the plaintiff was hired by the defendant as a common laborer to keep its yard clear of trash, chips, and other debris incident to the operation of the plant. That there was in use in the factory at the time of the accident a dangerous machine, known as a "bottom machine," to which was attached a large circular saw. That at least two servants were necessary to operate the machine and handle

the logs, chains, ropes, belts, and other appliances, and it could not be operated, fed, and managed by a less number of servants without greatly increasing the risk and danger of the operator. That it was the custom of the defendant not to employ fewer than two of its servants in such operation. That it was the duty of the defendant to engage a sufficient number of servants to discharge that service with reasonable safety to themselves, and not to assign the plaintiff to such position of danger, and transfer him to essentially new duties and responsibilities and expose him to hazards different from those incident to his original contract of employment, and for the performance of which he was unfitted by reason of lack of experience and skill. Nevertheless the defendant did not observe its duty in that regard, and although the plaintiff was hired as a common laborer, as before mentioned, the defendant, with knowledge of the increased danger and his lack of experience and skill, without necessary instruction, negligently required the plaintiff to operate the dangerous machine and saw without assistance. That while the plaintiff, in the exercise of reasonable care and without fault on his part, singly and alone, and in obedience to the master's order, was preparing and adjusting a log of wood upon the table used in connection with the rapidly revolving saw, to be cut into designated pieces, his right hand was borne down and forced into sudden contact with the saw and so injured and mangled that it became necessary to amputate his arm between the wrist and elbow. The count also contains the averment that the increased risk was not so dangerous that a prudent man would have refused to incur it.

It is objected that the count shows no causal connection between the alleged grounds of negligence and the accident, and, moreover, that it does not forewarn the defendant of the case it is required to meet.

The count is not amenable to criticism on either grounds. It sets forth with reasonable certainty facts that show that the casualty was proximately due to the defendant's negligence in ordering an inexperienced servant, of whose lack of skill it had knowledge, without instruction and without assistance, to operate a dangerous machine, which duty was ordinarily performed by a sawyer and helper.

It has never been the purpose of this court to introduce innovations in pleading in negligence cases, or to subject the plaintiff to unreasonable requirements in setting out his cause of action. All that is necessary is for the pleader "to set forth the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment." Surely this oft-repeated and reasonable rule of the common law (taken literally from 1 Chitty's

Pleading [9th Am. Ed. 232, 233]), while not unduly burdensome on the plaintiff, is quite sufficient to advise the defendant of the case he is called upon to defend. This subject has been so recently and so repeatedly discussed by this court that it demands neither elaboration nor citation of authority.

The next assignment of error arises in connection with the plaintiff's instruction No. 1.

That instruction told the jury that it was the duty of the defendant to use reasonable care not to expose its servant to risks beyond those incident to the service at the time of the contract of employment, and if they believed from the evidence that, while the plaintiff was performing his duties with ordinary care, the defendant violated its duty in the particular indicated, and that such breach of duty on its part was the proximate cause of the injury, the defendant is liable in damages, unless the jury should further believe from the evidence that the risk to which the servant was exposed was so glaring, constant, and imminent that an ordinarily prudent man would have refused to incur it.

In interpreting that instruction, the plaintiff's counsel argued that, although the plaintiff assumed the risks incident to his employment as a laborer in the yard, he did not assume the risk of operating without assistance the machine by which he was injured, unless the risk was of such a character that an ordinarily prudent man ought to have declined to assume it. Thereupon counsel for the defendant objected to that line of argument, and requested the court to instruct the jury verbally as to the meaning of the instruction, to which request the court replied that counsel could give his interpretation of the instruction, but, if he desired an instruction from the court construing the language used, he must reduce such instruction to writing.

The instruction in question was taken substantially from an instruction founded upon a similar state of facts approved in *Va., etc., Cement Co. v. Luck*, 103 Va. 427, 49 S. E. 577. See, also, *Goodman v. R. & D. Ry. Co.*, 81 Va. 586, and *R. & D. Ry. Co. v. Burnett*, 88 Va. 542, 543, 14 S. E. 372.

The terms placed upon counsel by the court—namely, that if he wished an instruction qualifying or explaining an instruction already given he must reduce it to writing—were not unreasonable, and are in accordance with the usual and better practice in such case.

The next assignment of error is to the alleged failure of the plaintiff to show that the absence of a sufficient number of servants was the proximate cause of the accident.

From the standpoint of a demurrer to the evidence, this assignment is without merit. Indeed, the following admission in the petition for the writ of error would seem to answer the contention: "In the case at bar,

the plaintiff, as shown by the evidence, claimed that he should have had an assistant to help him lift extra heavy logs on the table connected with the circular saw, and because he did not have such an assistant, and attempted to lift an extra heavy log, he lost his balance and fell against the saw."

The plaintiff testified that two men were always necessary to lift the heavier logs. He was a young Italian laborer, who could not speak English, and understood very little of the language. Testifying through an interpreter as to how the accident happened, he said: "He was lifting up a piece that was extra heavy. He thought probably he could handle it. He had been doing it for a day, but in picking up this piece and putting it over it overbalanced him and bore him against the saw and cut his hand off."

This evidence establishes a state of facts which sufficiently shows the causal connection between the injury received and the failure of the defendant to provide the plaintiff with an assistant to help him feed and operate the machine. *Improvement Co. v. Smith's Adm'r*, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59; *Marshall v. Valley R. Co.*, 99 Va. 805, 808, 34 S. E. 455; *Virginia, etc., Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362.

The remaining assignment of error concerns the action of the court in overruling the defendant's motion for a new trial on the ground of after-discovered evidence.

The theory of the defendant as to the cause of the accident, as testified to by the foreman in charge of the sawroom, is that Dalea was at the rear side of the saw cleaning the trash away with a little stick, and as he turned around he threw his hand on the back of the saw and received the injury of which he complains. The after-discovered evidence is that of two of the hands in the factory. Neither saw the accident, but one of them claims to have seen the plaintiff immediately before it occurred scraping sawdust from under the rear end of the saw, and the other states that he saw him immediately after the accident standing at the rear end of the saw. The effect of this evidence, if true, is merely corroborative of the testimony of the foreman.

The rule governing the granting of new trials on the ground of after-discovered evidence is well settled, and is stated by Judge Cardwell, in *Norfolk v. Johnakin*, 94 Va. 290, 26 S. E. 832, as follows: "Motions for new trials are governed by the same rules in civil as in criminal cases, and the circumstances, controlling the granting of new trials upon the ground of after-discovered evidence are summed up by this court in *Nicholas' Case*, 91 Va. 753, 21 S. E. 868, thus:

"(1) The evidence must have been discovered since the trial.

"(2) It must be evidence that could not

be discovered before the trial by the exercise of reasonable diligence.

"(3) It must be material in its object and such as ought, on another trial, to produce an opposite result on the merits.

"(4) It must not be merely cumulative, corroborative, or collateral"—citing 4 Min. Inst. pt. 1, p. 758; *St. John's Ex'r v. Alderson*, 32 Grat. 140, 143; *Wynne v. Newman's Adm'r*, 75 Va. 817; *Whitehurst v. Com.*, 79 Va. 558. See, also, *Tallafiero v. Shephard*, 107 Va. 56, 57 S. E. 585.

It does not appear that this evidence could not have been discovered before the trial by the exercise of reasonable diligence. Both affiants were employes of the defendant, and the simple inquiry as to what they knew of the accident (though neither saw it) would have elicited the desired information. Besides, the evidence is only cumulative and corroborative of the testimony of the foreman. So that in neither aspect do the affidavits measure up to the required standard.

Upon the whole case we find no error in the judgment complained of, and it must be affirmed.

Affirmed.

(109 Va. 341)

CHESAPEAKE & O. RY. CO. v. HUNTER.
(Supreme Court of Appeals of Virginia. March 11, 1909.)

1. NEGLIGENCE (§ 111*)—PLEADING—INSUFFICIENCY OF GENERAL ALLEGATIONS.

It is not sufficient for the declaration to allege negligence in a general way, but it must aver the acts relied on with reasonable certainty and show that they constitute the efficient and proximate cause of the injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 182; Dec. Dig. § 111.*]

2. PLEADING (§ 11*)—FACTS OF EVIDENCE—DECLARATION.

The declaration in a personal injury case need only contain a concise statement of the material facts on which recovery is demanded, without pleading the evidence relied on to sustain its averments.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 81; Dec. Dig. § 11.*]

3. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—DECLARATION—ALLEGATIONS OF NEGLIGENCE.

The declaration, in an action by an employe against his master for personal injury from the fall of a rail upon him, held to insufficiently charge the acts of negligence relied on.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

Error to Circuit Court, Goochland County.
Action by George Hunter against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

D. H. & Walter Leake, for plaintiff in error. Jas. C. Page and Jas. Alston Cabell, for defendant in error.

WHITTLE, J. This action is brought by the defendant in error, George Hunter, to recover damages for personal injuries received while in the service of the plaintiff in error, the Chesapeake & Ohio Railway Company.

The only assignment of error which demands our attention relates to the action of the court in overruling the demurrer to the declaration.

The declaration contains three counts, the gravamen of each of which is as follows:

(1) That the defendant was the owner of an iron or steel rail of great weight, which was lying along its roadbed and under the control of certain of its agents or servants. That it was the duty of the defendant, by its agents and servants, so to control, manage, or handle the rail as not to carelessly and negligently injure the plaintiff, when not guilty of any negligence on his part. Yet the defendant, by its agents and servants, conducted itself so carelessly and negligently in the management, control, and handling of the rail as to allow it to fall upon and strike the plaintiff, inflicting the injuries of which he complains.

(2) That on the occasion of the accident the plaintiff was employed by the defendant to help its other employes to handle and move the rail in question, and it was the duty of the defendant to exercise ordinary care in selecting competent servants, especially a competent foreman, to handle and move the rail. Yet the defendant negligently failed to exercise such care in selecting a competent foreman, and in consequence of the negligent, unskillful, and wrongful orders and directions given by such incompetent foreman, the rail was allowed to fall upon and strike the plaintiff, inflicting the injuries of which he complains.

(3) That the defendant's foreman, who had authority over the plaintiff, did not give the proper and necessary orders or directions about handling and moving the rail, but gave such negligent and reckless orders that the rail, which was being handled by the plaintiff with reasonable care, was untimely, carelessly, and negligently thrown and fell upon the plaintiff, inflicting the injuries of which he complains.

The cardinal vice of all these counts is that, while they iterate and reiterate in varying phrase the charge of negligence against the defendant, they wholly omit to state the facts upon which the alleged negligence is predicated.

It is well settled that it is not sufficient for the declaration to allege negligence in a general way (for to do so is only to state the pleader's conclusions of law from undisclosed facts); but it must aver the act of negligence relied on with reasonable certainty and show that such act constitutes the efficient and proximate cause of the injury. Otherwise no traversable issue is tendered, and the court cannot determine, as a matter

of law, whether the declaration states a case of actionable negligence, and the defendant is not advised of the case which he is called upon to defend. Our reports contain numerous illustrations of this principle.

Thus, in the recent case of *Lynchburg Traction & L. Co. v. Guill*, 107 Va. 86, 57 S. E. 644, the court, speaking through the president, observes: "Negligence is a conclusion of law from facts sufficiently pleaded. The office of a declaration is to inform the defendant of the case which it has to meet, so that it may have a reasonable opportunity to prepare its defense. It is not enough to say that the plaintiff was injured, and that the injury resulted from the careless and negligent conduct of the defendant; but the facts relied upon to establish the negligence for which the defendant is to be held liable must be stated with reasonable certainty."

Tested by that standard, the first count of the declaration is insufficient. It states no fact from which the existence of actionable negligence can be inferred, or which informs the defendant of what it is required to answer.

So, with the second count, it avers, by way of premise, the duty of the defendant to exercise ordinary care in selecting competent servants, and, especially, a competent foreman, to handle and move the rail, and the breach of that duty. The pleader then proceeds to ascribe the accident to the negligent, unskillful, and wrongful orders and directions given by the incompetent foreman, without any suggestion as to what orders and directions were given; thus again substituting a bare conclusion for the facts from which it is to be deduced.

The third count is amenable to the same objection.

In the case of *Newport News & Old Point Ry. & Elec. Co. v. Nicolopoulos* (decided January 14, 1909) 109 Va. —, 63 S. E. 443, the court, speaking through Buchanan, J., says: "The third count does not aver in what particular the defendant failed to perform its duty. It charges generally that the defendant negligently ran its car into the plaintiff's wagon, whilst he was attempting to cross its track. As a count in trespass on the case, this count is not good under our decisions. * * * Whether an action based upon negligence be in case or trespass, the same reason exists why the acts of negligence relied on as a basis of recovery should be stated in the one case as in the other. The object of a declaration is to apprise the adverse party of the ground of complaint."

This court has not laid down, nor does it propose to establish, any unreasonable rules with regard to particularity of averment in declarations in personal injury cases. All that the rule requires is that the declaration shall contain a concise statement of the material facts on which a recovery is demanded. Of course, the evidence relied on

to sustain the averments of the declaration need not be pleaded. Surely a rule so essential for the enlightenment of the court and the defendant imposes no unreasonable burden upon the plaintiff. Indeed, it is hard to conceive how any intelligent system of pleading could require less.

It is well known to the profession that the practice under the liberal doctrine of some of the earlier cases had become so lax that in many instances declarations contained mere legal inferences upon the essential element of negligence, based upon no fact, and defendants were relegated wholly to the field of speculation as to the real grounds of their supposed liability. The decision in *Hortenstein v. Va. Car. Ry. Co.*, 102 Va. 914, 47 S. E. 996, was intended to correct the mischief which flowed from that practice.

In that case it is said by Judge Cardwell: "The court, upon mature consideration, has reached the conclusion that in actions for a tort the declaration must state sufficient facts to enable the court to say upon demurrer whether, if the facts stated are proved, the plaintiff would be entitled to recover."

See, also, *Blackwood Coal & Coke Co. v. James' Adm'r.*, 107 Va. 656, 60 S. E. 90, and *Virginia Cedar Works v. Dalea* (decided at the present term) 64 S. E. 41.

For the error of the court in overruling the demurrer to the declaration, the judgment must be reversed, the verdict of the jury set aside, and the case remanded to the circuit court, with leave to the plaintiff, if so advised, to amend his declaration, and for further proceedings.

Reversed.

(109 Va. 407)

NORFOLK & W. RY. CO. v. HOLMES' ADM'R.

(Supreme Court of Appeals of Virginia. March 11, 1909.)

1. RAILROADS (§ 309*)—CROSSINGS—CARE REQUIRED.

A railroad company must exercise care to avoid a collision at a highway crossing, and, the greater the danger, the greater is the vigilance required.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 981; Dec. Dig. § 309.*]

2. TRIAL (§ 156*)—DEMURRER TO EVIDENCE.

On a demurrer to the evidence, the facts which the evidence demurred to tends to establish must be taken as true, and the evidence of the party demurring must be rejected.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 354, 355; Dec. Dig. § 156.*]

3. RAILROADS (§ 312*)—HIGHWAY CROSSINGS—CARE REQUIRED.

Independently of any statute or ordinance, a lookout must be employed when a train is backed over a crossing in a frequented street, and merely ringing the bell or sounding the whistle when a train is standing near with its rear to the crossing is not sufficient warning to

pedestrians of an intention to back the train; and without other notice the company is negligent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 999; Dec. Dig. § 312.*]

4. RAILROADS (§ 350*)—STREET CROSSINGS—CARE REQUIRED—NEGLIGENCE—QUESTION FOR JURY.

Whether it is negligence for trainmen to run an engine backwards over a crossing in a frequented street, without stationing some one on the tender to signal its approach to one who may be on the track, is ordinarily for the jury, though under some circumstances the act may be negligence as a matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1162; Dec. Dig. § 350.*]

5. RAILROADS (§ 345*)—STREET CROSSINGS—CARE REQUIRED—NEGLIGENCE.

Where it is negligence to operate an engine backwards without having a flagman or a man on the tender, the absence of such precautions may be proven to establish the negligence of the railroad company, without reference to the existence, pleading, or proof of a municipal ordinance on the subject, provided the allegations of the declaration are sufficient to justify the admission of such evidence.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 345.*]

6. RAILROADS (§ 345*)—ACCIDENTS AT CROSSINGS—DECLARATION—EVIDENCE.

Where, in an action for the death of a pedestrian struck by an engine at a street crossing, the declaration set out in detail the peculiarities of the crossing, alleged that the tracks were flush with the pavement of the street, so that persons unfamiliar with the locality would not discern their presence; that the company was required to exercise reasonable care to keep watch so as to avoid running into pedestrians and to give warning of the approach of trains by ringing the bell or other means; and that it failed to do so—evidence that there was no flagman, no person riding on the front of the engine, and that the engineer could not see from his cab, and that there was no light burning, no bell ringing, was admissible to prove negligence.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 345.*]

7. RAILROADS (§ 344*)—ACCIDENTS AT CROSSINGS—PLEADINGS.

The declaration in an action against a railroad company for the death of a pedestrian struck by a train at a crossing need not allege in detail all the methods of precaution that the railroad company might or ought to have taken to give timely warning of the approach of the train, but the particular duty must be alleged, and its violation must be charged.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 344.*]

8. RAILROADS (§ 348*)—ACCIDENTS AT CROSSINGS—NEGLIGENCE.

In an action for the death of a pedestrian struck by an engine at a street crossing, evidence held to show actionable negligence, authorizing a recovery.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 348.*]

9. RAILROADS (§ 348*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a pedestrian struck by an engine at a street crossing, evidence held to show that decedent was free from contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 348.*]

10. EVIDENCE (§ 588*)—WEIGHT OF EVIDENCE. The jury may discredit the testimony of a witness where the same is inherently unsatisfactory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

Error to Circuit Court of City of Norfolk.

Action by the administrator of Florence I. Holmes against the Norfolk & Western Railway Company. There was a judgment for plaintiff rendered after overruling a demurrer to the evidence, and defendant brings error. Affirmed.

Hughes & Little, for plaintiff in error. Brooke & Brooke, Richard McIlwaine, Jr., and J. F. Rutherford, for defendant in error.

HARRISON, J. Mrs. Florence I. Holmes and Mrs. Mabel E. Munsell were killed by an engine of the plaintiff in error on the western end of Main street, in the city of Norfolk, on the night of September 28, 1907, between 7 and 8 o'clock. The administrator of each of the decedents brought suit to recover damages in the circuit court of the city of Norfolk, alleging in each case that the deceased came to her death, without fault on her part, as a result of the negligence of the defendant railroad company, and in each case there was a judgment for \$10,000 in favor of the plaintiff, which we are asked to review and reverse.

The evidence being the same, the cases were heard together in this court.

In the case now under consideration, being that of Mrs. Holmes' administrator, there was a demurrer to the evidence, which was overruled by the circuit court and judgment entered in favor of the plaintiff for the damages ascertained by the jury. This action of the circuit court is assigned as error.

A brief statement of the physical conditions and special circumstances surrounding the point of the accident is essential to a clear understanding of the case.

The Merchants' & Miners' Transportation Company occupies an inclosed yard on the north side of West Main street, in the city of Norfolk, extending from the intersection of that street with Newton street westwardly toward the Bay Line wharf, a distance of about 200 feet. Beginning at the intersection of Newton and Main streets, and going thence westwardly along the sidewalk on the north side of Main street, the first 55 feet of this yard front on Main street is occupied by a building. Proceeding further west, the yard is inclosed by a close fence, nearly 7 feet high, in which there are three gates, each about 17 feet wide. The railroad track of the defendant company forms a "Y" in Mathews street south of its intersection with Main street. The eastern prong of this "Y" crosses Main street, and enters the yard through the first gate reached in going west along the north side of Main street, and the

western prong of the "Y" crosses Main street and enters the yard through the third gate. It was at this third and last-mentioned gate that the accident occurred.

The intersection of Mathews with Main street does not constitute a street crossing, Mathews street running only as far north as the south side of Main street, the north sidewalk of Main street being continuous as far down as the wharf at its end. An engine, therefore, coming out of a gate of the yard, passes immediately over the sidewalk on the north side of Main street.

The conditions pointed out show that the place at which the accident happened was one involving peculiar danger to persons going west along the north side of Main street.

A railroad company is bound to exercise care to avoid a collision when its road crosses a public highway, and, the greater the danger, the greater is the vigilance required.

Viewing the testimony from the standpoint of a demurrer to the evidence, it appears that from Newton street to the place of the accident, a distance of about 150 feet, the railroad yard was so obstructed by buildings and fences that a pedestrian on the north side of Main street, going west to the wharf, could not see an engine being operated in the yard and approaching the street on the western prong of the "Y," nor could the engineer in charge of the engine going out of the yard on the western prong of the "Y" see any one approaching on the sidewalk from the east and going toward the wharf; there not being space enough between the cab window and the gatepost on the eastern side of the gate for him to see a person so approaching.

It further appears that the plaintiff's intestate and her companion were strangers in the city of Norfolk, having never been there before the day they were killed, and only along Main street in the morning as they came from the wharf with friends who met them there. In going west along Main street on their return to the wharf, between 7 and 8 o'clock at night of the same day, when it was very dark and "drizzly or misty," as they passed the gate through which the western prong of the "Y" ran, an engine of the defendant, with tender in front, moving at the rate of four miles an hour, emerged from the yard upon the sidewalk of the street, colliding with the intestate and her companion, instantly crushing the life out of both, and scattering their mutilated remains in different directions about the street.

It further appears that the Main street of Norfolk is a populous thoroughfare, and that at the time of the accident, on account of the Jamestown Exposition, which was then in progress, it was more than usually traveled. It further appears that the engine, with the tender in front, came from its place of concealment in the yard upon the sidewalk with no light burning, no bell ringing,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

preceded by no flagman, and without any watchman or warning of any kind to persons who might be passing along the street upon which it was about to enter.

If these facts are to be taken as true, and they must be on a demurrer to the evidence, the negligence of the defendant is beyond question.

It is contended on behalf of the defendant that the circuit court erred "in admitting evidence of the lack of a flagman or watchman or man on the tender in the absence of proof of an ordinance requiring it."

Several of the counts of the declaration set out a city ordinance providing that, whenever a locomotive engine is used within the city of Norfolk, a man shall be required to ride on the front of the locomotive or engine, or on the tender or car in advance of the train as the case may be, and no such locomotive shall be allowed to cross West Main street until a flagman shall have been stationed at the intersection of the railroad with the street to display a flag by day and a light by night, etc.

The theory of the defendant seems to be that, because there was no proof of the alleged ordinance requiring the precautions mentioned, the failure to take such precautions cannot be proven under the other counts of the declaration as tending to show the defendant's negligence. This position is not tenable.

"Independently of any statute or ordinance on the subject, when a train is backed over a crossing in a frequented street, a lookout must be employed. Merely ringing a bell or sounding the whistle on the engine, when the train is standing near with its rear to the crossing, is not sufficient warning to passers-by of an intention to back the train, and that without other notice the company will be negligent." *Mark's Adm'r v. Petersburg R. Co.*, 88 Va. 1, 3, 18 S. E. 299.

Whether or not it is negligence for the servants of a railroad company to run an engine backwards without stationing some one on the tender to signal its approach to a person who may be on the track is a question which is controlled by the circumstances under which the engine is operated. Under some circumstances the act is negligence as a matter of law, but in most cases it is a question of fact, to be submitted to the jury. *So. Ry. Co. v. Daves*, 61 S. E. 748.

If, under the circumstances under which the engine in question was operated, it was negligence for the defendant company to have "no flagman or watchman or man on the tender," then the absence of such precautions may be proven to establish the defendant's negligence, without reference to the existence, pleading, or proof of an ordinance on the subject, provided the allegations of the declaration are sufficient to justify the introduction of such evidence.

The counts of the declaration other than those alleging the ordinance set out in detail the special peculiarities of the locality and its environments and approaches, by reason of which passengers on the street were obstructed in their view of engines or trains while in the yard and about to move therefrom into Main street; the fifth count alleging that the tracks of the railroad were let into and flush with the pavement of the street, so that persons unfamiliar with the locality passing along the street in the nighttime, in the exercise of ordinary care, would not discern their presence.

These, in brief, are the allegations of the circumstances under which the train was operated. These counts then proceed to charge the duties imposed upon the defendant company, under the special circumstances alleged, to be to exercise due and reasonable care to keep watch and on the lookout so as to avoid running into and over and injuring persons passing, etc., and the duty to exercise due and reasonable care to give warning of approach of the train by ringing a bell or by taking other means of notification so as to avoid, etc.

These counts do not allege that any particular method or precaution in exclusion of others was incumbent upon the defendant in carrying out the duty imposed upon it, but only to exercise due and reasonable care to perform the duty of keeping watch and lookout so as to give warning of its approach by ringing a bell or by taking other means of notification. These counts then allege that the defendant violated its duty and did not exercise due and reasonable care to keep watch and lookout, and to give warning of its approach by ringing a bell or by taking other means of notification.

To sustain the alleged violation of these duties, the plaintiff produced evidence that the view of the engineer from his cab was so obstructed that he could not keep watch and lookout; that no light was burning on the tender as it came out in front of the train; that no bell was ringing; that there was no watchman at the crossing; that there was no flagman to warn persons of the approach of the train; and that there was no person riding on the front of the tender which was in front of the engine. These are the ordinary and usual methods adopted for giving notice and warning to persons under the circumstances of this case, and proof that not one of them was employed tends to establish the allegation of the declaration that no warning was given.

The rules of pleading do not require the allegation, in detail, of all the methods of precaution that the defendant might or ought to have taken to give timely warning under the circumstances here disclosed. The particular duty must be alleged, and its violation must be charged. The duty here is alleged to be "to exercise due and reasonable care to keep

watch and lookout and to give warning of the engine's approach"; and the violation of this duty is charged. To sustain this charge, evidence was admissible to show that there was no flagman, no watchman, no person riding on the front of the engine, that the engineer could not see from his cab, and that no light was burning and no bell ringing. See *Ches. & Ohio Ry. Co. v. Hoffman*, 63 S. E. 432.

The negligence of the defendant being established by competent testimony, we come to consider whether the plaintiff's intestate was guilty of contributory negligence.

In this connection it is important to bear in mind the physical environments of the place where the accident occurred. These have been sufficiently described, and need not be repeated here. It was a dark, drizzly or misty night, with the spot badly lighted. The testimony shows that down to the very instant of the accident, when it was too late to escape, the decedent had no notice or warning of the danger that confronted her.

Only two witnesses testified to having seen the accident. One of these, W. Royster, introduced on behalf of the plaintiff, was returning from his work at the wharf along the north side of Main street. As he neared the point of the accident, he saw the deceased and her unfortunate companion on the sidewalk on the north side of Main street, approaching him, and saw both ladies step on the track where it crosses the sidewalk at the instant that the backing engine emerged from the yard to the sidewalk, and testifies that the engine had gotten possibly four or five feet out of the gate when it struck deceased in the side. The testimony of this witness that these ladies were on the sidewalk on the north side of the street when they were struck is borne out by other testimony as to the physical evidences at the point of contact. Two ladies' combs were found immediately after the accident, one in the middle of the sidewalk and one near the grating, just about where Royster saw them struck by the engine. Some brains were also found on the sidewalk and at the grating mentioned. The evidence further tends to show that at the point where this witness locates these ladies when struck there was a dragging, as if some one had been dragged over the surface there.

The testimony to which we have adverted clearly shows that the deceased was struck while on the sidewalk, and just as she stepped on the track, about four or five feet from the gate through which the engine emerged.

This evidence is uncontradicted, except by the testimony of R. L. Burgess, a witness introduced on behalf of the defendant company. This witness, who arrived at the moment, says that he was standing on the corner of Mathews and Main streets, on the south side of the latter, and that he saw two ladies, he supposes the two who were the victims of

this accident, standing in the middle of Main street between the western prong of the "Y" and its eastern prong; that "they were talking there, and one of them said to the other, 'Let's get across the track ahead of the engine,' and one caught her arm into the other's arm"; that he saw the engine coming, and they "sprung" for a run to go across the track, and one had an umbrella hoisted, "and I seen them fall across the track, and I turned my head and walked away. That is all I know about that part of it. I could not swear the engine killed them." This witness further says that the ladies did not run straight across the track, the shortest way, but went diagonally in a northwesterly direction towards the track, recklessly running. This would be toward the approaching engine, which he says they were trying to avoid.

It is insisted on behalf of the defendant in error that the remark, "Let's get across the track ahead of the engine," which is attributed to one of these ladies, shows that the deceased had actual knowledge of the proximity of the engine; and that the remark made is a fact not contradicted. This witness does not claim to have heard this remark at any other time or place than while the ladies mentioned were standing together in the middle of Main street. The evidence of the plaintiff shows that the victims of this accident were not at the time the remark is said to have been made standing together in the middle of Main street, but that they were at that time on the northern sidewalk of the street, about the gate through which the engine that killed them passed; the only remark made by them being the exclamation as they were struck, "Oh, Lordy!"

All that happened was in a brief moment, and it is hardly possible that these ladies could have been seen standing together in the middle of Main street saying and doing there the things attributed to them, and at the same time to be where the evidence of the plaintiff places them. The statement of the witness Burgess must be taken as a whole; and, so considered, it cannot be reconciled with the plaintiff's evidence. We cannot sever the remark which he attributes to one of these ladies from its setting, and say that it establishes the contributory negligence of the plaintiff's intestate. Without reference, however, to the rule which rejects the statement of this witness on a demurrer to the evidence, his whole testimony is inherently unsatisfactory, and a jury would have been well warranted in discrediting it as they did do in the companion case of *N. & W. Ry. Co. v. Munsell's Adm'r* (which action on their part was approved by the judgment of the circuit court) 64 S. E. 50.

We are of opinion that the record does not sustain the charge that the deceased was guilty of contributory negligence.

Upon the whole case, we find no error in the judgment of the circuit court, and it is affirmed.

Affirmed.

KEITH, P., and CARDWELL, J., absent.

(109 Va. 417)

NORFOLK & W. RY. CO. v. MUNSELL'S ADM'R.

(Supreme Court of Appeals of Virginia. March 11, 1909.)

1. RAILROADS (§ 351*)—ACCIDENTS AT CROSSINGS—EVIDENCE—INSTRUCTIONS.

Where, in an action for the death of a pedestrian struck by an engine at a street crossing, the evidence showed that the place of the accident was one of peculiar danger to pedestrians, because they could not see an approaching engine nor could the engineer see pedestrians approaching, and that the street was a populous thoroughfare, an instruction that the greater the danger the greater the vigilance required from the company, and that any neglect to give warnings of the train's approach proper under the peculiar circumstances rendered it liable, etc., was not open to the objection that there was nothing to show that the place of the accident required special precaution.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 351.*]

2. RAILROADS (§ 351*)—ACCIDENTS AT CROSSINGS—EVIDENCE—INSTRUCTIONS.

An instruction in an action for the death of a pedestrian struck by an engine at a street crossing, which gives the conditions, showing the unusual surroundings and dangerous conditions of the crossing, and which states that the railroad company was bound to use such precautions as were proper under the surroundings to give warning of the approach of its trains, etc., is not open to the objection as leaving the jury to impose fanciful requirements on the company in protecting pedestrians.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 351.*]

3. RAILROADS (§ 351*)—ACCIDENTS AT CROSSINGS—EVIDENCE—INSTRUCTIONS.

An instruction, in an action for the death of a pedestrian struck by an engine at a street crossing, which gives the conditions, showing the unusual surroundings and dangerous conditions of the crossing as proven by plaintiff, and which states that the company was bound to use such precautions as were proper under the circumstances to give warning of the approach of its trains, and that, if such conditions existed, then, unless the company used proper precautions, decedent was not guilty of contributory negligence, is not objectionable as singling out and emphasizing one charge of negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 351.*]

4. DEATH (§ 90*) — ACTION FOR NEGLIGENT DEATH—DAMAGES.

In an action for the death of a married woman 31 years old, struck by an engine at a street crossing, mutilating her body, a verdict for \$10,000 will not be set aside as excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 129, 130; Dec. Dig. § 90.*]

Error to Circuit Court of City of Norfolk.

Action by Munsell's administrator against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This was an action for the death of a married woman, 31 years old, struck by an engine at a street crossing, mutilating her body. The jury rendered a verdict for \$10,000.

The following is instruction No. 1:

"The court instructs the jury that a railroad company running and operating its trains upon and across the streets of a city must use greater care and diligence to prevent accidents to persons who may be upon or crossing said streets than is required of it in less frequented and populous localities; that in certain localities in a city greater precautions may be necessary than in others by reason of the existence in such localities of conditions or particular surroundings, making the danger of accidents there greater than in those places at which such conditions and particular surroundings do not exist; and that if a train is running upon or across a highway, or street, at a place where, by reason of the existence of special conditions and particular surroundings, there is greater danger of accidents to persons upon or crossing the street than in places where such special conditions and particular surroundings do not exist, it is the duty of the railroad company and its employees in charge of the train to exercise greater precautions, to be on the lookout, and to give warning of the approach of the train of a character depending upon the particular locality and circumstances to avoid accidents than would be required in other localities where such conditions and particular surroundings do not exist, and any neglect of such precautions to be on the lookout and to give warning of the approach of the train as are proper under the peculiar surroundings and circumstances of the locality constitutes negligence for which the railroad company is liable in damages if the jury believe that said negligence was the proximate cause of the accident, unless the injured person, by the exercise of such care on his part as would be used by an ordinarily prudent person under the same circumstances, could have avoided the accident."

Hughes & Little, for plaintiff in error. Brooke & Brooke, Richard McIlwaine, Jr., and J. F. Rutherford, for defendant in error.

HARRISON, J. This case grows out of the same accident that was the subject of inquiry in the case of Norfolk & Western Ry. Co. v. Holmes' Adm'r (in which an opinion is handed down at the present term of this court) 64 S. E. 46.

The plaintiff's intestate and her friend, Mrs. Holmes, were together at the time of the accident, and both were struck and killed at the same moment by the same engine. The testimony in the two cases is the same,

and has only been printed in the other case, upon the understanding, however, that it is to be read and considered in this case.

The action brought by Mrs. Holmes' administrator was heard and disposed of upon a demurrer to the evidence. This case was submitted to a jury upon instructions, and a verdict found for the plaintiff, which the circuit court refused to set aside. The record here contains bills of exception not found in the other record.

Bill of exception No. 1 is to the action of the court in admitting evidence, in the absence of any city ordinance, that the defendant company did not have a flagman or watchman at the gate. This question has been fully discussed and disposed of adversely to the defendant in the case of Holmes' administrator, and what is there said need not be repeated here.

Bill of exceptions No. 2 is taken to the action of the court in giving certain instructions asked for by the plaintiff.

The first instruction is objected to upon the ground that there is nothing in the evidence to show that this was a place of any special danger, or that at the time of the accident there was any crowd in the neighborhood or anything requiring special precaution. The objection is wholly untenable. The opinion in the Holmes' Case discusses the evidence sufficiently to show that this instruction was fully justified, and could not have misled the jury.

The second instruction given for the plaintiff is objected to on the same ground as the first, and also for the reason that there was no sufficient testimony upon which to base it, and because of the plaintiff's negligence in failing to look and see the train. These matters are fully discussed and disposed of in the Holmes' Case, and what is there said can be read in connection with this case.

It is further urged that instruction No. 2 is objectionable because it left the jury blindly to impose fanciful requirements upon the defendant, and singled out and emphasized one charge of negligence.

We find nothing in this instruction to authorize an imposition by the jury of fanciful requirements upon the defendant. The conditions are given which show the unusual surroundings and dangerous condition of the place, and the jury are told that, if they believed such conditions existed, the defendant was bound to use such precautions as were proper, under the peculiar surroundings and circumstances, to give warning of the approach of the train. Nor was it objectionable for singling out and emphasizing one charge of negligence. It gave the jury the general conditions, as plaintiff believed them to exist, and said, if they believed that such conditions did exist, then unless the defendant, in view of these conditions, used such precautions as were proper, the plaintiff

was not guilty of contributory negligence. If the conditions shown in the evidence and described in the instruction existed, it was for the jury to say whether, in view of such conditions, the defendant had used such precautions as were proper for the protection of persons passing on the street when its engine was emerging from the yard.

Bills of exceptions Nos. 3 and 4, as stated in the petition to this court, are not regarded by the plaintiff in error as of sufficient importance to be emphasized. It is therefore unnecessary to prolong this opinion with their consideration.

The fifth and last assignment of error is to the action of the court in refusing to set aside the verdict of the jury.

The verdict of the jury cannot be disturbed upon the ground that it is excessive, and the discussion in the Holmes' Case, to which reference is here made, is sufficient to show that the verdict cannot be set aside upon the ground that it is contrary to the law and the evidence.

The judgment complained of must be affirmed.

Affirmed.

KEITH, P., and CARDWELL, J., absent.

(109 Va. 254)

BOWE v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. March 11, 1909.)

1. TAXATION (§ 679*)—SALE TO STATE AND RESALE—TAXES FOR WHICH LAND MAY BE SOLD—CITY AND STATE TAXES.

Code 1887, § 666, as amended by Act Feb. 11, 1898 (Acts 1897-98, p. 343, c. 306; Code 1904, p. 326), authorizes the sale of land sold and bid in by the commonwealth for the amount for which the sale to the commonwealth was made, but other provisions of the section make the purchase dependent upon the payment of all taxes, penalties, fees, and costs. Code 1887, § 636 (Code 1904, p. 311), makes the taxes due the city as well as those due the state a lien on the property. Code 1887, §§ 638, 639 (Code 1904, p. 313), provide for the sale of the property for a sum sufficient to pay the unpaid state and city taxes thereon, with interest, costs, and charges connected therewith. By Code 1887, § 662 (Code 1904, p. 324), when any real estate is offered for sale as provided by section 638, and no one bids the amount chargeable thereon, the treasurer shall purchase it in the name of the auditor of public accounts for the benefit of the state, city, or town respectively, unless it has been previously purchased in the name of the auditor, when it shall be sold for what it will bring. A lot was sold by the city of Richmond under authority of its charter for nonpayment of city taxes for certain years, and at each sale was bid in by the city, but no proceedings were taken to invest it with title, and in 1897 the lot was sold for nonpayment of delinquent state taxes and purchased by the state in the name of the auditor of public accounts, and was thereafter sold to defendant pursuant to his application to purchase it, filed under section 666; he paying only the taxes due the state and not those due the city. *Held*, that though the provisions of the city charter

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under which it sold the lot and bid it off for nonpayment of city taxes, and those of chapter 28, were conflicting, when considered together so far as possible, they authorized the sale of property only upon payment of taxes due the city, as well as those due the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

2. STATUTES (§ 225*)—CONSTRUCTION—RELATED STATUTES—CONSTRUING TOGETHER.

Cognate statutes should be construed together and made to harmonize so far as possible.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 300, 802, 803; Dec. Dig. § 225.*]

3. TAXATION (§ 805*)—SALE—ACTIONS TO TRY TITLE—ACTIONS AGAINST CLAIMANT—DEFECTS IN SALE.

Under Code 1887, § 661 (Code 1904, p. 321), providing that a suit to set aside the deed of a purchaser under Code 1887, § 666 (Code 1904, p. 326), which relates to the sale by the state of property sold for nonpayment of delinquent taxes, shall not be brought, except for fraud, unless brought within two years after the deed was recorded, a purchaser must comply with all the provisions of section 666 in order to plead the statute as a bar, so that one purchasing without paying city taxes due as well as state taxes, as required by that section, could not plead the statute as a bar to an action by the city to subject the property to payment of city taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1595; Dec. Dig. § 805.*]

4. TAXATION (§ 761*)—TAX DEEDS—VALIDITY—TIME OF SALE.

Under Code 1887, § 666, as amended by Act Feb. 11, 1896 (Acts 1897-98, p. 343, c. 306; Code 1904, p. 326), providing that if no person who has the right to redeem land sold to the state for delinquent taxes at the time notice of the application to purchase is served shall appear within four months after such notice and redeem, the applicant may purchase within five days after the expiration of four months by paying all taxes, etc., a deed which showed that four months had not elapsed since service of notice of the application to purchase, when the deed was executed by the clerk of the hustings court of the city of Richmond, was void on its face, in absence of long acquiescence and possession, and hence was open to collateral attack in a suit by the city to subject the property to payment of taxes due it, which were not paid by the purchaser on the sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1511; Dec. Dig. § 761.*]

Appeal from Chancery Court of Richmond.

Suit by the City of Richmond against R. B. Bowe to subject property to the payment of city taxes. From a decree for complainant, defendant appeals. Affirmed.

Stuart Bowe and Leake & Carter, for appellant. H. R. Pollard, for appellee.

BUCHANAN, J. For the year 1893 to the year 1899, inclusive, a lot lying in the city of Richmond, assessed in the name of Jane King, was returned delinquent for the nonpayment of the city taxes or levies. Under the authority of the charter of the city, the lot was sold for each year's nonpayment of the said taxes, and at each sale was bid in by the city; but the proceedings under its charter necessary to invest the city with title

to the lot were not taken. Acts 1869-70, pp. 139-141, c. 101, §§ 75-83.

In the year 1895 the said lot was returned delinquent for the nonpayment of the taxes due the state, and in the year 1897 sold therefor and purchased by the state. No person entitled to redeem the land having done so within two years, R. B. Bowe, the appellant, on the 15th of November, 1899, filed his application with the clerk of the hustings court of the city to purchase the same under the provisions of section 666 of the Code of 1887, as amended by an act approved February 11, 1896 (Acts 1897-98, p. 343, c. 306; Code 1904, p. 326). The notice required by that section to be given was served on the 17th day of November, two days after the application to purchase was filed. On the 17th day of March, 1900, the clerk of the hustings court executed a deed to the appellant, conveying the lot to him as purchaser thereof. The deed was acknowledged and recorded on the same day.

By section 83 of the city charter (Acts 1869-70, p. 140, c. 101), as amended by an act approved March 6, 1900 (Acts 1899-1900, p. 944, c. 864, § 1), it is provided that where real estate has been struck off to the city, when sold by it for delinquent taxes or levies due it, which has not been redeemed, and to which the city has not perfected its title in the manner prescribed by its charter, the city may enforce its lien for the taxes due it in a court of equity and release its right as purchaser, or to become a purchaser, of such real estate. Under that provision of its charter this suit was brought by the city to subject the said lot to the payment of the taxes due the city, and for which it had been sold and bid in by the city. The appellant and the parties interested in the lot under the will of Mrs. Jane King, who had died in the year 1895, were made parties defendant to the suit.

The appellant demurred to and answered the bill. The court overruled the demurrer and directed one of its commissioners to ascertain and report the amount of taxes due the city, all the liens upon the lot, its annual and fee-simple value, and who was the then owner thereof.

The commissioner reported that the amount of the city taxes (which was a little less than the amount claimed in the bill) was a lien upon the lot, that there were certain debts secured by deeds of trust which were also liens upon it, that the deed executed by the clerk of the hustings court to the appellant conferred no title upon him, and that the lot passed under the will of Mrs. King to John King, trustee for Mary M. J. K. Haynes and Maggie A. K. Dicken.

Each of the findings of the commissioner were excepted to by the appellant, the exceptions were overruled by the court, the report confirmed, and a decree entered setting aside and annulling the deed executed by the

clerk of the hustings court to the appellant as to the taxes due the city, and directing the lot to be rented for the satisfaction of the same.

From that decree this appeal was allowed.

The first question to be considered is whether or not the trial court erred in holding that the tax deed conveying the lot to the appellant was invalid as to the taxes due the city.

Section 666 of the Code of 1887, as amended by the act of February 11, 1898, under which the appellant filed his application to purchase, provided that, if no person who had the right to redeem at the time of the service of the notice of the application to purchase shall appear within four months after such notice is served and redeem the land in the manner prescribed by the section, then the applicant shall have the right to purchase the same within five days from the expiration of the four months as aforesaid, by paying all taxes, penalties, fees, and costs.

The deed shows upon its face that when it was executed the clerk of the hustings court had no authority to make the conveyance, because four months had not elapsed since the service of the notice of the application to purchase. It further appears from the deed itself that the applicant to purchase had not paid the taxes due the city, and that he had not is one of the admitted facts in the case.

While the provisions of the charter of the city, under which it made sale of and bid off the lot in question for the nonpayment of the city taxes due thereon, and the provisions of the general law of the state governing the sale of land returned delinquent for the nonpayment of taxes, as found in chapter 28 of the Code of 1887 as amended and in force when the said lot was sold and purchased by the state for the nonpayment of taxes due on it, are incongruous and difficult to construe so as to give effect to all the provisions of the charter of the city and of the general law in force when the applicant filed his petition to purchase, it is clear, we think, that when the provisions of both are considered together and made to harmonize as far as possible, as they must be, they did not authorize a sale and conveyance of the lot to the appellant without his paying the taxes due thereon to the city as well as those due the state.

There is language in section 666 of the Code, as amended by the act approved February 11, 1898, which, if it stood alone, would have given the appellant the right to purchase the lot "for the amount for which the sale to the commonwealth was made"; but there is also language in the section which made his right to purchase dependent upon "his paying to the clerk all taxes, penalties, fees and costs" due on the lot and connected with his application to purchase. Which of

these conflicting, or apparently conflicting, provisions is to control, must be determined by looking to the other provisions of chapter 28 of the Code of 1887 and especially sections 636, 638, 642, and 662 of the Code of 1887 (Code 1904, pp. 311, 313, 314, 324).

Section 636 of the Code makes the taxes due the city as well as those due the state a lien upon the lot. Sections 638 and 639 provide for a sale of the lot for a sum sufficient to pay the unpaid state and city taxes thereon, with interest, costs, and charges connected therewith. Section 662 provides that: "When any real estate is offered for sale, as provided by section 638, and no person bids the amount chargeable thereon, the treasurer shall purchase the same in the name of the auditor of public accounts, for the benefit of the state and county, city or town, respectively, unless such real estate has been previously purchased in the name of the auditor, in which case it shall be sold for such price as it will bring."

When all the provisions of law bearing upon the question, as before stated, are considered together, it is clear that the lot, when purchased in the name of the auditor of public accounts in 1897, was held for the benefit of the city as well as for the state, and that the appellant had no right to purchase it without the payment of the taxes thereon due both.

But it is insisted that, even if this be so, this suit was not instituted until more than two years after the recordation of the appellant's deed, and is therefore barred by section 661 of the Code, which provides, among other things, that a suit to set aside, annul, and cancel the deed of a purchaser under the provisions of section 666 of the Code shall not be brought except for fraud, unless it be brought within two years after the deed has been duly admitted to record.

In order to claim the benefit of the provisions of section 661, as was held in *Virginia Building & Loan Co. v. Glenn et al.*, 99 Va. 460, 39 S. E. 136, a purchaser under section 666 of the Code must comply with all the provisions of the latter section. This, as we have seen, the appellant did not do.

It is further insisted that this suit is a collateral attack upon the appellant's deed, and cannot therefore be maintained under the decisions of this court in the cases of *Hitchcox v. Rawson*, 14 Grat. 526, and *Machir v. Funk*, 90 Va. 284, 18 S. E. 197.

It was held in the first-named case that the tax deed offered in evidence in an action of ejectment could not be collaterally attacked for irregularities upon its face. The deed in that case was made under and confirmed by decrees of a court having jurisdiction of the proceedings in which the deed was made. In disposing of the question of the irregularities in the proceeding, Judge Lee, speaking for the court, said: "It is not a question of jurisdiction, but of the regularity of the mode

in which the jurisdiction has been exercised; and if there be jurisdiction, whatever irregularities may have occurred in the course of the proceeding, the decree will yet be evidence, at least as against strangers, in a subsequent collateral proceeding. That mere irregularities in a case of this kind will not suffice to exclude the record as evidence in a subsequent controversy, when offered by the party claiming under the sale, has been expressly decided by this court in *Smith v. Chapman*, 10 Grat. 445, and it cannot be considered as any longer an open question."

In *Machir v. Funk*, the other case relied on, it was held, upon the authority of *Hitchcox v. Rawson*, that the validity of a sale of land delinquent for the nonpayment of taxes, which is regular on its face, cannot be collaterally assailed.

This is a different case from either of those. The deed in this case is invalid on its face. The clerk of the hustings court had no authority to make a deed to the applicant until the four months had expired after the service of the notice required by section 666 of the Code. He was clothed with a mere naked power and could only exercise it in the manner prescribed by law.

Such a deed is invalid, unless there has been such a long acquiescence and possession under it as to justify a presumption in favor of the deed, as was the case in *Robinet v. Preston's Heirs*, 4 Grat. 141. See *Sulphur Mines v. Thompson's Heirs*, 93 Va. 316, 25 S. E. 232, and authorities cited.

That a tax deed, which shows upon its face that the law which authorized its execution has not been complied with, is invalid, see, also, *Redfield v. Parks*, 132 U. S. 239, 250, 10 Sup. Ct. 83, 33 L. Ed. 327; *Swope v. Prior*, 58 Iowa, 412, 10 N. W. 788; *Bowman v. Wittig*, 39 Ill. 416, 428; *Black on Tax Titles*, § 208.

We are of opinion that the chancery court did not err in holding that the tax deed of the appellant was invalid as to the claim asserted by the city of Richmond against the lot in question, and in directing it to be subjected to the payment of the taxes ascertained to be due the city.

There being no error in the decrees appealed from to the prejudice of the appellant, they must be affirmed.

Affirmed.

(109 Va. 828)

COMMONWEALTH v. GOODWIN.

(Supreme Court of Appeals of Virginia. March 18, 1909.)

1. CRIMINAL LAW (§ 1024*)—WRIT OF ERROR—PETITION OF COMMONWEALTH.

Const. art. 6, § 88 (Code 1904, p. cccxx), and Code 1887, § 4052 (Code 1904, p. 2134), giving the Supreme Court of Appeals jurisdiction to grant a writ of error on petition by the commonwealth in a case for violating a law relating

to the state revenue, applies to a prosecution for unlawfully selling malt liquor, where the issue was whether accused could sell malt beverage under the revenue law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1024.*]

2. INTOXICATING LIQUORS (§ 134*)—"MALT BEVERAGES"—SALE—"MALT LIQUOR."

Byrd Law (Acts 1908, pp. 275-287, c. 189) § 23½, defines "malt beverage" a nonintoxicating liquor, and requires the manufacturer to pay a special license tax and give a bond. Section 28 provides that the act shall not affect municipal charter provisions respecting licenses. Manassas Charter (Acts 1901-2, p. 216, c. 215; Acts 1906, p. 204, c. 128) § 14, requires the payment of license to sell "malt liquors." Held, on a prosecution for unlawfully selling malt liquor, that "malt beverage" is a malt liquor within the charter provision, and that compliance with the Byrd law does not avoid necessity for complying with the charter provision.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 134.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4314-4315.]

3. INTOXICATING LIQUORS (§ 134*)—"MALT LIQUORS."

"Malt liquors" include nonintoxicating, as well as intoxicating, liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*]

Error to Circuit Court, Prince William County.

Wade Goodwin was acquitted of unlawfully selling malt liquor by the circuit court on appeal from a conviction before a justice, and the Commonwealth brings error. Reversed.

Robt. A. Hutchison, Atty. Gen., for the Commonwealth. S. G. Brent and Julien Gunn, for defendant in error.

BUCHANAN, J. The defendant in error, Wade Goodwin, was convicted by a justice of the peace of Prince William county of unlawfully selling "malt liquor," or a mixture thereof, in the town of Manassas.

Upon appeal to the circuit court of that county, the whole matter of law and fact being by agreement submitted to the court, there was a judgment in favor of the accused. To that judgment this writ of error was awarded on the petition of the commonwealth.

Upon the calling of the cause, the defendant moved the court to dismiss the writ of error as improvidently awarded upon the ground that this is a prosecution for the violation of the "local option" law of the state, and not for a violation of the law relating to state revenue.

Whether or not a prosecution for the violation of the local option law where there is no pretense that the sale for which the accused is prosecuted was made under a license authorizing it need not be considered in this case. The defense of the accused in the circuit court, as appears from the facts

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

agreed, was that he had the right to make the sale of "malt beverage," the article sold by him, and at the place where it was sold, under the revenue laws of the state. This is denied by the commonwealth.

The question involved in the case would seem, therefore, to come clearly within the provisions of section 88, art. 6, Const. (Code 1904, p. ccxxx), and section 4052 of the Code of 1887 (Code 1904, p. 2134), which confer jurisdiction upon this court to grant a writ of error upon the petition of the commonwealth in a case for the "violation of a law relating to state revenue."

By section 23½, c. 189, p. 285, Acts 1908 (Acts 1908, pp. 275-287, c. 189, known as the "Byrd Law"), it is provided:

"That 'malt beverage' within the meaning of this section shall be construed to be the product of a brewing plant, or brewery, and shall, as to its composition, comply with the standards now, or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be nonintoxicating and in no event contain in excess of two and one-quarter per cent. in volume of alcohol.

"No person, firm, or corporation shall manufacture 'malt beverage,' as herein defined, except subject to the provisions of this act.

"'Malt beverage' shall be manufactured only by some person, firm or corporation having a manufacturer's malt liquor license, and who shall, before manufacturing the same, pay an additional special license tax of two hundred and fifty dollars (\$250.00) per year, and execute a bond in the penalty of ten thousand dollars (\$10,000) before and with security (either personal or corporate), approved by the judge of the circuit or corporation court of the county or city in which such manufacturing is proposed to be done; the condition of said bond shall be to faithfully comply with the provisions of this act.

"'Malt beverage' shall be sold by the manufacturer direct to the consumer (not to be drunk where sold) and in quantities of not less than one half dozen bottles, nor more than four dozen bottles at any one time, and shall not be sold or offered for sale by any other person, firm or corporation. 'Malt beverage' shall be sold only in bottles in which shall be blown, in letters at least one half inch in height, the name and address of the manufacturer and the words 'malt beverage.' No person, firm or corporation shall place in such bottles and sell or otherwise transfer any liquid containing alcohol in excess of two and one quarter per cent. in volume.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not less than five hundred dollars nor more than one thousand dollars, or, in the discretion of the jury, confined in jail for not less than three months nor more than twelve months for each offense."

By the facts agreed, it appears that the "malt beverage" sold by the defendant an-

swered the description of that article as defined by that section, was sold directly to the consumer, not to be drunk where sold, in quantities of six bottles, with the name and address of the Robert Portner Brewing Company of Alexandria, the manufacturer, blown into each bottle one-half inch in height; that the defendant was acting as the agent of said brewing company in the town of Manassas, which had a license as a manufacturer of malt liquors and had paid the additional special tax and had given the bond required in order to entitle it to manufacture and sell "malt beverage," and, except a state tax of \$5 and a town tax of \$2.50 for a merchant's license, neither the said brewery nor the defendant had paid any license in the said town or county.

Upon the facts agreed, the guilt or innocence of the accused depends upon the question whether a compliance with all the provisions of section 23½ of the said act in all respects authorizes the brewing company to sell "malt beverage" in the town of Manassas through an agent located and doing business in that town.

Several grounds are relied on by the Attorney General to sustain his contention that the brewing company had no such right; but, in the view we take of the case, it is only necessary to consider one of them.

By section 14 of the charter of Manassas (Acts 1901-02, p. 216, c. 215; Acts 1906, p. 204, c. 128), it is provided that "no license shall be granted to any person, club or corporation to sell ardent spirits, malt liquors or any mixture thereof, or any bitters containing alcohol, either by wholesale or by retail, or to be drunk at the place where sold, within the corporate limits of said town, unless the applicant shall first produce before the court authorized to grant such license the written consent of the town council that the applicant is a corporation under the laws of some state of the United States, or that the person is sober, discreet and of good moral character, and that the place is suitable and convenient, and such certificate shall further show that the said applicant has paid into the town treasury a sum not less than seventy-five dollars nor more than the sum of three hundred dollars, as shall be prescribed by the said council.
* * *

By section 28, c. 189, p. 287, Acts 1908, it is provided that nothing in this act shall be construed as changing the provisions of the charter of any town or city touching the granting of licenses.

If "malt beverage" be a malt liquor or a mixture thereof, then under the provisions of the charter of the town of Manassas no license could be granted for its sale therein except with the consent of the town council and a compliance with the other provisions of the charter. That there was no such compliance is clear from the facts agreed. While "malt beverage," as defined by section 23½

of the Byrd law is not intoxicating, it is a malt liquor. It seems to be well settled that the general term "malt liquors" includes both intoxicating and nonintoxicating malt liquors.

Black, in his article on Intoxicating Liquors in 23 Cyc. 41, 60, says that, "if the statute specifically forbids the unlicensed sale of malt liquors, the question of the intoxicating properties of the liquor sold is immaterial. It is only necessary to determine whether it was a malt liquor." *Eaves v. State*, 113 Ga. 749, 39 S. E. 318, 321.

See, also, the following cases, where it was held that if the law prohibits or regulates the sale of "cider" by name, without any qualifying word, it applies to all cider, without regard to its intoxicating qualities. *Commonwealth v. Dean*, 14 Gray (Mass.) 99; *State v. Roach*, 75 Me. 123; *State v. Spalding*, 61 Vt. 505, 17 Atl. 844.

In *State v. Kauffman*, 68 Ohio St. 635, 67 N. E. 1062, it was held that a malt beverage which contained less than 2¼ per cent. alcohol, and which was not intoxicating, was embraced within the meaning of an act which related to trafficking in spirituous, vinous, malt, and intoxicating liquors. See *U. S. v. Ducournau* (C. C.) 54 Fed. 138, 139; *U. S. v. Cohn*, 2 Ind. T. 475, 52 S. W. 38.

"Malt beverage" being a malt liquor within the meaning of the charter of the town of Manassas forbidding its sale without a license acquired in the manner prescribed by the charter, the accused had no right to sell it in that town, even if the effect of section 30 of the Byrd law (Laws 1908, c. 168, p. 287), as contended by the counsel of the defendant, were to repeal section 587 of the Code of 1887 (Code 1904, p. 291), so far as it forbids the sale of "malt beverage" in non-license territory.

It is insisted by the defendant that section 23½ of the act known as the "Byrd law" is unconstitutional. If it were, the result in this case would be the same, since he is not convicted of the violation of any of its provisions.

The judgment of the circuit court must therefore be reversed, and this court will enter such judgment as the circuit court ought to have entered.

Reversed.

(109 Va. 513)

OLIVER REFINING CO. v. PORTSMOUTH COTTON OIL REFINING CORPORATION.

PORTSMOUTH COTTON OIL REFINING CORPORATION v. OLIVER REFINING CO.

(Supreme Court of Appeals of Virginia. March 24, 1909.)

1. PLEADING (§ 216*)—DEMURRER—SCOPE OF INQUIRY.

In an action on a written agreement, where one count is the common count in assumpsit and

the other counts are based on the agreement in writing, the question whether the agreement upon which the other counts were based could be introduced to sustain a recovery upon the common counts could not be determined upon a demurrer to those counts, but could only be determined on the trial when the evidence was offered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 216.*]

2. PLEADING (§ 204*)—GENERAL DEMURRER.

Where a count contains several breaches, any one of which is well assigned, a general demurrer to the count should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 487; Dec. Dig. § 204.*]

3. PRINCIPAL AND AGENT (§ 183*)—RIGHTS OF ACTION BY PRINCIPAL OR AGENT—CONTRACTS OF AGENT.

Where an agent contracts by deed in his own name, his principal cannot sue upon it. If an agent makes a contract not under seal in his own name for an undisclosed principal, either the agent or the principal may sue upon it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 691-700; Dec. Dig. § 183.*]

4. PRINCIPAL AND AGENT (§ 189*)—ACTIONS—PLEADING.

A declaration, in an action on a contract, which states that in making the contract one of the parties named therein acted for plaintiff, that the contract was afterwards approved by the stockholders of the defendant company as a contract with plaintiff, that plaintiff furnished the whole consideration to the defendant provided for by the contract, and that defendant company conveyed and transferred all the property mentioned in the contract to plaintiff, sufficiently avers that the party who made the contract acted as the agent of plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 189.*]

5. CONTRACTS (§ 164*)—CONSTRUCTING INSTRUMENTS TOGETHER.

Where two papers are executed at the same time or contemporaneously between the same parties in reference to the same subject-matter, they must be regarded as parts of one transaction and receive the same construction as if the several provisions were in one and the same instrument.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. § 164.*]

6. CONTRACTS (§ 246*)—MODIFICATION—OPERATION AND EFFECT.

Where parties to a contract, as preliminary to a conveyance of property under the contract, come together and make an agreement stipulating for the future adjustment of certain specific matters of difference between them, it will be assumed that they intended that, with the exceptions named, the provisions of the contract should in all other respects be treated as satisfied by the conveyance made, especially where the contemporaneous agreement in part relates to defects in property conveyed, which the original agreement provided should be in good condition when turned over, which turning over was done when the deed was made and the contemporaneous agreement entered into.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 246.*]

7. DEEDS (§ 94*)—CONSTRUCTION AND OPERATION—MERGER OF PREVIOUS AGREEMENTS.

Where a deed has been accepted as a performance of an executory contract to convey real estate, the rights of the parties rest thereafter solely in the deed, although the deed varies from the one provided for in the contract, and

the law remits the grantee to his covenants in his deed, if there has been no fraud or mistake.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 266; Dec. Dig. § 94.*]

8. EVIDENCE (§ 442*)—PAROL EVIDENCE—ACTIONS—ADMISSIBILITY OF EVIDENCE.

An agreement for the transfer of certain property, including a manufacturing plant, specified that the plant was to be in good working condition when turned over, and that it was subject to the inspection of the party purchasing it as to its condition and working order before the acceptance of the deed. In an action by the purchaser for damages because the plant was not in working order, defendants offered in evidence an agreement between the parties, entered into at the time the deed was made, which provided that certain matters, including some that were specified as a cause of action by plaintiff, were reserved for future adjustment. *Held*, that the agreement was admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

Error to Law and Chancery Court of City of Norfolk.

Action by the Portsmouth Cotton Oil Refining Corporation against the Oliver Refining Company. Judgment for plaintiff, from which each party brings error. Reversed and remanded.

Williams & Tunstall and C. J. Collins, for plaintiff. Thos. H. Willcox and J. W. Willcox, for defendant.

BUCHANAN, J. An action of assumpsit was brought by the Portsmouth Cotton Oil Refining Corporation against the Oliver Refining Company. There was a verdict in favor of the plaintiff, a motion to set it aside, which was sustained upon the ground that the damages were excessive, and the trial court ordered that the verdict should be set aside and a new trial granted, unless the plaintiff would remit all of its recovery except a named sum. The plaintiff remitted under protest, and a judgment was rendered for the reduced amount. To that judgment each party applied for and obtained a writ of error.

There was a demurrer to the declaration and to each count thereof, which was overruled.

The fourth was the common count in assumpsit. The other three counts were based upon the following agreement in writing:

"This agreement made and entered into this 13th day of July, 1906, by and between Oliver Refining Company (a corporation organized and existing under and by virtue of the laws of the state of Virginia), party of the first part, and Aspegren & Co., a co-partnership consisting of Adolph Aspegren and John Aspegren, having their office in the Produce Exchange in the city of New York, witnesseth:

"The said second party has offered and does offer to the stockholders, directors and officers of the first party to purchase at and for the price of \$125,000.00 the property de-

scribed as follows: All the buildings of the cooperage and refinery and the boiler house and all the machinery and fixtures therein contained, storage tanks, and thirty-one tank cars, railroad track and oil lands contained by a straight line running parallel to outside of railroad track of the refinery from the Norfolk & Portsmouth Belt Line Railroad, Paradise Creek, containing about seven acres of land, upon which said buildings and tracks are located, if more or less than seven acres are contained in said tract at the rate of five hundred dollars per acre shall be added to or deducted from said purchase price.

"The said first party also agrees to sell, and said second party agrees to buy at its present market value, all the stock in trade, consisting of barrels, caustic soda, fuller's earth and other material contained in said building and appertaining to said business and to pay therefor in cash.

"Said first party will cause a survey to be made of the lands included in this offer and will attach the same to this instrument, when presented to its stockholders, at a meeting called for the purpose of passing upon and ratifying this proposition.

"Payment of said sum of \$125,000.00, the purchase price of said property in addition to said stock in trade, shall be made as follows: \$25,000.00 thereof in cash upon the delivery of the deed by the first party, which delivery shall be made at the office of the said second party above stated; said deed to be made to Portsmouth Cotton Oil Refining Corporation, which last-named concern has been by said second party incorporated for the purpose of taking the title and issuing the securities hereinafter mentioned. Said second party agrees to take all proper and necessary steps to authorize the making, execution and delivery of a mortgage of \$100,000.00 upon all of the property so transferred to it by the first party and to cause and procure the issue of \$100,000.00 six per cent. bonds with coupons attached conditioned for the payment of said interest semiannually at the office of the trustee to whom such mortgage shall be made. Said mortgage and bonds to be a first lien upon all of the property of said corporation then owned by it and all improvements to or additions thereon or thereto, and the principal of said bond shall be payable in gold of standard weight and fineness in ten years from the date of such mortgage. Said bonds to be in denominations as follows: 200 bonds of \$500 each.

"Said mortgage to contain provisions for the insurance and preservation of the property and all the ordinary and usual conditions attending like mortgages for securing a bond issue and shall be submitted for the approval of said first party before execution. The trustee therein shall be selected by said first party subject to the approval of said second party.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"It is understood that a meeting of the stockholders of the said first party has been called at the office of the company in Portsmouth, Va., for Friday, July 20, 1906, for the purpose of considering this agreement and proposition with a view to ratifying the same and authorizing the proper officers of the company to execute the necessary deeds and transfers.

"The deed of said property when executed and delivered is to be free and clear of all incumbrance and the plant to be subject to the inspection of said second party as to its condition and working order before the acceptance by them of the deed.

"The stock in trade so to be transferred shall be inventoried by said first party (and) shall be paid for at the fair market value thereof for the purposes of this agreement. It is understood that the aggregate of such stock in trade is of the value of about \$5,000.00. Plant to be in good working condition when turned over.

"It is agreed, however, that the deed to the Portsmouth Corporation shall be subject to the perpetual right to use the railroad track's scales and use of tracks leading to the tracks of the crushing plant to the party of the first part."

The object of the action was to recover damages for the alleged breach of the provision in the contract of sale that "the plant should be in good working condition when turned over" to the plaintiff.

The first error assigned by the Oliver Refining Company in its petition for a writ of error is to the action of the court in overruling the demurrer to the declaration.

The objection made to the common counts is without merit. They are in the usual form. Whether or not the agreement upon which the other counts are based could be introduced to sustain a recovery upon the common counts was a question to be determined upon the trial when the evidence was offered, and not upon a demurrer to those counts.

The objection made to the first and second counts that upon a proper construction of the agreement sued on there could be no recovery of damages against the defendant on account of losses resulting from the necessity of purchasing new presses, since the parties in entering into the agreement could not have contemplated any damage on that account, is equally without merit. Conceding for the purposes of the demurrer that this were true, there were other grounds of damage alleged, which, if sustained by proof, would have entitled the plaintiff to recover. The demurrer to each count is a general demurrer. It goes to the whole of each count, and an objection which, if sustained, would not vitiate the whole count, cannot be thus made. The assignment of a special cause as ground of demurrer does not narrow the scope of the demurrer. Where a count contains several breaches,

any one of which is well assigned, this is sufficient to maintain the action, and a general demurrer to the count should be overruled. See *Henderson v. Stringer*, 6 Grat. 130; *Wright v. Michle*, 6 Grat. 354.

The other grounds of demurrer are that the agreement on its face shows that the plaintiff is not a party to it, that the provisions therein contained were not made for its sole benefit, and that there is no privity between it and the defendant. The cases of *Newberry v. Newberry*, 95 Va. 119, 27 S. E. 899, and *McIlvaine v. Big Stony Lumber Co.*, 105 Va. 613, 54 S. E. 473, are relied on to sustain this ground of demurrer.

The instrument sued on in each of those cases was under seal, and the rigid rule of the common law applied except so far as modified by statute. What is said in those cases must therefore be read and considered in connection with their facts. If the agreement sued on in this case had been under seal, it may be that under the principles announced in those cases the plaintiff could not maintain an action upon it, because not made solely for its benefit, even though *Aspegren & Co.* were acting as its agents in the transaction, for it seems to be well settled at common law that, where an agent is contracted with by deed in his own name, his principal cannot sue upon it. See *Dacey on Parties*, side page 134, and cases cited; *Story on Agency*, § 422; 3 Rob. Pr. (New Ed.) 34-37. But it is a well-established rule of law that, where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. *Nat. Bank v. Nolting*, 94 Va. 263, 26 S. E. 826; 3 Rob. Pr. (New Ed.) 34; *Dacey on Parties*, side pages 138, 139; *Mechem on Agency*, § 769.

It is averred in the first count in the declaration that in making the contract sued on *Aspegren & Co.* were acting for the plaintiff, that the contract was afterwards approved by the stockholders of the defendant company as a contract with the plaintiff, that it (the plaintiff) furnished the whole consideration to the defendant provided for by the contract, and that the defendant conveyed and transferred all the property mentioned in it to the plaintiff. If these averments are true, *Aspegren & Co.*, in making the agreement sued on, were the agents of the plaintiff company, and it had the right to bring this action.

The averments of the second and third counts, if true, show that the plaintiff is the assignee or beneficial owner of the contract sued on in each of those counts, and under section 2860 of the Code of 1887 (Code 1904, p. 1500), it can maintain an action thereon in its own name.

We are of opinion therefore that the demurrer to the declaration and to each count thereof was properly overruled.

The next assignment of error which we will consider is the action of the court in re-

fusing to permit the defendant to introduce in evidence an agreement between the plaintiff, the defendant, and Aspegren & Co. at the time the deed provided for by the agreement sued on was executed.

The rejected agreement commences as follows: "Memorandum. In the matter of the purchase of certain land and personal property by Portsmouth Cotton Oil Refining Corporation from the Oliver Refining Company, The parties to this agreement being about to pass the deeds relating to this property, and some unsettled matters not having been provided for, it is understood and agreed that those matters (naming them) are to be hereafter adjusted."

Two of the unsettled matters referred to in that agreement, and which were reserved for future adjustment, were the repairs of certain tank cars and of the floor of the cooerage building. The tank cars and cooerage building are specifically mentioned in the agreement of sale and are parts of the "plant" which that agreement provided should be conveyed to the plaintiff free of all incumbrance and in good working condition when turned over, and was to be subject to the plaintiff's inspection as to its condition and working order before the acceptance of the deed.

Where two papers are executed at the same time or contemporaneously between the same parties, in reference to the same subject-matter, they must be regarded as parts of one transaction and receive the same construction as if their several provisions were in one and the same instrument. See *Anderson v. Harvey*, 10 Grat. 386; *Torrence v. Shedd*, 112 Ill. 466, 467; *Johnson v. Moore*, 28 Mich. 3; and cases cited in notes to 13 Cyc. 614.

The plaintiff, having the right under its contract of purchase to inspect the plant as to its condition and working order before the acceptance of the deed, even if it were not its duty to do so, was under no obligation to accept the deed unless the plant was at that time in good working condition. It is true that the plaintiff insists that it could not ascertain whether or not the plant was in good working order until after it was conveyed and turned over to it. This contention, however, seems to contradict the language of the agreement of sale, which expressly provides for an inspection for that purpose before the acceptance of the deed.

If, when the deed was executed and delivered and the contemporaneous agreement entered into, the plaintiff did not intend to receive the plant as in good condition in all respects, except as to tank cars and the cooerage floor, the agreement ought and naturally would have contained some provision on

that subject. When to complete the performance of a contract, and as preliminary to a conveyance of the property, the parties come together and make an agreement stipulating for the future adjustment of certain specific matters of difference between them, the law assumes that they intended that, with the exception of things named, the provisions of the contract should, in all other respects, be treated as satisfied by the conveyance made, especially where the contemporaneous agreement in part relates to defects in the property conveyed which the original agreement of sale provided should be in good condition when turned over, which turning over it is conceded was done when the deed of conveyance was made and the contemporaneous agreement entered into. *Disbrow v. Harris*, 122 N. Y. 362, 25 N. E. 356.

The general rule is, and no rule is better settled than, that where a deed has been executed and accepted as a performance of an executory contract to convey real estate, the rights of the parties rest thereafter solely in the deed. This is true although the deed thus accepted varies from that provided for in the contract, and the law remits the grantee to his covenants in his deed, if there is no ingredient of fraud or mistake in the case. 2 *Devlin on Deeds*, § 850a; *Shenandoah V. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Trout v. N. & W. Ry. Co.*, 107 Va. 576, 59 S. E. 394; note to *Clifton v. Jackson*, 16 Am. St. Rep. 621.

Whether the deed of conveyance executed in this case and accepted by the plaintiff, in the absence of the contemporaneous agreement, would have come within the general rule and rendered the executory contract sued on *functus officio* by merger, and have furnished the only evidence of the rights of the parties, as is argued by counsel for the defendant, need not be considered, as that is not this case.

The action of the court in refusing to admit the contemporaneous agreement in evidence was error for which its judgment must be reversed.

The defendant assigns other errors, but as they are such as are not likely to arise upon another trial or depend upon the evidence in the case, which will be different, it is unnecessary to consider them.

It follows from what has been said in disposing of the defendant's assignments of error that the plaintiff was not prejudiced by the action of the court in requiring it to remit a part of its recovery, and that its assignment of error is without merit.

The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial not in conflict with the views expressed in this opinion.

Reversed.

(132 Ga. 343)

HERNDON et al. v. COLQUITT COUNTY et al.

(Supreme Court of Georgia. March 10, 1909.)

1. INTERLOCUTORY INJUNCTION PROPERLY REFUSED.

Regardless of the technical questions raised as to the form of the answer or its verification, under the evidence introduced on the hearing of the application for interlocutory injunction, there was no error in refusing it.

2. HIGHWAYS (§ 122*)—PUBLIC ROAD REGISTER LAW—RECOMMENDATION OF GRAND JURY.

Sections 516-519 of the Political Code of 1895, on the subject of a public road register, which were codified from the act approved October 16, 1891 (Acts 1890-91, p. 134), do not become operative in any county until the grand jury of that county shall so recommend.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 122.*]

3. HIGHWAYS (§ 122*) — ALTERNATIVE ROAD LAW—RECOMMENDATION OF GRAND JURY.

What is known as the "alternative road law," embodied in sections 573-583 of the Political Code of 1895, which were codified from the act of October 21, 1891 (Acts 1890-91, p. 135), does not go into effect in any county until it is recommended by the grand jury thereof at a term of court.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 122.*]

4. HIGHWAYS (§ 122*)—PUBLIC ROAD REGISTER LAW—ALTERNATIVE ROAD LAW—ADOPTION.

The "public road register law" and the "alternative road law" are two separate laws, enacted on different dates, although by the same Legislature. The adoption of the alternative road law by recommendation of the grand jury in a particular county does not ipso facto put in force in that county the public road register law; and therefore the adoption of the alternative road law does not alone render it unlawful to work the roads of the county, unless they are shown on a public road register, as provided by section 516 of the Political Code of 1895.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 122.*]

5. HIGHWAYS (§ 151*)—WORK ON ROAD BY RESIDENTS OF COUNTY.

Although citizens and residents of a portion of a county may contend that the county authorities have not had the public roads of that section worked with due diligence and care, and that such roads have fallen into bad condition, this does not authorize them to work certain portions of roads of their own selection and not under the supervision of the county authorities, and thereupon, when called upon by the duly constituted authorities to do road work or pay the commutation tax, to refuse to do so on the ground that they have already done an amount of work which was equivalent to that which the law requires them to do when duly summoned.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 151.*]

(Syllabus by the Court.)

Error from Superior Court, Coffee County; R. G. Mitchell, Judge.

Action between Ellis Herndon and others and Colquitt County and others. From the judgment, Herndon and such others bring error. Affirmed.

J. A. Wilkes, for plaintiffs in error. W. F. Way and A. B. Buxton, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 256)

SATTERFIELD et al. v. TATE.

(Supreme Court of Georgia. Feb. 27, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§§ 138, 148*)—POWERS (§ 81*)—VALIDITY OF EXECUTION.

A power given in a will to the executor to sell any such portion of the lands devised as may become necessary by reason of some cause unforeseen to the testator, and then for the executor to sell such portion only with the consent of named devisees, was not validly executed by a parol agreement to sell, entered into, when no necessity for a sale had arisen, between the executor and one desiring to purchase, consented to and concurred in by such devisees, and the execution by such devisees to such person, at the instance and direction of the executor and for the purpose of carrying out such parol agreement, of an ordinary warranty deed, without any reference whatever to the power; the grantee in the deed paying a valuable consideration to the grantors, and all the parties understanding and believing at the time such transaction to be an effectual execution of the power in accordance with the terms of the will.

(a) Where such purchaser had notice, at the time of the transaction above stated, of the limitations upon the executor's power to sell, he took, under the deed executed by such devisees to him, only such estate in the land as the devisees had.

(b) While generally a court of equity will aid the defective execution of a power when the defect relates to matter of form in the execution, it will not render its aid where the exercise of the power is invalid for the reason that the donee at the time was not authorized to execute it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560-566, 569-575; Dec. Dig. §§ 138, 148; Powers, Cent. Dig. §§ 99-103; Dec. Dig. § 81.*]

2. WILLS (§ 545*)—CONSTRUCTION—ESTATES CREATED.

A will which devised lands to Lina and Amanda for the life of Lina, with remainder to Amanda, but, if they should both die without leaving child or grandchild, then all property not disposed of by the executor, in accordance with the power referred to in the preceding headnote, should revert to such persons as would be the testator's heirs at law at his death had he made no will, gave a joint life estate to Lina and Amanda during the life of Lina, and a defeasible vested remainder to Amanda, subject to be divested upon her dying without child or grandchild during the life of Lina; and, where Amanda's remainder has been so divested, the land, at the death of Lina, without child or grandchild, will go to such executory devisees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176; Dec. Dig. § 545.*]

3. LIFE ESTATES (§ 8*)—ACCRUAL OF CAUSE OF ACTION—DEATH OF LIFE TENANT.

One to whom Lina and Amanda executed a warranty deed to the lands so devised, and in accordance with the transaction set forth in the first headnote, took the respective es-

tates Lina and Amanda had in the lands, as stated in the second headnote, and upon the death of Amanda, without child or grandchild, during the life of Lina, no prescription could arise during the life of Lina in favor of the grantee in such deed against such executory devisees.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

(Syllabus by the Court.)

Error from Superior Court, Lumpkin County; J. J. Kimsey, Judge.

Equitable petition by William B. Tate against Barilla D. Satterfield and others. Judgment for plaintiff, and defendants bring error. Reversed.

William B. Tate filed an equitable petition in the superior court of Lumpkin county against Barilla D. Satterfield of that county and 74 other persons, some of whom resided in Lumpkin county, others elsewhere in this state, and still others beyond the limits of the state. The substance of the petition, so far as now material, was: Stephen Griffith, late of Pickens county, Ga., died November 11, 1873, testate, seised and possessed of lots of land 109 and 110 in the Fourth district and Second section of that county. His will was duly probated, and William Tate, the named executor, qualified thereunder.

The following are the material parts thereof:

"Item 3d. I give and bequeath and devise to Lina and my daughter, Amanda Griffith, persons of color, who were formerly my faithful domestic servants, lots of land number one hundred and nine (109), one hundred and ten (110), and the east half of one hundred and twelve (112), all of said lots of land situate, lying and being in the fourth (4th) district and second (2nd) section of said Pickens county, each lot containing one hundred and sixty acres, more or less, known as my home place, together with all the appurtenances belonging to the same, and also all of my personal property. * * *

"Item 4th. I desire and direct my executor, * * * to hold the lands named in item three until the death of Lina, unless from some unseen cause to me it should become necessary to sell some portion of it, in which event he is to sell only such portion of it as Lina and Amanda may consent to, and at her, Lina's, death the land together with all the property not otherwise disposed of, of every description, during Lina's lifetime, named in said third item, to go to and vest in my daughter, Amanda Griffith, daughter of Lina. But I desire and direct that my executor not to rent or control the lands, nor other property given in the above items, only to keep and sell such as may be necessary by and with the advice of Amanda and Lina. It being my desire and wish that the lands be a home for Amanda and Lina to

control, rent, and enjoy the profits on together with all other property during Lina's lifetime, and at her death I direct my executor to turn over the land, together with all other property, to my said daughter, Amanda unreservedly, to do as she may think proper with."

"Item 6th. I desire and direct that all the property given in this will to my said daughter, Amanda Griffith, is given to her free from contracts, control, and sale of any husband that she marries, but is to be her sole and separate property; and if Lina and Amanda both die leaving no child or children nor grandchildren, then in that event the property not disposed of in their lifetime reverts to those who now by law would be entitled to the same if I had made no will.

"Item 7th. I desire and direct that my executor, * * * not to have any appraisal of my estate nor to make annual returns to the ordinary, * * * and that he make all sales by the advice and consent of Lina and Amanda, without order of the ordinary and at private sale, that may become necessary and after paying expenses, etc., to pay over the proceeds to Lina and Amanda, and to the other if one be dead. * * *"

On May 27, 1887, Lina and Amanda conveyed lots 109 and 110 to the petitioner by an ordinary warranty deed, making no reference therein to the will of Stephen Griffith, to the executor thereof, or to the power given by it to the executor to sell the land. Since the date of such deed petitioner has been in the open, notorious, continuous, and peaceable possession of such lots of land under claim of right. The executor was fully cognizant of and consented to the sale of the lands conveyed to petitioner by said deed, and petitioner purchased said lands from the executor, who acted in the premises on the authority of and by and with the consent and advice of said Lina and Amanda; said sale being made in pursuance of and in conformity with the provisions of said will. Lina and Amanda, as the lawful owners of said lands, had a right in and of themselves to convey the same, and said deed conveyed a full title to your petitioner; but the defendants named claimed to own an interest in said lands by virtue of the sixth item of the will. Lina Griffith had no child living then, save Amanda, and has had no children since, and possibility of further issue of the said Lina is extinct, she being now more than 80 years old, and since the execution of the deed to petitioner Amanda had died without issue; and the said sixth item of the will could have application only to property devised to Amanda and Lina which was not disposed of by them in manner and form hereinbefore stated. The claim of defendants operates as a cloud upon the title of petitioner, and,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

while without foundation, operates to his prejudice and embarrassment in the perfect ownership of the land. The prayers were that the defendants be required to set up in the proceeding their claim to the land in question. If they have any, that a decree be granted forever quieting and establishing the title of petitioner to such lands, and declaring him to be the owner thereof in fee simple, for injunction, general relief, and process. Some of the defendants failed to appear. The others demurred to the petition, and filed answers. Among the grounds of demurrer were that the petition showed no title to the fee of the land in the petitioner, and that no equitable right against the defendants was set forth. There was also a special ground of demurrer, in response to which the plaintiff amended as follows: The purchase of said lands was by a parol agreement with the executor consented to and concurred in by Lina and Amanda Griffith, and the deed from Lina and Amanda was executed at the instance and direction of the executor in fulfillment of the parol purchase. The agreement was for the purchase of the fee-simple title, and the deed was intended to convey the same, and was believed by all the parties to be effectual so to do under the provisions of said will. Petitioner is in possession of the land, and can bring no action at law to assert and quiet his title. The claims of defendants under the will may be used vexatiously and injuriously against him, impairing the marketability of his title, and he has reason to apprehend that some of the evidence upon which he relies to impeach the claims of defendants, and uphold his own title, may be impaired and lost by lapse of time. He paid the purchase money named in said deed, and the same went to the uses directed in the will; and, if his deed is not in form a proper execution of the power of disposition given in the will, he is at least invested with a perfect equity in the land (possession having been at once given him by reason of said purchase and payment). The executor, William Tate, is dead. After purchasing and paying for the land, petitioner was put in possession of it by the executor and by Lina and Amanda Griffith; and his possession and control has been absolute. The executor lived 10 years after the making of the sale, without even questioning the right and title of plaintiff in the property; and Lina, who is still in life, and Amanda, who died on July 11, 1892, aged 58 years, also allowed him to remain in absolute, adverse, and peaceable possession. The court overruled all the demurrers, and, after hearing the evidence submitted (the defendants offering no evidence), directed a verdict in favor of the petitioner against all the defendants, and entered thereon a decree that title to the two lots of land is vested in fee simple in the petitioner, and that all claims of the defendants thereto be declared to be void and the

same be removed as a cloud upon petitioner's title, and the defendants be perpetually enjoined from asserting any claim to the lands. Defendants excepted.

R. H. Baker, O. J. Lilly, and H. H. Perry, for plaintiffs in error. H. H. Dean, F. C. Tate, S. H. Sibley, and W. A. Charters, for defendant in error.

FISH, C. J. In the view we take of this case, it is necessary to adjudicate only a few of the questions raised in the record. In our opinion the demurrer should have been sustained. The first point we will consider is whether, under the allegations of the petition, there was a valid execution of the power of sale conferred by the will on the executor. As to this question, some pertinent rules of law may be stated. The intent of the testator as the donor of a power governs. *Mackey v. Moore*, Dudley, 94, 96; *Berrien v. Thomas*, 65 Ga. 61; *City Council of Augusta v. Radcliffe*, 66 Ga. 469, 474; *Taylor v. Atkins*, 1 Burr. 60, 121; *Thorley v. Thorley*, 10 East, 442, 443; *Daly v. James*, 8 Wheat. 535, 536, 5 L. Ed. 670; 4 Kent's Com. (12th Ed.) 345. Consequently a person claiming title under the execution of a power takes under the authority of that power (*Id.*; *Bradish v. Gibbs*, 3 Johns. Ch. [N. Y.] m. p. 550; *Doolittle v. Lewis*, 7 Id. 48); for an act done under a power must have its validity from the grantor of the power, and not from the person that executes it (*Id.*; *Middleton v. Crofts*, 2 Atk. 662).

In *Sears v. Livermore*, 17 Iowa, 297, 85 Am. Dec. 564, the same principles are thus stated: "The appellant takes under the execution of a power, and, of course, under its authority, just as if the power and the instrument executing it had been incorporated in the same deed. Her title rests upon the act creating the power, and takes effect as if created by the original deed. *Marlborough v. Godolphin*, 2 Ves. 78; *Cook v. Duckenfield*, 2 Atk. 562; *Doolittle v. Lewis*, 7 Johns. Ch. [N. Y.] 45, 11 Am. Dec. 389. The authority to sell being derived from the power, it follows that the purchaser is bound to look for and to understand the extent of the power, or, as elsewhere expressed, 'taking under the power, he is bound to see that its terms are complied with.' *Ormsby v. Tarascon*, 3 Litt. 410. And, of course, in this, as in all other contracts, the object and design of the parties should be kept strictly in view in ascertaining the nature and extent of the power." In *Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178, it was held: "Where a testator devised certain land to his wife for life, and gave her power, in case of need, to sell all his estate, real and personal, for her comfortable support, * * * she took only a life estate with a power of sale depending on a contingency. Those who claim under a contingent power of sale in a will must show that the power was well executed, and that the contingency hap-

pened; and it is for the jury to decide whether it happened or not." In *Griswold v. Perry*, 7 Lana. (N. Y.) 98, it was held: "A purchaser of land from a trustee with power to convey only on the happening of an event, which is a condition precedent, must ascertain at his peril whether the condition has been fulfilled." In *Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 499, it was held: "Power to sell, either in a will or deed, to be exercised on the happening of a particular event, cannot be lawfully exercised until that event happens." On same line, see *Sweigart v. Frey*, 8 Serg. & R. (Pa.) 299; *Hall v. McLaughlin*, 2 Bradf. Sur. (N. Y.) 107; *Loomis v. McClintock*, 10 Watts. (Pa.) 274; *South Carolina R. Co. v. Toomer*, 9 Rich. Eq. (S. C.) 270; *Carlyon v. Truscott*, 20 L. R. (Eq. Cas.) 348. "Every purchaser of realty for value takes the risk of his vendor being clothed with power to sell at the time of the sale, and by the mode of sale adopted." *Terry v. Rodahan*, 79 Ga. 289, 5 S. E. 38, 11 Am. St. Rep. 420. In the case at bar it appears that item 4 of the testator's will directs the executor to hold the lands described in item 3 during the life of Lina Griffith, but with the exclusive possession and control thereof in Lina and Amanda as a home for them, they to rent the land and receive and enjoy the profits thereof, and that the executor should sell only such portion of said lands as might become necessary for some cause unforeseen to the testator upon the consent of Lina and Amanda. The power was thus given to the executor alone, and to be exercised by him only on the happening of a particular event—that is, some unforeseen cause rendering a sale necessary—and then to sell only such portion of the land as should be necessary upon the consent of Lina and Amanda. There was no allegation or suggestion in the petition that anything had occurred rendering the sale of the land, or any portion thereof, necessary. Indeed, it may be fairly inferred from the petition and its exhibits that no necessity for a sale had arisen. It was made about 14 years after the testator's death, and presumably there were no debts of the testator then existing to be paid. Besides, it appears that the purchase money was paid, not to the executor, but to Lina and Amanda. And as Lina had no child except Amanda, and the latter had no children, it would be reasonable to presume, considering the amount of other property devised and bequeathed to them in the will, and their station in life and probable needs, they being negroes, that the sale of the two lots of land in question, 320 acres, all at one time, was not necessary for their support and maintenance. But, be this as it may, no necessity for a sale appears from the petition. In the present case we need not go to the full extent of some of the rulings above referred to; for it is apparent from the allegations of the petition that the petitioner had knowledge of the condition upon which the

executor was authorized by the will to exercise the power to sell the land. Petitioner alleges that he entered into a parol agreement with the executor as such for the purchase of the land, which agreement was consented to and concurred in by Lina and Amanda, and that the deed made to him by Lina and Amanda was executed at the instance and direction of the executor in fulfillment of such parol purchase, and the deed was intended to convey the fee-simple title to the land, "*and was believed by all said parties to be effectual so to do under the provisions of said will.*" (Our underscoring).

Clearly these allegations are equivalent to acknowledging and affirming that the petitioner, as well as the executor and Lina and Amanda, knew of the provisions of the will, of the particular power of sale therein conferred upon the executor alone, and that petitioner purchased the lands in question in view of this provision of the will. The only agreement to sell entered into by the executor was in parol. Even his request and direction to Lina and Amanda to execute the deed to petitioner was merely verbal. The deed so executed was simply a warranty deed in the usual form, and purported to be a conveyance by Lina and Amanda Griffith of the fee-simple title to the land in question to the petitioner in consideration of \$1,250 paid by him to them. There was no reference therein to the executor's power to sell, nor even any reference to the executor or to the will wherein this power was conferred upon him. While it has been held that a court of equity will aid the defective execution of a power, when the defect relates to matter of form in the execution, it has never been ruled, so far as we are informed, that it will render its aid where the execution of a power is not merely defective in form, but invalid by reason of the fact that the contingency upon which the power was to be exercised has never happened. See 2 Pom. Eq. Jur. (3d Ed.) § 590; 22 Am. & Eng. Enc. L. 1130; *Cockerell v. Chalmeley*, 1 Russ. & M. 418.

2. What title was devised by the will of Stephen Griffith to Lina and Amanda Griffith, whose deed of bargain and sale is held by the defendant in error? The third and fourth item of the testator's will, which must be read and construed together, gave a joint life estate, for the life of Lina, to Lina and Amanda, with a vested remainder to Amanda at Lina's death. This vested remainder to Amanda is, however, made defeasible by the sixth item of the will, which declares that, if Amanda dies leaving no child or grandchild, the property "not disposed of"—that is, by the executor in the lifetime of Lina in accordance with the power of sale in the will—shall revert to his heirs who would be such by law when he died if he had made no will. All divesting clauses, especially of remainders, are to be construed so as to vest the estate indefeasibly at the earliest possible period of time.

The period of possession or distribution indicated in the will now under construction is the death of Lina. Consequently, if Amanda had survived Lina, either with or without a child or grandchild, her defeasible, vested remainder would then have become indefeasible, and belonged to her, in the words of the testator, "unreservedly to do as she may think proper with." It is therefore clear that the contingency for the divesting of the remainder to Amanda refers to her dying in the lifetime of Lina without leaving a child or grandchild in esse at Lina's death. These legal principles need not be enlarged upon here; for they are thoroughly covered by the opinion in the case of *Sumpter v. Carter*, 115 Ga. 893, 899, 900, 42 S. E. 824, 60 L. R. A. 274, and the authorities there cited. As the contingency upon which Amanda's remainder was to be divested has happened by her dying, without a child or grandchild, in the lifetime of Lina, and as the latter had no other child than Amanda, and is 80 years of age, without the possibility of having another child, upon her death the fee in the lands now in controversy, in the absence of a valid disposition of the same by the executor under the power of sale, will go to the testator's heirs under the sixth item of his will. The deed of Lina and Amanda, which purports to convey a fee-simple estate to the petitioner, passes only the title which they respectively had under the terms of the will. A purchaser of the entire estate from the life tenant acquires only the interest of such life tenant. Civ. Code 1895, § 3095. And a purchaser of the entire estate from the holder of a defeasible vested remainder takes the title subject to the contingency upon which it becomes divested before the period of possession or distribution. Nothing but the survival of the life tenant by the remainderman or by a child or grandchild of the remainderman, according to the terms in the limitation over, could make the remainder indefeasible or absolute, and give the fee to the grantee of the holder of such remainder. *Sumpter v. Carter*, 115 Ga. 893, 900, 42 S. E. 824, 60 L. R. A. 274, and cases cited. So that the death of Amanda Griffith without a child or grandchild before the death of Lina, the life tenant, which contingency divested Amanda's defeasible vested remainder, left the petitioner with no other than that of a tenant per autre vie; that is, for the life of Lina.

8. This being the extent of the title held by the petitioner, what force is there in his claim to the title by prescription? Most clearly none. The executor held no greater estate than for the life of Lina, the life tenant, though his investment with the power of sale extends to a sale of the fee, if made in accordance with the terms and conditions of sale authorized by the power. Civ.

Code 1895, §§ 3191, 3171. This power, of course, does not enlarge the estate with which the will clothed him. See *Luquire v. Lee*, 121 Ga. 624, 628, 629, 49 S. E. 834, where these legal principles are fully stated. It could have made no difference in this case, so far as prescription is concerned, if the executor had held an estate in fee. In no event could he bring an action for possession of the land against the petitioner who holds the deed of the life tenant until after the death of the life tenant. *Lamar v. Pearre*, 82 Ga. 354, 363, 9 S. E. 1043, 14 Am. St. Rep. 168; *Napier v. Anderson*, 95 Ga. 618, 628, 23 S. E. 191; *Fleming v. Hughes*, 99 Ga. 444, 450, 27 S. E. 971. Neither could the heirs of the testator to whom the whole estate reverts upon the death of Lina, the life tenant, and whose right of possession therefore only accrues at that time, commence an action against petitioner for possession of the land until after the death of Lina, the life tenant. It follows that, as the petitioner could not be ousted by these parties during the life of Lina, the life tenant, he, of course, cannot claim title by prescription against them during the same period of time.

What has been said above as to the demurrer controls the case as to the verdict directed, and shows that the direction of a verdict in favor of the petitioner against the defendants was erroneous, and should be set aside.

Judgment reversed. All the Justices concur.

(112 Ga. 342)

WILLIAMS v. GIDDENS et al.

(Supreme Court of Georgia. March 10, 1909.)

1. BOUNDARIES (§ 52*) — ADJUDICATION BY PUBLIC AUTHORITIES — PROCEEDINGS BY PROCESSIONERS.

The evidence submitted in behalf of the applicants did not require a finding that the processioners had run and marked a line between the adjoining lands of the applicants and the protestant, where no boundary line had been previously located and established; and therefore the court did not err in overruling the motion of the protestant to dismiss the proceedings on the ground that the processioners had run and marked a new line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 257; Dec. Dig. § 52.*]

2. BOUNDARIES (§ 52*) — ADJUDICATION BY PUBLIC AUTHORITIES — PROCEEDINGS BY PROCESSIONERS.

"Where actual possession has been had, under a claim of right, for more than seven years, such claim shall be respected" by the processioners in cases of disputed land lines, "and the lines so marked as not to interfere with such possession." Civ. Code 1895, § 3248. The provisions of this section being, according to some of the evidence submitted, applicable to the case, the court erred in instructing the jury as follows: "If you believe from the evidence * * * that [the protestant] had the exclusive and continuous possession of this property to

the line which he claims, and that it is the true line, for seven years, and had it up until this line was run by the processioners, then the court charges you that the processioners had no right to interfere with that line. That is the simple question for you to determine: Which is [the] true line?" The phrase "and that it is the true line" was erroneous, as it qualified the provisions of such Code section.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 257; Dec. Dig. § 52.*]

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Processioning proceedings between G. E. Williams and W. P. Giddens and others. From the judgment, Williams brings error. Reversed.

Alexander & Gerry, for plaintiff in error. Bule & Knight, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(132 Ga. 352)

McCLAREN v. WILLIAMS et al.

(Supreme Court of Georgia. March 11, 1909.)

1. LIMITATION OF ACTIONS (§ 180*)—DEMUR- RER RAISING DEFENSE.

Where a petition shows that the cause of action is barred by the statute of limitations, it is subject to demurrer on this ground. *Thornton v. Jackson*, 129 Ga. 700, 59 S. E. 905; *Lang v. Camp Phosphate Co.*, 113 Ga. 1011, 39 S. E. 474.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

2. APPEAL AND ERROR (§ 854*)—REVIEW— REASONS FOR DECISION.

Where a demurrer to a petition contained general and special grounds, and the court sustained "the demurrer" and dismissed the petition, there is no presumption that the ruling was based on any particular ground of the demurrer; but the judgment will be treated as sustaining the entire demurrer upon all of its grounds, and the judgment will be affirmed if the petition was properly dismissed for any reason set forth in the demurrer. *Gunn v. James*, 120 Ga. 482, 43 S. E. 148; *Huggins v. Southeastern Lime & Cement Co.*, 121 Ga. 311, 48 S. E. 933; *Killough v. Simmons*, 125 Ga. 101, 53 S. E. 819.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3410; Dec. Dig. § 854.*]

3. PLEADING (§ 199*)—DEMURRER—SPECIAL DEMURRER—WAIVER.

Where a demurrer containing general and special grounds states therein the grounds of the general demurrer first, there is no merit in the exception that "the grounds of special demurrer could not follow a general demurrer, and that the judgment of the court sustaining these grounds following the general demurrer was and is error, and that the filing of a general demurrer first in the order of demurrers by defendant was and is a waiver of any and all grounds of special demurrer."

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 199.*]

4. LIMITATION OF ACTIONS (§ 53*)—ACCOUNT- ING.

The administrator of the deceased owner of a judgment brought suit against the executrix of the administrator of one who, as attorney for

such owner, had the judgment in his hands for collection, to recover the amount collected by such executrix on the judgment, making the following allegations: The attorney obtained such judgment for the owner in 1875, and died with such judgment in his hands for collection. The administrator on his estate was appointed in 1883, and kept the judgment in life until his death. The defendant, who was executrix of the administrator of the attorney, undertook the collection of such judgment, and received the proceeds of the collection thereof in September, 1896. The owner was dead when the collection was made. His heirs at law had heard that the debt was discharged in bankruptcy proceedings, but were ignorant of the fact that any property was subject to the judgment, and did not know of the collection until about six months before this suit was brought. Soon after they knew of the collection by the defendant, the plaintiff was appointed administrator of the deceased owner of the judgment, and brought this suit, which was filed on the 19th day of October, 1907, against the defendant as an individual and as executrix to recover the amount she received in the collection of the judgment. *Held*, that the cause of action was barred by the statute of limitations, and the court committed no error in dismissing the petition on demurrer.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 53.*]

5. OTHER GROUNDS OF DEMURRER NOT CON- SIDERED.

In view of the ruling above made, it is unnecessary to consider the other grounds of the demurrer.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action between M. C. McClaren, administratrix, and M. K. Williams, executrix, and others. From the judgment, McClaren brings error. Affirmed.

H. B. Moss and Griffin & Attaway, for plaintiff in error. J. J. Northcutt, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(123 Ga. 221)

WILLIAMS v. GARBUTT LUMBER CO.

(Supreme Court of Georgia. Feb. 26, 1909.)

1. MASTER AND SERVANT (§§ 253, 259, 261*)— INJURIES TO SERVANT—PETITION—SUFFI- CIENCY.

In a suit by a servant against a master for a personal injury resulting from a log which was being loaded on a tram car slipping and rolling against him, the petition alleged in substance as follows: The injury resulted from the condition of a cant hook which was being used by a fellow servant, and which was so worn at the point of the hook and at the place where it joined the handle that it would not hold the log. Plaintiff was without fault, and he was not injured by any negligence of his fellow servant, but by reason of negligence of the master in furnishing a defective and unsafe cant hook to the fellow servant of plaintiff, and in not inspecting it. The plaintiff and his fellow servant were principally engaged in cutting logs, and were called to assist in loading only when necessary. The cant hooks were all carried on the log train and kept there or at the mill, at a distance of several miles from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the place where the plaintiff and his fellow servant were cutting logs. They were engaged in a different department of the work from that to which was intrusted the furnishing and taking care of cant hooks. The defect could only be discovered by inspection. The hook was not regularly used by or kept in the custody of the fellow servant. Neither the plaintiff nor the fellow servant knew of the defective condition of the tool, and they had no opportunity to know of it, as they would be called to where the cant hooks were, and would take any hook accessible, and immediately proceed to loading logs, having neither time nor opportunity for inspection. The fellow servant was only 18 years of age, and had not reached such years of discretion as to be trusted with such a tool, unless it had been inspected or he had been warned of the danger. The master knew, or by the exercise of ordinary care ought to have known, of the unsafe condition of the tool. *Held*, that the petition was not subject to general demurrer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 809, 837, 849; Dec. Dig. §§ 256, 259, 261.*]

2. MASTER AND SERVANT (§§ 101, 124*)—INJURIES TO SERVANT—PETITION — SUFFICIENCY.

The other grounds of the demurrer did not authorize the dismissal of the case.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 171, 180, 235; Dec. Dig. §§ 101, 124.*]

(Syllabus by the Court.)

3. WORDS AND PHRASES—"FLOGGING HAMMER."

A "flogging hammer" is a small sledge hammer used for striking a large cold-chisel in chipping castings.

Error from Superior Court, Ben Hill County; W. V. Whipple, Judge.

Personal injury action by S. P. Williams against the Garbutt Lumber Company. Judgment for defendant sustaining a demurrer to the amended petition, and plaintiff brings error. Reversed.

S. P. Williams brought suit against the Garbutt Lumber Company, alleging, in substance, as follows: On March 23, 1906, the plaintiff was in the employment of the defendant, his duties being to cut logs which were to be used at the sawmill of defendant, and which it was customary to transport by hauling them to the defendant company's tram road, and loading them on trucks which were drawn by a steam engine. The loading of the logs would sometimes require the work of more men than were engaged on the cars or trucks, and it was a part of the plaintiff's duties, whenever called upon to do so, to leave his business of sawing logs, and assist in loading them for transportation. He was subject to the orders of the woodman of the defendant in this respect. The usual method employed for getting the logs on the trucks was this: The logs would be hauled up and placed upon skids, and, when ready to be loaded upon trucks, laborers would slide or push the logs along these skids on what were called "jumpers," which were other logs or timber running from the skids

in an inclined direction upward to about the level of the top of the trucks. A long chain would be put around the logs, and mules would be hitched to it, and by driving the mules forward the logs would be pulled up the inclined plane and carried upon the trucks of the logging train. While they were thus being loaded, it was necessary that the logs should be handled by laborers using "cant hooks" for the purpose of turning them, holding them in proper position, and otherwise working with them to get them upon the trucks. On the date named the plaintiff and other laborers were called to assist in loading logs in the manner mentioned. They proceeded to do the loading in the usual way. Nick Williams, who was a laborer of the same kind as the plaintiff and engaged in the same work, was assisting in carrying the logs up the "jumpers" in the manner described. Plaintiff, having aided him in getting the logs started up the "jumpers" toward the trucks, turned for the purpose of starting the next log, as was necessary and proper to be done, in order to load the logs quickly, as it was their duty to do. Nick Williams placed the cant hook which he had under one end of the log which was then on its way up the "jumpers," for the purpose of keeping it from slipping back. This was the proper way to do in carrying out that work. The cant hook which Nick Williams was using was defective; the wooden part of it being so badly worn that the metal hook would not hold properly. By reason of such defective condition the pressure of the log upon the cant hook caused it to slip out of place and fail to hold the log as it should have done, and would have done save for the defendant. This caused the log to slip or roll down the "jumper," near which the plaintiff was standing, engaged in his duty of bringing forward the next log. The log thus sliding or rolling struck the plaintiff on the leg, breaking it and causing a serious injury (which was described). It was the duty of the defendant to furnish to its laborers safe tools and appliances for their work, and it was negligent in furnishing a defective cant hook for that purpose. This duty rested upon the defendant corporation, and the failure to discharge it was not due to any fault on the part of the plaintiff or any fellow servant. Plaintiff was not negligent, but used all reasonable care and diligence in the performance of his duty, and the injury was not due to the negligence of any fellow servant.

By amendment, it was alleged, in substance, as follows: The cant hook used by Nick Williams had become from long use somewhat worn at the point, and was not sharp enough to catch and hold the log upon which it was being used. The defects in it as set out here and in the original petition were not perceptible unless closely examined.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and, it being kept in the custody of the Garbutt Lumber Company, and not being regularly used or kept by Nick Williams, he had no occasion to inspect or examine it carefully. In fact, he did not do so, but took it and proceeded immediately to use it, relying upon it, thus furnished to him, as being in proper and safe condition for the work to be done. At the time of the injury to the plaintiff Nick Williams was a boy about 16 years of age, and, while physically able to perform the portion of the work expected of him, he had not reached the age of discretion and judgment at which it was proper to intrust him with the use of such a tool as a cant hook, unless it was carefully examined and inspected by the Garbutt Lumber Company or its agent employed for that purpose to see that the cant hook was a safe one for the work to be done with it; or unless the attention of Nick Williams was specially called to the danger of handling and using a cant hook that might not be in a perfect condition. The cant hooks used by the laborers were all carried on the logging train of the defendant, and were kept there at the mill, at a distance of several miles from the point where the plaintiff and Nick Williams were engaged in cutting logs. Nick Williams and the plaintiff were engaged in an entirely different department of work from that to which was intrusted the furnishing and taking care of the cant hooks. Nick Williams did not know of the defective condition of the cant hook used by him, nor did the plaintiff. When it became necessary to load the logging train, the plaintiff, Nick Williams, and other laborers, would leave their axes with which they were cutting logs and go to the logging train, where each laborer would take for his use any cant hook accessible; no particular one being assigned to any laborer. Immediately upon taking up the cant hooks, the plaintiff and other laborers would load the logs as they did on this occasion. Therefore they had no time or opportunity to inspect the cant hooks. Neither the plaintiff nor Nick Williams had a reasonable opportunity to know of the unsafe condition of the cant hook; but the Garbutt Lumber Company did have knowledge of its unsafe condition, or ought to have had by the exercise of ordinary diligence.

The defendant demurred to the petition as amended, the court sustained the demurrer, and the plaintiff excepted.

Haygood & Cutts, for plaintiff in error.
Hal Lawson, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The general rule requires a master to use ordinary diligence to furnish his servant with appliances reasonably suited for the use for which they are intended, and to use like diligence in inspecting and keeping them in proper condition for use. To this general rule some courts of other states have de-

clared that there exists what has been denominated an exception as to "simple tools." The basis on which this has been placed by some of the courts is that where a tool or instrumentality is so entirely simple in its nature and character that its condition can be seen at a glance, or that one who uses it has as good an opportunity as the master for knowing its condition, the servant cannot recover on the ground that the master did not inspect it. In some of the decisions there is a broad announcement that the master is under no duty to inspect such simple tools. It will be found, however, that in most of the cases where this rule or exception was applied the controversy was between the master and the servant to whom he furnished the tool, and where the defect and danger were so apparent that the servant was guilty of negligence in using the tool, or where he knew of its condition, or had equal opportunity with the master for knowing it. The apparent hardship of holding the master to a high degree of diligence relatively to his servant in regard to inspecting very simple things, the condition of which must be patent to the person using them, appears also to have had weight in some instances. Thus in the case of *Martin v. Highland Park Mfg. Co.*, 128 N. C. 264, 38 S. E. 878, 83 Am. St. Rep. 671, where an injury occurred from a fragment of steel which flew off from a hammer that was being used to drive a new key into a shaft, it was said: "Well, then, if defendant furnished its employes with tools known to it to be defective, or by ordinary care and inspection could have known of such defects, and the injury was caused by reason of such defects, then there would have been evidence of negligence to be submitted to the jury. But was there any apparent defect in the hammer? Or was there a defect known to the defendant or its agent? Or was the hammer used in a negligent, careless, or unworkmanlike manner? If such state of facts existed, the plaintiff failed to offer any evidence to prove it." And, after referring to whether the hammer was properly tempered or not, it was added: "Surely, it cannot be seriously contemplated that every employer is responsible for injuries occurring from improperly tempered axes, hoes, scythes, trace chains, lap links, bridle bits, etc., the imperfection of which could not be known till used, or for defective whiffle-trees, ax helves, hoe handles, hand spikes, plow lines, and such like (the defects of which would be first discovered by the party using them), unless the employer is shown to have had knowledge of such defects. If such be the rules of law, then the contentment of the farmer must give place to anxiety and dread lest injury, resulting to a servant from a splintered hoe helve or hand spike, defective bridle bit, whiffle-tree, or plow line, et id simile, may at any time occur, and sweep from him his farm and belongings in compensation of the damage done. To the same

experience would the contractor expect to be subjected should a defective nail, while being driven by one of his carpenters, break and do injury. To this doctrine we cannot subscribe." It was accordingly held that the mere occurrence of the injury was not sufficient to raise a presumption of negligence; it being stated that "in the case at bar there was no evidence that any defect in the hammer was known to exist either by the plaintiff or the defendant, nor is there any evidence to show that its condition was such as to incite an inquiry or suspicion."

The Supreme Court of Wisconsin, in *Stork v. Stolper Cooperage Co.*, 127 Wis. 318, 106 N. W. 841, discussed the basis of what is called the "simple tool" exception, as follows: "It may be conceded that, generally speaking, a monkey wrench is in such category; and the rule of law is well established in this state and elsewhere that in case of such simple tools no liability rests on the master for the ordinary perils resulting from their use, nor for those latent and usual defects or weaknesses which, by reason of the common, usual character of the appliances, are presumed to be known to all men alike. This exception from liability is, we believe, in all cases based upon the condition that the defect and peril are such that no superiority of knowledge in the master over the employé exists or can be presumed [citing authorities]. Another qualification of the master's liability indulged in case of such simple tools and appliances is exemption from a duty to inspect to ascertain the development of defects or disrepair in the course of their use, based also upon the assumption that such conditions are as much within the observation of the employé as of the master, if not more so [citing authorities]. While these rules result practically in a relaxation of the master's duty and liability in the case of such simple tools, they are not at all in denial of the general underlying principle of the law of negligence that one who knowingly exposes another to a likelihood of injury is liable therefor, in the absence of consent by such other or of contributory negligence. As stated above, the relaxation of the master's duty and liability rests on the assumed equality of knowledge and ability to discover the defect complained of. It can have no application to a defect of which the master is actually cognizant, and which, as a reasonable man, he should appreciate is likely to result in injury to one using the implement as it is likely to be used, and which is neither known to the employé nor of such a character as to be obvious to that observation which may be expected to accompany its use."

In a note to *Vanderpool v. Partridge*, 13 L. R. A. (N. S.) 668, is collected a number of cases on the subject. The annotator makes the following general observation: "The rule of respondeat superior rests upon the assumption that the employer has a better and more comprehensive knowledge than the employé,

and therefore ceases to be applicable where the employé's means of knowledge of the danger to be incurred is equal to that of the employer. Such is the case where the instrument or tool, the defect in which is the cause of the injury, is of so simple a character that a person accustomed to its use cannot fail to appreciate the risks incident thereto. The mere simplicity of a tool, as is apparent upon consideration of the basis above stated of the rule of respondeat superior, will not exempt the master from all care, or relieve him from liability under all circumstances; but the capacity, intelligence, and experience of the servant, the character of the defects, his opportunity for detecting them, his situation and the circumstances calculated to withdraw his attention from them, as well as the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise, are factors of varying importance, which must also be taken into account. The manner in which they operate will be further considered in connection with the various instrumentalities involved." And see 1 *Labatt on Master & Ser.* § 154. In *Chicago, Kan. & Western Ry. Co. v. Blevins*, 46 Kan. 370, 26 Pac. 687, an employé of a railway company who was working on a bridge was thrown off his balance, and injured by the fall. He claimed that this was caused by the rebound of a maul which he was using, and that this resulted from the unsafe and dangerous condition of the tool furnished him by the company, in that it had a cracked and crooked handle, and had become so badly battered and worn that it was uneven on the surface, which caused it to glance and rebound in such a way as to jerk him over and off his balance. The jury found in favor of the plaintiff. The case was carried to the Supreme Court, where the judgment was affirmed. That court held that the question of liability of the company depended upon whether its agents were negligent in furnishing an unsafe tool to the employé, or whether he was guilty of contributory negligence, and that what might be held ordinary care on the part of an employé under some circumstances might not be sufficient under others. It was said: "So, in this case, while there does not seem to have been a great degree of care exercised by Blevins (the plaintiff), yet, when we consider that the maul was handed him by the representative of the railroad company, which gave him a right to suppose it was safe, that he was in a high and dangerous position, which limited his opportunities for the inspection of the maul, and that the work at the time was being rushed, so that he was hurried and his opportunity for inspection of the maul thus interfered with, we do not care to say he did not exercise ordinary care under the circumstances." It would seem that an ordinary maul was a simple kind of tool, and

that its battered condition could be easily seen, but the circumstances under which it was furnished and the situation and surroundings were such as to leave the question of the diligence or negligence of the respective parties to be determined by the jury. What ordinary care requires a master to do in reference to a tool or instrumentality may be affected by the character of such tool or instrument; and so the simplicity of a tool and the obviousness of its condition may affect the servant in his use of it, and bear upon the question of diligence or negligence on his part. But the master is bound to use ordinary care; and if, under the circumstances of the particular case, it appears that he has not done so, he will not be freed from liability if the other elements necessary to a recovery by the servant exist. In most of the cases involving the matter of the simplicity of the tool used the question arose, under the evidence, as to whether the facts were such as to show a want of diligence on the part of the master, or negligence on the part of the servant, or equal opportunity for knowledge on the part of both. In a smaller number the sufficiency of the pleadings was involved. In nearly all of the adjudications where the simple-tool idea was considered, the question arose between the master and the servant to whom he furnished the tool for use, and not between the master and another servant who was injured by the breaking of the tool or its defective condition while being handled by the servant to whom it was furnished. In a few cases another servant was injured. The difference between the two does not seem to have been very carefully considered or discussed, but among the adjudicated cases, bearing on that subject there is conflict. In Michigan no distinction appears to have been made between the servant who used the tool and a fellow servant, where both were working together in making holes through a section of boiler iron. *Rawley v. Colliat*, 90 Mich. 31, 51 N. W. 350. And in a Minnesota case the injured employé was at work with another in cutting bolts from a rod of iron, and a piece of steel flew from the hammer in the hands of the other employé, causing the injury. *Koschman v. Ash*, 98 Minn. 312, 108 N. W. 514, 116 Am. St. Rep. 373. On the other hand, in *Campbell v. Gillespie Co.*, 69 N. J. Law, 279, 55 Atl. 276, it was declared that, "when the defect in the tool taken by the servant is obvious, the servant who takes it, although it is the only one on the premises, assumes the obvious risk of danger to himself, but he cannot assume an obvious risk in such case for a fellow servant who does not know of the danger." The case is cited, however, by the same court in a later decision where a somewhat broad view was announced. *Demato v. Hudson Co. Gas Co.* (N. J. Err. & App.) 67 Atl. 28. But there the employé injured was the same one who used the tool. In *L. & N. R. Co. v.*

Roberts (Ky.) 70 S. W. 833, it was said: "In this case it was not shown that it was appellee's duty to handle the implement found by the jury to have been defective; that is, the spike maul. Therefore the question of his opportunity to know its condition does not appear to have been relevant to this cause, because, at the outset, his opportunity for knowing would not be carried further than an examination of those tools with which he himself was required to work." In *De La Vergne Ref. Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471, 60 S. W. 319, in an action by an employé for an injury caused by a piece of steel flying off from a rivet hammer, the defendant requested the court to charge that as it was shown that such hammers were of the best make, and it was agreed that they had to be highly tempered, and were on that account necessarily to some degree brittle and liable to chip off, the plaintiff had assumed the risk of being injured by such chipping off. The evidence showed that the hammer had become cracked from use, and was more liable in that condition to chip off than when new. It was held that there was no error in refusing the request. "Nor was it error, under such state of facts, for the charge to submit the question as to whether or not defendant had used ordinary care in furnishing safe rivet hammers for the purpose for which they were being used. Where plaintiff's part of the work was merely to hold the rivet hammer while it was being used by another employé, and he had been engaged at such work only a few days, and there was testimony that he knew nothing about the condition of the hammer, it was for the jury to determine whether he knew, or was negligent in not knowing the danger, although the cracked condition of the hammer was apparent on a casual examination."

While in a number of cases, in dealing with the particular facts involved, it has been held that the tool then being used (such as a stick with which to push cars, an ordinary hammer, or the like) was so simple in its character that the servant had at least equal opportunity with the master for observing it, and that he was at fault for not doing so, or that the master could not be charged with negligence as a matter of law for not inspecting it, and that, therefore, in such cases there could be no recovery, no arbitrary and invariable rule can be laid down by which it can be declared that a master is relieved from the duty of inspecting certain specified tools, regardless of the circumstances of the case. Nor can a court well undertake to make a catalogue of tools by name, and say that as to injuries caused by them there shall be an arbitrary exemption from liability on the part of the master. At last the duty of the master must necessarily to some extent depend, not merely upon the name of the tool, but also the circumstances under which it is furnished or kept for use and under

which it is used. The underlying principle, rather than the name of the tool, is the important matter. An illustration of this may be seen in the fact that a hammer has sometimes been referred to as falling within the simple-tool exception, and yet a "flogging hammer," which is a small sledge hammer used for striking a large cold-chisel in chipping castings, was differentiated from it. See *Vant Hul v. Great Northern Ry. Co.*, 90 Minn. 329, 96 N. W. 789; *Morris v. Eastern Ry. Co.*, 88 Minn. 112, 92 N. W. 535; *Koschman v. Ash*, 98 Minn. 312, 108 N. W. 514, 116 Am. St. Rep. 373, *supra*. In the *Koschman Case* the *Vant Hul Case* was also distinguished from that then under consideration, because "the defendant not only manufactured the hammers, but kept them in a room fenced off for the purpose, and provided a tool inspector, whose duty it was, on the application of the workman, to hand out the tool for the particular purpose." In the *Morris Case*, too, it was alleged that there was a defect in the making of the tool; the defendant being also the manufacturer. In *Banks v. Schofield's Sons Co.*, 126 Ga. 667, 55 S. E. 939, a piece of steel flew from the end of a chisel which an employé was using in dressing or chipping the iron on the truck frame of an engine. It was held that, under the facts of the case as set out in the plaintiff's petition, the servant was not entitled to recover from the master damages on account of the injury so caused. The law in reference to the duty of a master in furnishing machinery to his servant, and the duty of the servant in regard thereto, as codified (Civ. Code 1895, §§ 2611, 2612), and the declaration there made, that, in a suit by a servant against the master for an injury arising from a defect in a machine, "it must appear that the master knew or ought to have known * * * of the defect or danger in the machinery supplied, and it must also appear that the servant injured did not know and had not equal means of knowing such facts, and by the exercise of ordinary care could not have known thereof," were treated as applicable in principle to the case then under consideration. It was said that: "The plaintiff's petition is fatally defective in three particulars: It fails to show that he did not know of the condition of the chisel before he was injured by its use; it shows that his means of knowing its condition were as good as those of the defendant; and it is apparent that by the use of ordinary care he could have known its condition." In this state, also, the character of the duties performed, whether the nonassignable duties of the master or not, has been adopted as the test of whether one is a fellow servant of an injured employé, rather than the grade of ranks of the servants respectively. *Moore v. Dublin Cotton Mills*, 127 Ga. 610, 56 S. E. 839, 10 L. R. A. (N. S.) 772.

We do not find it necessary in this state

to adopt any arbitrary rule as to tools bearing certain names or described somewhat indefinitely as "simple tools." If what is called the "simple-tool rule" is based on the principle of equality or superiority of opportunity for knowledge on the part of a servant, that principle forms a part of the test applied by our Civ. Code 1895 (sections 2611, 2612) in a suit against a master by a servant for an injury claimed to have arisen from the negligence of the master in failing to comply with the duties imposed on him in regard to machinery, and which, as already seen, has been held to apply in principle to cases arising from defective tools. The application of the rule that it must appear that the master knew or ought to have known of the defect or danger, and that the servant injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof, to the facts of the particular case under investigation, will furnish a solution of the question of liability or nonliability. In the determination of each case, the nature, character, and simplicity or complexity of the tool is, of course, an important factor for consideration. The case may be so plain, on the pleadings or evidence, that but one conclusion can legitimately be drawn, as in decisions of this court cited below; or it may be of such a character as, under the facts disclosed, requires submission to the jury. We do not in what is here said conflict with former rulings of this court as to what a petition must allege in a suit by an injured servant against a master; nor with those rulings where, under the evidence, considering the nature of the tool as well as the circumstances of the case, it was held that no negligence on the part of the master was shown, or that there was a want of ordinary care on the part of the servant, or that there was knowledge or equal opportunity for knowledge by the servant and assumption of risk by him, and that there could be no recovery. See *Lee v. Atlantic Coast Line R. Co.*, 125 Ga. 656, 54 S. E. 678; *E. Tenn., etc., Ry. Co. v. Perkins*, 88 Ga. 1, 13 S. E. 952; *Stewart v. Seaboard Air-Line Ry.*, 115 Ga. 624, 41 S. E. 981; *Moseley v. Schofield's Sons Co.*, 123 Ga. 197, 200, 51 S. E. 309, and similar cases. But the reason for each decision is the application of the underlying principles of the law governing the relation of master and servant to the facts as shown by the pleadings or evidence in the case before the court, rather than any arbitrary rulings as to a particular instrumentality bearing a given name. Nor is there anything contrary to this ruling in the decision in *Ga. Railroad & Banking Co. v. Nelms*, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308, where it was held that a hammer used by a track hand on a railroad was not a part of the "machinery" of the railroad company within the meaning of the statute

which declares that such a company shall be liable for any damage done to persons, stock, or other property "by the running of the locomotives or cars or other machinery" thereof.

In the case now before us it was alleged that the plaintiff and his fellow servant, Nick Williams, were employed by the lumber company to cut and saw logs which were to be used at the sawmill of the company; that it was customary to transport the logs by loading them on trucks drawn by a steam engine over a tram road; that the log cutters were sometimes required to leave their principal work and assist in loading the trucks; that the cant hooks used in loading were not regularly kept by them, but were kept in the custody of the company, being all carried on the log train and kept there, or at the mill, a distance of several miles from the point where the plaintiff and Nick Williams were engaged in cutting logs; that they were employed in an entirely different department of the work from that to which was intrusted the furnishing and taking care of the cant hooks; that when it was necessary in loading the logging train the plaintiff, Nick Williams, and other laborers, would leave their axes and go to the train, where each laborer would take for his use any cant hook accessible, no particular one being assigned to any laborer; that immediately upon doing so they would load the logs as they did on this occasion; that they had neither time nor opportunity to inspect the hooks, and that neither the plaintiff nor Nick Williams knew of the defective condition of the hook used by the latter, or had any reasonable opportunity to know of its condition, which was not perceptible unless closely examined, but the lumber company did have knowledge thereof, or ought to have it by the exercise of ordinary diligence; that Nick Williams did not keep or regularly use the cant hook, and had no occasion to inspect or examine it carefully, and did not do so, but took it and proceeded to use it, relying upon its being in proper and safe condition for the work to be done; that Nick Williams was a boy about 16 years of age, and, while physically able to perform the work expected of him, he had not reached the age of discretion and judgment at which it was proper to intrust him with the use of such a tool unless it was carefully examined and inspected by the company, or unless his attention was specially called to its dangerous condition; and that the cant hook used by Nick Williams was so badly worn, both as to the wooden part and at the point of the hook, that the metal hook would not hold a log properly. It was further alleged that the plaintiff was not injured by reason of negligence on the part of his co-employé, but by reason of that of the master. Under these allegations it cannot be said as matter of law that the master was free from fault, or

that the plaintiff, or even his fellow servant, had equal opportunity with the master for knowing of the danger, or that the plaintiff was lacking in ordinary care. Nor does merely calling the tool a "cant hook" alone serve to free the master as matter of law from liability under these allegations. The evidence when introduced may or may not make out a case authorizing a recovery by the plaintiff, but it cannot be said that the allegations of the petition failed to do so.

It was contended that if the master furnished tools which were good, and another which was bad, and a fellow servant selected the defective tool, this was the act of the fellow servant, and the master was not liable for the result. The allegations on this subject have already been mentioned. If the master discharged the duties imposed on him by law, and a fellow servant by virtue of his negligence caused the injury, the master would not be liable. But, if the master is guilty of negligence proximately causing the injury, he would not be freed from liability, although the fellow servant may likewise have been negligent. Under the plaintiff's allegations it does not appear that he was injured by reason of negligence of a fellow servant without negligence of the master. *Ocean Steamship Co. v. Matthews*, 86 Ga. 418, 12 S. E. 632; *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; *Loveless v. Standard Gold Mining Co.*, 116 Ga. 427, 42 S. E. 741, 59 L. R. A. 596; *Jackson v. Merchants' & Miners' Transportation Co.*, 118 Ga. 651, 45 S. E. 254.

The demurrer raises the contention that the plaintiff himself was negligent in turning to get another log, in not perceiving the danger, and in choosing a more dangerous way to perform his work, when he could have selected a safer one. It cannot be said from the face of the petition that the plaintiff was negligent, or chose between two ways to perform his work, one of which was fraught with danger. The demurrer is in part speaking in its character.

The case must be remanded to the trial court, where the facts may be fully developed by the evidence, and the question of liability determined under the law as applicable thereto.

Judgment reversed. All the Justices concur.

(132 Ga. 347)

DIXON v. MINNESOTA LUMBER CO.

(Supreme Court of Georgia. March 10, 1909.)

1. DISMISSAL AND NONSUIT (§ 79*)—DISMISSAL BY COURT OF ITS OWN MOTION.

When, upon the call of a suit pending in the superior court, neither party appeared, and, referring to the case, the judge merely made an entry on the trial docket, "November term, 1904, dismissed for want of prosecution," and the case was stricken from the docket, but no

order was ever taken, nor entry made on the minutes, by the judge, such entry, without more, was insufficient to accomplish a dismissal of the suit. *Williams v. Rawlins*, 33 Ga. 117 (10), 123. See, also, *Greenfield v. Vason*, 74 Ga. 126 (3).

(a) In a direct proceeding afterwards brought, attacking the validity of the entry and moving the court to re-enter the case upon the docket, it affirmatively appearing, from statements in the bill of exceptions, duly certified, that no order of dismissal was taken and entered upon the minutes of court, and that nothing else was done by the judge, except as first above indicated, it was erroneous for the judge to refuse to re-enter the case on the docket, to be disposed of in accordance with law.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 175; Dec. Dig. § 79.*]

2. OTHER DECISIONS DISTINGUISHED.

Nothing said here is in conflict with the rulings made in *Clarke v. Western Union Tel. Co.*, 112 Ga. 633, 37 S. E. 870, *Thornton v. Perry*, 101 Ga. 608, 29 S. E. 24 (1), and *Armstrong v. Lewis*, 61 Ga. 680. The rulings there made dealt with the entry of the judge merely as evidentiary in character, and held that, there being no direct attack upon the entry, and the recitals thereof being presumed to be true, the entries could not be controverted in a collateral proceeding.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action between S. E. Dixon, administratrix, and the Minnesota Lumber Company. From the judgment, S. E. Dixon brings error. Reversed.

R. G. Dickerson and J. L. Sweat, for plaintiff in error. S. C. Townsend and Wilson, Bennett & Lambdin, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(132 Ga. 300)

FLURY v. HIGHTOWER BOX & TANK CO.
(Supreme Court of Georgia. March 10, 1909.)

MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—NONSUIT.

This being a suit for recovery of damages on account of personal injuries, and it appearing from the evidence for the plaintiff that his opportunities of discovering the defective condition of the machine, in the operation of which the injuries complained of were received, were equal or superior to those of the master (defendant), and that he had in fact observed the defects, recovery by the plaintiff would have been unauthorized by the evidence, and the court did not err in granting a nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1072-1078; Dec. Dig. § 288.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. A. Flury against the Hightower Box & Tank Company. Judgment for defendant, and both parties bring error. Affirmed, and cross-bill of exceptions dismissed.

Ben J. Conyers and Walter T. Colquitt, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

BECK, J. The plaintiff brought suit against the defendant company for the recovery of damages for injuries alleged to have been sustained by him while engaged as an employé of the company in operating a machine known as a "rip saw." In the declaration it is averred that the machine, which he was directed to operate, was defective, in that the opening of the table, through which the saw ran, was worn by constant use until it was larger than it should have been, and that the saw had too much play while in operation through the opening. It is also alleged that the defective and dangerous condition of the saw was not known to the petitioner, but was known to the defendant. The plaintiff further alleged that he did not know of the defects, that they were not discoverable by him in the exercise of ordinary care, and that he had not equal means with the defendant of discovering the defects. While he was engaged in sawing narrow strips of lumber upon said saw, one of the strips was caught in the saw, pulled down in the opening through which the saw revolved, and plaintiff's right hand was carried with the piece of plank down and against the saw, with the result that the thumb and fingers on that hand were cut off. After the plaintiff had introduced testimony and closed his case, the court, upon motion of the defendant, granted a nonsuit; and this judgment is excepted to.

Under the evidence, the court did not err in rendering the judgment complained of. The defects in the machine which the plaintiff was engaged in operating when he received the injuries stated, as appears from the testimony of the plaintiff himself, were not only discoverable in the exercise of ordinary care, but they were defects which were as well known to the plaintiff as to the defendant, if not better. He was a man of intelligence and experience. He had been employed for several months in the operating of saws of different kinds, and had been engaged for two months, or longer, in the operation of the rip saw by which his hand was mutilated. He had seen and noticed the width of the aperture through which the saw revolved. He saw and knew the width and thickness of the plank that was being sawed at the time his fingers were brought in contact with the revolving saw. While the specific defects in the fitting of the saw had not been pointed out to him, he had observed them, and he had been cautioned generally as to the danger of coming in contact with the saw itself. If the operation of the machine was dangerous at the time the injuries complained of were received, the plaintiff assumed the risk, with all the

defects patent and staring him in the face. Under the facts of this case, a verdict for the plaintiff would have been entirely unauthorized by the evidence.

But counsel insist that a general demurrer to the petition had been overruled, and that all the material allegations were supported by evidence. This proposition cannot be assented to. The vital and essential allegation that the defective condition of the machine—that is, the table and the aperture of the same, through which the saw revolved—"was unknown to plaintiff, was not discovered by him in the exercise of ordinary care, and plaintiff had not equal means with defendant of discovering said defect," does not find support in the evidence of plaintiff himself. Besides this, other material allegations in the declaration were contradicted by the evidence.

Judgment affirmed. Cross-bills of exceptions dismissed. All the Justices concur.

(132 Ga. 310)

ROBERTSON v. HEATH.

(Supreme Court of Georgia. March 10, 1909.)

1. TRIAL (§ 85*)—OBJECTIONS TO EVIDENCE.

Where, on a proceeding by writ of habeas corpus to determine the custody of a child, certain affidavits were offered, and objection was made to them as a whole on the ground that they were irrelevant, hearsay, and stated opinions, instead of facts, and many of the statements contained in them were not subject to such objection, there was no error in overruling it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

2. HABEAS CORPUS (§ 85*)—PROCEDURE—RECEPTION OF EVIDENCE.

Where the writ of habeas corpus is used as a means of determining the custody of an infant, the better practice is to hear evidence viva voce, or taken by deposition or interrogatories, after notice and with opportunity for cross-examination. But this is not an absolute and inflexible rule, and the presiding judge is vested with discretion as to admitting affidavits under the circumstances of a particular case which render it necessary or proper.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85.*]

3. HABEAS CORPUS (§ 85*) — CUSTODY OF CHILD—EVIDENCE.

On the merits of this case, there was no error in awarding the custody of the child to the father, instead of to the maternal grandmother.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85.*]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Application by C. F. Heath for a writ of habeas corpus against S. E. Robertson to obtain possession of a child. Judgment for petitioner, and defendant brings error. Affirmed.

Boykin Wright, for plaintiff in error. C. Henry & R. S. Cohen, for defendant in error.

LUMPKIN, J. C. F. Heath obtained a writ of habeas corpus against Mrs. S. E. Robertson, for the purpose of securing the custody of his child, a girl four years of age, alleged to be illegally held by the respondent, in disregard of his parental rights. The respondent, who was the maternal grandmother of the child, claimed that the father had relinquished to her his parental control, by a valid and binding contract, when the child was only a few weeks old, and after the death of its mother. The father, who had remarried, denied this. The evidence was conflicting. The presiding judge awarded the custody to the father, and the grandmother excepted.

1. On the hearing most of the evidence was delivered orally by the witnesses. Three affidavits were offered by the plaintiff, tending to support other evidence in his favor, by which it was sought to prove, among other things, that he expressed unwillingness to part with the custody of the child permanently and declined to do so. Objection was made to their admission, "on the ground that they were irrelevant, hearsay, stated opinions, instead of facts, and for the further reason that respondent was denied the right and privilege of cross-examining the witnesses." The objection was overruled. Many of the recitals in the affidavits were relevant, were not hearsay, and were not mere opinions. Thus there were statements that the father sent money and clothes to the respondent for the support of the child, and that he has asked the respondent if she needed any more money for that purpose and received a negative answer. The objection was to the affidavits as a whole. If any special parts of them were subject to objection, they were not pointed out.

2. The question then arises, were these affidavits properly admitted over objection on the ground that the respondent was denied the right of cross-examination? Properly exercised, this is an important right. Its function is not merely to confuse or harass adverse witnesses, but to develop the whole truth, which does not always fully appear from the testimony of a witness on his examination in chief. Facts may be omitted, without any wrongful intent, which give an entirely different appearance to the case; or, if feeling or interest colors the evidence of a witness, whether intentionally or not, this can often be made to appear. Generally speaking, testimony is not admissible, on a final trial of the issues in a case, where there has been no opportunity for cross-examination, save in certain special instances, which the law writers treat as exceptions to the rule excluding hearsay evidence. On the hearing under a writ of habeas corpus, involving the custody of a child, the better practice is to require the testimony to be delivered from the stand, or by depositions

or interrogatories duly taken, with the privilege of cross-examination preserved, where practicable. Affidavits are often unsatisfactory at best. The affiant swears that what he states is true; but he does not swear that it is the whole truth, nor has the adverse party an opportunity to inquire whether it is so. We do not commend the practice of determining so important a question as the awarding of the custody of a child, with all the possible consequences to its future life and happiness, upon mere *ex parte* affidavits, as a general practice. Such a decision is final, under the circumstances then presented.

But the introduction of affidavits in certain instances is permissible. It has long been the recognized practice to use affidavits on the hearing of applications for interlocutory injunctions or for the appointment of receivers *pendente lite*. It has been held permissible, on the hearing of applications for temporary alimony, to cause witnesses to be sworn, subject to cross-examination, or to admit affidavits. *Rogers v. Rogers*, 103 Ga. 763, 30 S. E. 659. Personally, when he was a judge of the superior court, the writer found the former method far more satisfactory, though less expeditious; and no doubt other trial judges have had the same experience. To see and listen to a witness for ten minutes, with the privilege on the part of the court to interpose a question when it is necessary for the full development of the truth, often gives the presiding judge a clearer insight into the real situation, in an alimony case, where his discretion is invoked, where the feelings of the parties are frequently deeply stirred, and where the judgment may be enforced by imprisonment, than to listen to affidavits for an hour. In such a case, there is not infrequently an indisposition to tell the whole truth, and thus open the door of the closet where the family skeleton may lie concealed. Affidavits on the same side are sometimes as uniform in appearance as eggs in the shell; but, if one of them be prodded with the point of a cross-question or two, the yolk is at once exposed.

Still the rule is not arbitrary or inflexible in certain hearings. On the subject of writs of habeas corpus to test the legality of the detention of one deprived of his liberty, *Pen. Code* 1895, § 1222, provides as follows: "If the return denies any of the material facts stated in the petition, or alleges others upon which issue is taken, the judge hearing the return may, in a summary manner, hear testimony as to the issue, and to that end may compel the attendance of witnesses, the production of papers, or may adjourn the examination of the question, or exercise any other power of a court which the principles of justice may require." The writ is also used as a means of determining the custody of minor children. The presiding judge often has to use great discretion in judging of the status of parties and what is for the welfare of the child. He needs all the light he can obtain

for the just and faithful discharge of his duty. It may be that a witness is beyond seas, or inaccessible, or for other reason cannot be put upon the stand. The writ is a speedy writ. The proceeding is summary in its nature. It is a judicial proceeding, and to be conducted in an orderly manner as such. But it is not exactly a lawsuit in the ordinary sense of the term. *Simmons v. Ga. Iron & Coal Co.*, 117 Ga. 309, 43 S. E. 780, 61 L. R. A. 739. To delay its hearing until a witness absent from the state or the country can return, or until interrogatories can be prepared, notice given, cross-questions propounded in writing, and commission forwarded to a distant state or country, and there formally executed, might require so much time that the hearing under the writ would be unreasonably delayed. It may be necessary to admit an affidavit, or, in default of it, to exclude much needed light altogether; or there may be other circumstances rendering the use of affidavits proper. On this subject the presiding judge must be allowed some discretion. This is certainly true when the question is entirely of a civil nature, and not involving criminal law. In 15 Am. & Eng. Enc. Law (2d Ed.) 208, referring to habeas corpus cases, it is said: "The use of affidavits in evidence is now authorized by statute both in England and in the United States, though the practice existed in England before the enactment of the statute. Thus affidavits may be used to enlarge the time of the return, to fortify the return, or to controvert the truth of its recitals, but not to deny the existence of any facts found by the court. So, too, affidavits are admissible in proof of facts which, conceding the return to be true, will show the detention to be illegal." In so far as this statement is based on the express provisions of statutes, it does not apply in this state, where the only statute bearing on the subject is that quoted above. Nor does it mean that the guilt or innocence of a person indicted or arrested under regular process for a criminal offense can be tried and determined in this summary manner.

In *Hurd on Habeas Corpus* (2d Ed.) 304, it is said: "It was not provided by statute in England, until the passage of St. 56 Geo. III, c. 100, § 3, that the truth of the facts set forth in the return, in cases other than commitments for criminal or supposed criminal matter, might be examined into by affidavit; but it was nevertheless the practice to do so long before that period. And the same practice prevails in other summary proceedings, such as interlocutory applications in chancery, and various motions in actions of law, to set aside judgments, to obtain attachments, to enter satisfaction, etc., and in criminal proceedings, for leave to file a criminal information, and, after conviction of misdemeanor, for leave to show matter in aggravation by the prosecutor, or in mitigation by the defendant." In *Church on Habeas Corpus* (2d Ed.) p. 289, § 207, it is said:

"This species of evidence is of very low order, and it is with reluctance that judges and courts will receive it in many cases. It is received with caution and closely scrutinized. Affidavits are highly objectionable if not taken before competent authority and properly authenticated; but when they are so taken, though without notice to the adverse party, they may be offered and received in evidence, but their reception is addressed to the sound discretion of the court, which must be regulated by the circumstances of each particular case. Affidavits should not be used where the attendance of witnesses can be obtained with reasonable diligence, and when this can be done the attendance of witnesses will be required in examinations in criminal proceedings." In *State v. Lyon*, 1 N. J. Law, 409, on the original hearing had upon the return of the writ of habeas corpus, an affidavit, taken ex parte and not entitled in the cause, was offered in evidence, and objection was made to its admission. The court said: "This evidence has been objected to on the ground that it is ex parte and taken without any notice being previously given to the person against whom it is designed to operate. The party adducing it is bound to show that the testimony is legal, and taken in a mode conformable to law. The fact which constitutes the ground of objection has not been denied, and, as we are not satisfied that there exist any reasons to take it out of the general rule, the evidence must be overruled."

In *Hurd on Habeas Corpus*, pp. 306, 307, it is said: "In the *D'Hautville Case*, in the Court of General Sessions of the City and County of Philadelphia, in 1840, ex parte affidavits, taken before the writ of habeas corpus was sued out, were rejected by the court, which thought the 'admission of such evidence would be a dangerous precedent.' The court, however, admitted that it was within their discretion to receive the affidavits. They held that the party offering them could not insist upon their reception as a matter of right, and that under the circumstances of the case, the conduct of the relator in giving notice of the taking of other evidence subsequent to the date of the writ, and the lapse of time, affording ample opportunity to take the evidence contained in the affidavits objected to on like notice, they ought not to be received." In *Verser v. Ford*, 37 Ark. 27, it is said: "In deciding contests upon writs of habeas corpus for the custody of infant children, the principles adopted in the chancery court must govern. No rigid rules to govern the practice have or can be formulated." See, also, *Church on Habeas Corpus* (2d Ed.) §§ 154, 212.

As an illustration of an English case arising under a writ of habeas corpus to test the custody of a minor, in which affidavits were used, mention may be made of the celebrated case of *King v. Delaval*, 1 Wm. Bl. 410, 439.

Without entering into a discussion of St. 31 Car. II, or St. 56 Geo. III, c. 100, touching the writ of habeas corpus, or whether it is permissible to use affidavits in cases involving criminal matters in this state, it is sufficient to say that, where the writ is used as a means of determining the custody of an infant, the better practice is to hear evidence viva voce, or taken after notice and with opportunity for cross-examination, where practicable, but that this is not an inflexible rule, and that the presiding judge is vested with discretion as to admitting affidavits, under the circumstances of the case.

In the proceeding now before us, the presiding judge, in the exercise of his discretion, admitted certain affidavits. The plaintiff in error, who assigns this ruling as error, carries the burden of showing that it is such. The record discloses nothing as to the circumstances on which the court based his ruling, nor any facts which would show that there was an abuse of discretion in it. They were cumulative, also, of very positive testimony delivered on the stand by the applicant for the writ. Under the facts as disclosed by the record, we cannot say that there was any such error in this ruling as to require a reversal.

3. On the merits of the case it may be said that there is no unusual feature to differentiate it from others of like kind. The child's mother died. The father left his infant daughter with her maternal grandmother. Later he remarried, and desired the custody of his child, which was refused. Prima facie, in the absence of anything to the contrary, the father is entitled to the custody of his child. No question of unfitness or inability to care for the child was made. The grandmother contended that the father had relinquished to her his parental control by contract. He denied that he had done so. The evidence was conflicting, but was amply sufficient to sustain the finding of the presiding judge in favor of the father. No sufficient reason is shown why this judgment should be reversed.

Judgment affirmed. All the Justices concur.

(132 Ga. 280)

PUSSER et ux. v. A. J. THOMPSON & CO.
(Supreme Court of Georgia. March 10, 1909.)

1. LIMITATION OF ACTIONS (§ 167*)—OPERATION—BAR OF DEBT AS AFFECTING SECURITY—EQUITABLE MORTGAGE.

Where a deed under seal was made, conveying title in order to secure an indebtedness represented by a promissory note, under Civ. Code 1895, § 2771 et seq., and on its face it recited the debt and the purpose to secure it, although suit on the note became barred by the statute of limitations, the creditor could foreclose the deed as an equitable mortgage within 20 years from its execution.

[Ed. Note.—For other cases, see Limitation of Actions. Cent. Dig. § 652; Dec. Dig. § 167.*]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

While an instruction to the jury "that the presumption of law is against usury, and the burden would then be upon the defendant in this case, who sets up usury as a defense, to establish the existence of usury in the contract to your satisfaction," was not entirely apt or exact in expression, yet, when taken in connection with the entire charge, it does not require a reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

3. GROUNDS FOR NEW TRIAL.

There was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by A. J. Thompson & Co. against David Pusser and wife. Judgment for plaintiffs, and defendants bring error. Affirmed.

On February 6, 1892, David Pusser made to A. J. Thompson & Co. a promissory note for \$410.71, due on the 1st day of October after date. It was not a sealed instrument, under the law of this state. On the same day he executed to Thompson & Co., who were stated to be a firm composed of A. J. Thompson and G. P. Stubbs, a deed conveying certain described land. In the body of the instrument, as set out in the record, was the following clause: "This conveyance is intended to operate as provided in sections 1869, 1970, and 1971 of the Code of 1882, in regard to the sale of property to secure debts, and to pass the title of the property described into the said A. J. Thompson & Co., the debt hereby secured being one promissory note, for \$10.71 [\$410.71?], dated this day and due October 1, 1892." It was also provided that, if the debt should not be paid promptly at maturity, the grantees, their agents, or legal representatives, should be authorized to advertise the property and sell it at public outcry, making a conveyance to the purchaser in fee simple, "thereby divesting out of the said David Pusser all right and equity that he may have in and to said property, and vesting the same in the purchaser or purchasers aforesaid." In that event the proceeds were to be first applied to the payment of the debt and expenses of the sale, and the balance, if any, to be paid to Pusser. The note was not paid at maturity, and thereafter the right to bring suit on it became barred by the statute of limitations. In 1906 the holder of the security deed (the surviving partner of the firm) filed a petition in the superior court, alleging the making of the note, the giving of the deed to secure the debt, that it had not been paid, and that Pusser had remained in possession continuously since the note and deed were made. It was prayed that the security deed be foreclosed as an equitable mortgage; that the land be sold, the proceeds be applied to the liquidation of the debt specified

in such deed and the payment of costs of the proceeding, and the surplus, if any, be paid over to Pusser; and that his equity of redemption be forever barred. A general judgment on the note and for attorney's fees was also prayed, but this was stricken on demurrer. A demurrer was interposed on the grounds that the instrument referred to in the petition was not a mortgage, but a deed to secure a debt, and could not be foreclosed as a mortgage, and that the plaintiff had an adequate remedy at law, and was not entitled to any decree of foreclosure. These grounds of demurrer were overruled. The defendants pleaded that there was usury in the transaction, that the title which the deed purported to convey was thereby rendered void, and that accordingly the instrument could not be foreclosed or enforced. The jury found for the plaintiff. A motion for a new trial was made and overruled, and the defendants (Pusser's wife having been joined with him) excepted.

Herbert L. Grice and Tomlinson Fort, for plaintiffs in error. H. F. Lawson and W. G. & Warren Grice, for defendants in error.

LUMPKIN, J. (after stating the facts as above). 1. The principal question in this case is whether the plaintiff could proceed by equitable petition to foreclose the security deed as an equitable mortgage. At common law a mortgage was originally treated as a conveyance of property, defeasible by the payment of the debt secured when due. The title conveyed was like other estates defeasible upon condition subsequent. To relieve debtors from the hardship resulting from a forfeiture or loss of the property by mere failure to pay promptly, often resulting in an unconscionable advantage to the creditor and the obtaining by him of property valued far beyond the debt secured, equity interposed and permitted them to redeem the land by the payment of principal and interest, instead of losing it entirely. Efforts were made by creditors to shape contracts which would forfeit the property to them on non-payment, or prevent redemption; but such attempts met with but little favor in courts of equity. Thus grew up the somewhat peculiar situation that in courts of law a mortgage conveyed a title defeasible upon condition, while in courts of equity the real nature of the transaction—the securing of payment to the creditor—was considered, and redemption was allowed after default in making payment according to the promise. Thus came to be established what is known as the "equity of redemption," which in modern times has been recognized as the right of the mortgagor, and for many purposes he has been treated as the substantial owner of the land, except as against the secured creditor. Lord Mansfield went quite far in ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pressing this view, and in referring to a mortgage as only a security. In America a number of states have adopted the plan of treating a mortgage only as a security or lien, rather than as a conveyance of title. 1 Jones on Mortgages (6th Ed.) § 6 et seq. Such is the status of a mortgage in Georgia, where Civ. Code 1895, § 2723, declares that "a mortgage in this state is only a security for debt, and passes no title." As a natural result of holding a mortgage to be a mere lien, other things might intervene and seriously interfere with the security. A power of sale contained in a mortgage was held to terminate upon the death of the mortgagor. A year's support for the family or dower for the widow might claim precedence. In order to provide greater security for the creditor, and to prevent matters of the kind referred to from endangering the collection of the debt, the Legislature provided that a conveyance of the actual title could be made, with bond to reconvey upon payment. Provision was also made by which the creditor, upon upon recovering judgment against his debtor, might file and have recorded a deed reconveying the property to the latter, and levy on and sell it for the debt; and priority was given to him, upon pursuing the statutory remedy, over other judgments against the debtor.

It will be observed that this authorized the conveyance of title as security, somewhat analogous to the common-law mortgage. Upon nonpayment, the creditor could proceed as above indicated, or he could bring ejectment against his debtor, and recover possession of the land. Still the substantial fact that this conveyance was for the purpose of security, and not to convey an indefeasible title, was recognized. In 1889 the Legislature passed an act providing that, where such deed was made to secure a debt, the surrender and cancellation of the deed in the same manner that mortgages are canceled, on payment of the debt, should operate to reconvey the title, "and such cancellation may be entered of record by the clerk of the superior court in the same manner that cancellations of mortgages are now entered." Civ. Code 1895, § 2774. By section 2775 it is declared that the vendor's right to reconveyance of the property, upon compliance with the contract, shall not be affected by any liens, incumbrances, or rights which would otherwise attach to the property by virtue of the title being in the vendee; but the right of the vendor to a reconveyance shall be absolute and permanent upon his compliance with his contract with the vendee, according to the terms thereof. It has been held that if the holder of such a deed sues the maker in ejectment or complaint for land, and recovers possession, he does not hold it absolutely freed from all claim on the part of the debtor; but the latter may still bring him to an accounting, and repossess himself of the land upon payment of the

debt. *Polhill v. Brown*, 84 Ga. 338 (10), 10 S. E. 921. If suit is brought by the holder of the deed to recover possession of the land from the maker, the latter may file an equitable plea, and prevent the recovery by paying the amount due. *Id.*; *Lackey v. Bostwick*, 54 Ga. 45. As against the rest of the world, except the creditor or one claiming under him, the debtor remaining in possession is so far treated as the owner that he may defend an action of ejectment, or may bring one if evicted, and the security deed which he has made, subject to the contract to reconvey on payment of the debt, cannot be set up against him as paramount outstanding title by a person who does not connect his title therewith. *Ashley v. Cook*, 109 Ga. 653, 35 S. E. 89.

These illustrations will suffice to show that while a conveyance may be made to secure a debt, which will carry the title, and not stand exactly like a mortgage in the ordinary form, yet in many ways the substance of the transaction, that the underlying purpose is to secure a debt, and that there are equities remaining in the debtor, is recognized. The deed made in this case on its face recognized an equity in the debtor after failure to pay the debt at maturity, by authorizing the creditor, if he saw fit, to make sale, discharge the debt, and pay the balance to the debtor. A consideration of what has been said naturally leads to an understanding of the reason underlying decisions which have been made on the subject of whether such a deed can be foreclosed as an equitable mortgage, by petition invoking the equitable jurisdiction of the court. By section 2725 of the Civil Code of 1895 it is declared that "a deed or bill of sale, absolute on its face and accompanied with possession of the property, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried." Where such a deed was given without referring to the indebtedness, and apparently conveying an absolute title, but the debtor remained in possession, it was held that he (or rather his widow, in a contest with other creditors) could show that the conveyance was only intended to secure a debt, and thus operated as an equitable mortgage. *Carter v. Hallahan*, 61 Ga. 314. On such a title the creditor could bring ejectment, or, if he chose, the deed could be foreclosed in equity as an equitable mortgage. *Bateman v. Archer*, 65 Ga. 271. In *Wofford v. Wyly*, 72 Ga. 863, a deed made to secure a debt, though absolute in form, where the debtor remained in possession, was treated as an equitable mortgage, and subject to equitable defenses, when an action of ejectment to recover the land was brought upon it. In *Broach v. Smith*, 75 Ga. 159, it was held that "a conveyance made under section 1969 of the Code [section 2771 of the Civil Code of 1895] to secure a debt, and which

is void as title on account of usury, cannot be foreclosed as an equitable mortgage." The inference may be drawn that, if the deed had not been void for usury, it might have been so foreclosed, though this was not affirmatively ruled. In *Merrihew v. Fort* (C. C.) 98 Fed. 899, the District Judge of the United States, presiding in the Circuit Court, held that, "under Civ. Code Ga. 1895, § 2771 et seq., a deed to real estate, given to secure a debt, may be foreclosed by the grantee as a mortgage, notwithstanding a provision therein that it is to be construed as a deed passing title, and not as a mortgage; such provision being one for the benefit of the grantee, which he may waive at his election." See, also, *Ray v. Tatum*, 72 Fed. 112, 18 C. O. A. 464; *Bank of the Metropolis v. Guttschlick*, 14 Pet. 20, 10 L. Ed. 335. In North Carolina and West Virginia deeds of trust to secure an indebtedness, as there customarily made, have been treated as equitable mortgages. *Arrington v. Rowland*, 97 N. C. 127, 1 S. E. 555; *Criss v. Criss*, 28 W. Va. 388; 1 *Jones on Mortgages* (6th Ed.) §§ 62, 162, et seq. See, also, *Hester v. Gairdner*, 128 Ga. 531, 58 S. E. 165.

While the statute provides a method by which a judgment can be obtained against a debtor, a reconveyance made for the purpose of levying and a sale made, with certain advantages and priorities in favor of the creditor pursuing such method, and while he also has the option to bring suit for the recovery of possession of the land by virtue of the title conveyed by the security deed, yet this does not prevent him, if he so chooses, from treating the instrument as an equitable mortgage and proceeding to foreclose it by equitable petition. If he elects to do so, what effect, if any, it may have on the priorities and advantages given to him, where he proceeds in strict conformity to the statute, is not in question. The contention now made is as to whether he can pursue the remedy of filing an equitable petition to foreclose the instrument as an equitable mortgage, instead of pursuing the statutory plan. We think that he can do so. Even if ordinarily such a deed could not be treated by the grantee as an equitable mortgage, and foreclosed as such, there is a special reason why he should be allowed to do so in this case. Suit on the note is barred by the statute of limitations. He cannot, therefore, recover judgment on it, file a deed and levy upon the land on the manner pointed out by the statute. But the debt remains unpaid. If he should bring ejectment against the debtor and recover possession, that would not satisfy the debtor, nor would it operate as a finality as to the equities between them; but, as already stated, it has been held that, after recovery of possession, he could not hold the land as the absolute, indefeasible owner, but would be subject to an equitable accounting for rents, issues, and profits, and to have

the land ultimately restored to the debtor when the debt had been discharged. Why should the creditor be compelled to recover possession and hold it subject to an equity on the part of the debtor? He may do so, but will the law hold him to that method of procedure? If there are equities which may ultimately require adjustment between parties, why should a court having equitable jurisdiction refuse to adjust them now, instead of compelling one of the parties to wait until, at some definite time, he may be called on to do so by the other, or perhaps by lapse of time, death, forgetfulness, or other reason it has become difficult to clearly prove the facts? One of the maxims of equity is "Vigilantibus, non dormientibus, jura subveniunt." If to the vigilant, rather than to those who sleep over their rights or delay in asserting them, equity gives aid, and if laches in appealing to a court of equity sometimes furnishes reason for refusing relief, why should a court which administers equitable remedies refuse to finally adjust and determine the equities existing between the parties in a case like the one before us, and compel the secured creditor to resort to an inadequate legal remedy, and one which neither gives him absolute and infeasible title nor repays him his money, and postpones indefinitely the final settlement or adjustment between him and his debtor? This would be not merely to permit the exercise of a privilege similar to that which existed in England of entering upon mortgaged property and working out the debt, but would compel the creditor to take that course.

The decisions in the cases of *Story v. Dorris*, 110 Ga. 65, 35 S. E. 314, and *Duke v. Story*, 116 Ga. 388, 42 S. E. 722, do not conflict with what is here held. In the former of those two cases the debt to secure which an absolute conveyance was made became barred by the statute of limitations. The deed made no reference to it, but was absolute on its face. It was executed, also, not by the debtor himself, but one from whom he had contracted to purchase the land. The agreement that the title so conveyed should be held as a security rested entirely in parol. It was held that, after the right to sue upon the debt had become barred, equity would not undertake to foreclose "the equivalent of what might be termed an oral mortgage," there being nothing in writing or under seal to bind the debtor or prove an unbarred debt. So, likewise, in the case of *Duke v. Story*, it was held that "a security deed which does not refer in any way to the debt to secure which it was given, or furnish any evidence of its existence, cannot be foreclosed as an equitable mortgage, and a money judgment obtained thereon, if the obligation secured by the deed is barred by the statute of limitations." Neither of these decisions repudiate, but both recognize, the doctrine announced in *Elkins v. Edwards*, 8 Ga. 325, where it was held that "when a creditor takes a mortgage

to secure the payment of a promissory note, and the remedy on the latter is barred by the statute of limitations, his remedy, on the mortgage, is not necessarily barred, the debt being unpaid; but the creditor may avail himself of the statutory remedy to foreclose his mortgage, in satisfaction of his debt." In that case the mortgage was given to secure certain notes; and, the debt being thus referred to and described in a sealed instrument made to secure it, the fact that the remedy by suit upon the notes was barred did not destroy or bar the right to foreclose the mortgage. The difference will be readily perceived between a deed absolute on its face and containing no reference to a debt, where the only evidence of the indebtedness rests in parol or in a separate note suit on which is barred by the statute of limitations, and a mortgage or security deed under seal, which contains in itself evidence of the indebtedness which it was given to secure.

There was no error in overruling the demurrer. It contained one or two other grounds besides that above discussed, but they are not referred to in the brief of counsel for plaintiff in error.

2, 3. The grounds of the motion for a new trial contain nothing which requires a reversal. The evidence was conflicting as to whether there was usury in the original transaction when the security deed was executed, or whether some time thereafter, as an independent transaction, an effort was made to charge usury; but it was not such as to demand a finding that the deed was infected with usury, and was therefore void.

The court instructed the jury "that the presumption of law is against usury, and the burden would be upon the defendant in this case, who sets up usury as a defense, to establish the existence of usury in the contract to your satisfaction." This expression was perhaps not technically accurate or apt; but, when taken in connection with the entire charge, it practically informed the jury that when a deed to secure a debt was apparently regular and lawful, and did not disclose any usury on its face, and the defendant sought to have it declared void by setting up that it was infected with usury, this was an affirmative plea, and the burden of establishing it would rest upon the defendant.

Exception was taken to the use of the expression "the presumption of law is against usury." It might be interesting, but would be aside from the necessities of the case, to trace the history of many presumptions of law—how at first they were mere inferences of fact, which the jury might draw if they saw fit; how, after having undergone a novitate in the jury box alone, they then arose to the dignity of furnishing a prima facie presumption, which was rebuttable; and how some of them were ultimately graduated into the circle of conclusive presumptions of law.

From the entire charge it was evident that the court did not lead the jury to believe that there was any conclusive presumption against usury, but merely that he who set up affirmatively the existence of usury, and sought to avoid a deed by doing so, carried the burden of sustaining his contention. In *McBrayer v. Walker*, 122 Ga. 246, 50 S. E. 95, an entry on the deed itself indicated that it was void as title, because a part of a usurious transaction. The burden was thus on the plaintiff to explain the entry.

Objection is also taken to the expression "to your satisfaction," without adding specifically that a preponderance of evidence would suffice for that purpose. No request to charge appears to have been made on that subject. It has been held that, in the absence of a request, it is not error requiring a reversal to omit to define what constitutes a preponderance of evidence, or what may be considered in determining it. That point is not, of course, identical with the one now made, but is somewhat similar. *Gunn v. Harris*, 88 Ga. 439 (5), 14 S. E. 593; *Ga. Sou. & Fla. Ry. Co. v. Young Investment Co.*, 119 Ga. 513, 46 S. E. 644. In view of the whole charge, in the absence of any request for additional instructions, we do not think that the jury were at all likely to have been misled by this expression, or by the omission to state specifically that "in all civil cases the preponderance of testimony is considered sufficient to produce mental conviction."

Judgment affirmed. All the Justices concur.

(132 Ga. 350)

MOTZ v. CENTRAL OF GEORGIA RY. CO.
(Supreme Court of Georgia. March 11, 1909.)
RAILROADS (§ 345*)—INJURY TO PERSONS ON TRACK—NONSUIT.

The evidence introduced by the plaintiff being insufficient to support the essential allegations in the petition, the court did not err in granting a nonsuit upon motion of the defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1116; Dec. Dig. § 345.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Anton Motz against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 130 Ga. 414, 61 S. E. 1.

Oliver & Oliver, for plaintiff in error. H. W. Johnson and Lawton & Cunningham, for defendant in error.

BECK, J. Anton Motz brought suit against the Central of Georgia Railway Company to recover damages for the homicide of his son Horace, alleging that the deceased had been

killed in consequence of the negligent operation of a train by the agents and employees of the defendant company, and that at the time of his death the deceased was in the exercise of all due and reasonable care. This case was before the Supreme Court at a previous term, and is to be found reported in 130 Ga. 414, 61 S. E. 1. A complete statement of the facts, as alleged in the petition, is there to be found. In the decision in that case it was held that the court below erred in dismissing plaintiff's case upon demurrer. The cause, having been remanded, again came on for trial, and resulted in a nonsuit, and the plaintiff excepted. It is unnecessary to restate in full the allegations of the petition here, as they may be seen upon reference to the report of the case in 130 Ga. 414, 61 S. E. 1.

After a careful examination of the evidence in this record, we are of the opinion that the court below did not err in granting the judgment of nonsuit. The evidence for the plaintiff failed completely to establish the essential allegations of the petition; and, beyond the proof of circumstances from which the jury might have inferred that the deceased met his death by being struck by the engine or cars of the defendant company, there is no proof to support the material allegations of the petition. The petition alleges that the deceased stood on a public crossing, which was blocked by one of the defendant's trains; but the evidence shows that when struck the deceased was about opposite the depot, 75 or 100 feet from the crossing. There is no evidence that the crossing was a public road crossing. One witness referred to it as a "dirt road crossing," and said: "It is open to the public." Another witness for the plaintiff testified: "It is a regular railroad crossing, like most stations have." But the witness last referred to also testified: "I do not mean to say that this is a public road, laid out and maintained by the county authorities. I mean that it is used by the public." In the petition it is alleged that, while the deceased was standing on the crossing, a through freight approached at the "rapid rate of speed of about 20 miles per hour, and proceeded along said side track in the direction of said crossing, without reducing its speed, and without blowing any whistle, or ringing any bell, or checking speed, or otherwise complying with the requirements of the laws of Georgia relative to the duties imposed in approaching a public crossing." A witness for the plaintiff testified that the through freight was moving at an "ordinary rate of speed, about 7 or 8 miles per hour."

In the declaration the petitioner accounts for the presence of his son in the perilous position between the local freight train, which is alleged to have been on the main

line, and the incoming through freight train, passing over the switch, by alleging that his son did not know of the approach of the through freight until "same was upon them, and they were caught in the narrow space between the two tracks on which the moving trains were passing." No facts or circumstances are proved to support this allegation. It does not appear from the petition that any member of the crew of either the local freight or the through freight actually knew of the presence of the deceased. It is not proved, nor is it alleged, as in the case of *Crawford v. Southern Ry. Co.*, 106 Ga. 872, 33 S. E. 826, that on account of circumstances there was reason to apprehend the presence of any one at the place where the deceased was at the time he met his death. There is no evidence whatever that the locality at which the plaintiff's son was killed was populous, or in a place where the employees in charge of defendant's train were bound to anticipate the presence of any one upon or between its tracks. It is not shown by the evidence that the public, or any portion thereof, was accustomed to use the place on the track near the depot where the evidence shows the boy was struck. There was nothing to show why the deceased was at that place, nor that he had any right to be there. Under the facts of this case, as developed by the evidence, mere proof that the deceased was killed by one of defendant's trains did not raise a presumption of negligence against the defendant.

In other respects than those mentioned, there was a variance between the allegations and the proof; but the defects in the case as made by the evidence, and pointed out above, show that the plaintiff was not entitled to recover, and that the grant of a nonsuit was proper.

Judgment affirmed. All the Justices concur.

(132 Ga. 353)

GILLESPIE et al. v. POWELL.

(Supreme Court of Georgia. March 11, 1909.)

DEEDS (§ 119*)—ADVERSE POSSESSION (§ 114*)
—QUESTION FOR JURY—EVIDENCE—IDENTITY OF LAND.

Under the pleadings and the evidence, the court erred in directing a verdict for the defendant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 342, 343; Dec. Dig. § 119; Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by W. J. Gillespie and others against J. H. Powell. Judgment for defendant, and plaintiffs bring error. Reversed.

O. N. Starr and R. J. & J. McCamy, for plaintiffs in error. J. G. B. Erwin, Jr., for defendant in error.

HOLDEN, J. The plaintiffs filed a statutory complaint to recover from the defendant a tract of land described in the petition as follows: "Two acres, more or less, of lot No. 263 in the Seventh district and third section, and described as follows: Located near the southeast corner of the south half of said lot, and bounded on the north, east, and west by Pine Log creek, and on the south by lands of Henry Langston, and lying in the bend or fork of said Pine Log creek, and the same lands deeded to J. H. Powell by Z. T. Terrell." The defendant filed an answer, denying that plaintiffs had any title to the land, and setting up a prescriptive title of 20 years' adverse possession, and 7 years' adverse possession under color of title. Plaintiffs and defendant claim under a common grantor, Lewis. Upon the conclusion of the evidence, the court directed a verdict for the defendant, and the plaintiffs excepted.

Upon the trial the plaintiffs introduced in evidence a deed from Lewis to a mortgage company to secure a debt, dated February 1, 1889, conveying all of lot No. 263, except 2 acres on the west side of Pine Log creek, containing 158 acres, more or less. Other deeds were introduced to show that the property conveyed in this deed was sold under judicial process, and the title finally passed into the plaintiffs under a deed describing the property as it was described in the deed from Lewis to the mortgage company. It appears from the testimony that Lewis conveyed 2 acres of this land lot, located on the creek, to Butler. This deed does not appear in the record, and the deed of its execution nowhere appears. Plaintiffs claim that the 2 acres excepted in the deeds above named refer to the land conveyed by Lewis to Butler. The defendant contends that the 2 acres excepted in the deeds above named refer to the land sued for, and lie across the creek from the balance of the lot. The Butler land, as shown by the testimony, lies on the creek, but is not separated from the balance of the tract by the creek. The testimony of one of the plaintiffs was that the land in dispute was surrounded by the creek, and that it lay on the south side of the creek, and that "the piece that Powell bought from Claiborne Butler is in the southeast corner of the lot. The way the creek runs, the creek kinder runs around it; and that's why I say that it lies west of Pine Log creek." Lewis testified that the land in dispute lay south or west of the creek; that the Butler land does not lie west of the creek, but lies northeast of the creek; that the land in dispute was in the horseshoe bend of the creek. There was other testimony as to the location of these two tracts, but no plat or survey of the land was introduced in evidence. One of the plaintiffs testified that when he obtained an

option on the land, before he bought it, Lewis told him the 2 acres excepted in the deed was the land he sold to Butler, and that it was not the land in dispute. One of the plaintiffs also testified: "He said that he bought it from Joe Ab Lewis, and that it was my land. He said: 'It's your land, and I consider I can't hold the land.' He went on to say he was satisfied that he bought it, that it was the land company's land, and that they kept after him six or eight weeks, and that he thought possibly—said he was getting it cheap, for \$20, and if he got it a year or two it would pay. Mr. Powell said that. I went and had the land surveyed with the surveyor and the land proceSSIONERS, and they give that to me—laid it out and marked it out to me."

The testimony shows that the land sued for was in the bend of the creek, and across the creek from the rest of the land lot; and one of the plaintiffs testified that this land in dispute was on the south side of the creek. The land sued for was a part of land lot 263, and the deed under which the plaintiffs claimed conveyed all of this lot, except 2 acres on the west side of the creek. In view of all the evidence in the case, we think it was a question for the jury to decide whether or not the land excepted in the deeds under which the plaintiffs claim title referred to the land in dispute. If the 2 acres excepted in the plaintiffs' deeds referred to the land in dispute, across the creek, the plaintiffs could not recover. If this exception does not apply to this land sued for, the plaintiffs would be entitled to recover, unless some good defense is shown.

The defendant contended that he had a good title by prescription by reason of seven years' possession under color of title. The deed made by Terrell to Powell was executed in 1903, less than seven years before the filing of this suit; hence Powell could not claim a prescriptive title by reason of his own possession for seven years under color of title. It appears from the testimony that Terrell, under whom Powell claims, obtained a deed from Lewis in 1886, and that this deed was lost, and a copy thereof at some time established. It does not appear that this deed was ever recorded. The deed of the plaintiffs' predecessor in title was made and recorded before Terrell made a deed to the defendant. Lewis testified: "I reckon this paper that I delivered to Terrell was to better secure a debt. It was already secured. It was my own proposition to secure the debt. I owed \$630 here on an old judgment that was against the property that I had already mortgaged, and I deeded some property to get up that money; and he got the money for me, and in a short while he made me a trade on some land, and got Mr. Terrell to advance the loan that he had got for me, and Mr. Terrell come to my house, and I told him to better secure him I would make this deed to a little parcel of land to better se-

cure him." If the deed from Lewis to Terrell was not recorded, and Terrell was not in possession of the disputed land when Lewis made the deed to the mortgage company, and the latter took and recorded its deed without being charged with notice of the deed from Lewis to Terrell, this deed to Terrell would not be valid as against the mortgage company or those claiming under them. It further appears from the testimony that Lewis made the deal in selling the land to Powell, and the testimony indicates that Terrell never got any of the purchase money paid by Powell. It does not appear that any one was a party to the suit to establish a copy of the lost deed from Lewis to Terrell, except the parties to the deed. Lewis further testified: "Terrell never rented this land. I rented it all the time. I don't think he ever got any of the rents."

It appears uncertain from the testimony that Terrell was ever in possession of the land, by himself or through any one else, and under the evidence in the record before us the court could not say as a matter of law that there was any possession under color of title by Terrell, under whom Powell held, which could be tacked to the possession of Powell so as to make out seven years' adverse possession under color of title. Under the record the defendant could not contend that he has a prescriptive title by possession for 20 years by himself and those under whom he holds, even if Terrell went into possession of the land when the alleged deed from Lewis to him was made, because this deed, according to the testimony, was made in April, 1886, and this suit was filed less than 20 years thereafter, to the February term, 1906. There is no contention that any one was in possession of this land adverse to Lewis, the common grantor, prior to the making of the alleged deed in April, 1886.

We think the court committed error in directing a verdict in favor of the defendant, and the judgment is reversed. All the Justices concur.

(132 Ga. 296)

CULVER v. LAMBERT.

(Supreme Court of Georgia. March 10, 1909.)

1. MORTGAGES (§ 490*)—FORECLOSURE ACTION—EXECUTION—SALE—VALIDITY.

A borrower secured his note for the loan of money by deed to land, and upon default in payment at maturity the lender sued the note to judgment, upon which judgment an execution issued, and was levied on the land, without the lender having first reconveyed it to the borrower. At this sale the lender purchased the land, and a deed was made to him by the sheriff. Subsequently the lender, who had not previously conveyed the land to any one, after having made a deed to the defendant in execution, and after having had the same duly recorded, caused the execution again to be levied on the land, and the land sold thereunder by the sheriff. *Held*: (1) That the first sale was illegal and void; (2)

that the second sale was valid. The case of *Napier v. Saulsbury*, 63 Ga. 477, distinguished. [Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 490.*]

2. EXECUTION (§ 285*)—INVALID SALE—RENTS AND PROFITS—LIABILITY OF PURCHASER.

Where the lender went into possession under the first sale, he would be accountable to the borrower for the rents, issues, and profits intermediate of the two sales; but, if such rents and profits were insufficient to discharge the judgment, the resale of the property would not be invalid on this account, even as to the lender.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 285.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Emma J. Culver against M. A. Lambert. Judgment for defendant, and plaintiff brings error. Affirmed.

R. O. Lovett, for plaintiff in error. O. L. Pettigrew, for defendant in error.

EVANS, P. J. On February 5, 1895, Emma J. Culver borrowed \$1,000 from the University of the South, and secured her note for the loan by a conveyance to the lender of a certain lot of land. Judgment was obtained on the note in May, 1898, and the execution issued thereon was levied on the land, and it was sold on August 2, 1898, and purchased by the lender, who was plaintiff in *fi. fa.*, for \$100. The plaintiff did not file any deed of reconveyance to the defendant in *fi. fa.* previous to the levy of the execution. Subsequently, on April 1, 1903, the University of the South conveyed the land to the defendant for the purpose of levy and sale, which deed was duly recorded, and thereafter caused its execution to be levied on the land, which was brought to sale after due advertisement, and the plaintiff in *fi. fa.* became the purchaser. On July 21, 1905, the University of the South sold and conveyed the land to M. A. Lambert. Afterwards the defendant in *fi. fa.*, Emma Culver, instituted her action against M. A. Lambert to recover the land, and upon the foregoing facts appearing the court directed a verdict for the defendant, M. A. Lambert.

1. The controlling question in the case is whether the title of Emma J. Culver was divested under the last sale by the sheriff. It is admitted that the first sale was void. Where one borrows money from another, and makes him a deed to land to secure the debt, and the lender sues the borrower upon his failure to pay the debt at maturity, and obtains a judgment against him, before the execution is levied on the land given as security, the lender must reconvey the land to the borrower, and have the deed of reconveyance recorded; and a sale made under a levy without such deed of reconveyance is void, and will be set aside at the instance of the borrower. *Benedict v. Gammon Theo-*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

logical Seminary, 122 Ga. 412, 50 S. E. 162. The effect of the cancellation of the deed to the purchaser at the sheriff's sale by a court of equity on this ground is to nullify the proceedings had under the judgment from the time of the illegal levy. The judgment for the debt is not invalidated, but is still enforceable against the land by a levy of the execution, made after the record of a deed of reconveyance by the lender to the borrower. The parties to the illegal sale may voluntarily do what the courts will decree they shall do; that is, they may voluntarily cancel the illegal sale under the same circumstances where a court of equity would decree a cancellation. It is necessary, however, that a voluntary agreement to cancel a sale of this character shall be participated in by the purchaser at the sheriff's sale. He has been induced by the act of the plaintiff to put his money in the land, and the plaintiff will not be allowed to deprive him of his money, and retrace his illegal steps at pleasure, without restitution or adjustment of the purchaser's rights. *Napier v. Saulsbury*, 63 Ga. 477. But where the lender, who is the plaintiff, is also the purchaser at an illegal and void sheriff's sale, we see no reason why he cannot treat the sale as void, and proceed in the manner which he should have first adopted in the enforcement of his execution. The defendant cannot complain that the plaintiff treats as void a sale which the law pronounces invalid, and proceeds to sell again. The illegal sale did not change the status. It neither invalidated the plaintiff's judgment, nor divested the defendant's title. If the defendant had appealed to a court of equity to cancel the sheriff's deed to the plaintiff on the ground of the illegality of the sale, he could not equitably claim that the proceeds of the sale should be applied upon his debt. He could not have both the land and its proceeds. The second sale could hardly have had the effect of depressing the price of the land because of the prior illegal sale, since the rights of no new parties were injected into the transaction, and it was manifest that the only purpose was to bring the land to sale in a legal manner, under an execution issuing from a judgment founded on a debt to the plaintiff which the defendant had secured by conveying the land to the plaintiff. In the case in hand the plaintiff was the purchaser at the first sale, and in possession of the land at the time he caused the execution to be relevied; and this circumstance differentiates the case from that of *Napier v. Saulsbury*, supra, where a stranger was the purchaser at the first sale, and in possession at the time the plaintiff in execution undertook for the second time to have the land levied on and sold. We think that the last sale of the land was valid, and the title of the defendant was divested thereby.

2. At the conclusion of the evidence the plaintiff offered an amendment to the effect

that, after the first sale of the land in 1898, the purchaser thereat, the University of the South, went into possession and remained in possession until 1903, when it conveyed the land to M. A. Lambert, during which time it received the rents, and had quarried enough stone from the land to pay off the judgment, if properly accounted for; and the plaintiff prayed that the University of the South be made a party to the suit, and "be made to account for the rents and for the value of the rock taken from said land, and said sums be placed as a credit on said judgment." It was also alleged that M. A. Lambert had received, since her purchase, large sums from the sale of rock quarried on the land; and an accounting was asked for the rents and the value of the rock quarried by her. The facts pertaining to the sales of the land, as they appear in the first part of this opinion, were also alleged, and it was prayed that the sales by the sheriff be canceled and set aside. The amendment was disallowed, and properly so. The first sale of the land did not divest the title of E. J. Culver; and when the University of the South entered into possession of the land by virtue of being the purchaser at this illegal sale, it became accountable to her for the rents and profits of the land. *Polhill v. Brown*, 84 Ga. 338, 10 S. E. 921; *Dottenheim v. Union Savings Bank & Trust Co.*, 114 Ga. 788, 40 S. E. 825. Such rents and profits should have been applied to the credit of the judgment; and, if insufficient to have discharged it at the time of the second levy, the execution could legally proceed for the balance. The allegations that the University of the South had quarried sufficient rock to discharge its judgment while it was in possession of the land is too indefinite as an attack upon the judgment as being satisfied at the time of the second sale. The allegation is that the quarrying of stone by the University of the South occurred between 1898 and 1905. The second sale was legal, if the judgment was not satisfied, and this sale took place in 1903. How much stone was quarried before 1903 is not alleged. Since this last sale the University of the South had title, and, of course, could quarry the land ad libitum. No value is placed on the stone alleged to have been quarried, but only the vague statement made that enough stone was quarried, if properly accounted for, to pay off the judgment; and the prayer is that the amount found to be due on an accounting be credited on the judgment. This averment is too vague to raise the issue that the last sale was void, because had under an execution which had been settled. Indeed, the plaintiff does not pray for a cancellation of the sheriff's deed on the ground that the sale is void, because the judgment was fully paid off and discharged. If the defendant has a cause of action against the University of the South for rents and profits received from the land while in its possession intermediate of the two sales, it is

an entirely different controversy from the present suit. If M. A. Lambert's title is good, she had the right to quarry the stone since her purchase.

Judgment affirmed. All the Justices concurred.

(132 Ga. 288).

LONG et al. v. ROSE et al.

(Supreme Court of Georgia. March 10, 1909.)

MUNICIPAL CORPORATIONS (§ 142*)—OFFICERS—ELIGIBILITY—HOLDING OTHER OFFICE.

Pol. Code 1895, § 223, declares that "persons holding any office of profit or trust under the government of the United States (other than that of postmaster), or of either of the several states, or of any foreign state," are "held and deemed ineligible to hold any civil office in this state." *Held*, that this did not render one who held the office of solicitor of the county court of a county ineligible to hold the office of mayor of a municipal corporation located in such county; nor did it render persons who respectively held the offices of county treasurer and member of the board of education of the county ineligible to hold the offices of aldermen of such municipal corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 314; Dec. Dig. § 142.*]

(Syllabus by the Court.)

Error from Superior Court, Camden County; T. A. Parker, Judge.

Quo warranto by J. M. Long and others against D. P. Rose and others. From a judgment dismissing the case, relators bring error. Affirmed.

J. M. Long and others made application for leave to file an information in the nature of a quo warranto against D. P. Rose, W. H. Mullin, and J. R. Bachlott, in order to inquire into their right to hold the offices of mayor and aldermen of the city of St. Mary's. Permission being granted to file the information, the relators alleged as follows: They are residents, citizens, and taxpayers of St. Mary's. Under and by virtue of the charter of that city, on or about the first Monday in April, 1908, the Governor of the state appointed and commissioned respondent Rose as mayor of the city and respondents Mullin and Bachlott as aldermen, each for the term of one year. Each of them accepted the appointment and was duly commissioned, taking the oath of office and assuming and entering upon the discharge of the duties thereof, and is still doing so. They are without legal warrant or authority for so doing, each of them being ineligible to hold the office for the reasons hereafter stated: "Relators charge that respondent D. P. Rose is holding the office of mayor of said city without legal warrant and authority so to do, and is ineligible to hold said office, for the reason that at the time of his appointment and commission, and at the time of his taking the oath and assuming the discharge of the duties of said office of mayor, he was and is now commissioned,

qualified, and exercising the duties of and holding an office of profit and trust under the government of the state of Georgia, to wit, solicitor of the county court of Camden." Respondent Mullin is holding the office of alderman of said city without legal warrant or authority so to do, and is ineligible to hold said office, for the reason that at the time of his appointment and commission, and at the time of his taking the oath and assuming the discharge of the duties of said office, he was and is now commissioned, qualified, and exercising the duties of and holding an office of profit and trust under the government of the state of Georgia, to wit, member of the board of education of Camden county. Respondent Bachlott is holding the office of alderman of said city without legal warrant or authority so to do, and is ineligible to hold said office, for the reason at the time of his appointment and commission, and at the time of his taking the oath and assuming the discharge of the duties of said office, he was and is now commissioned, qualified, and exercising the duties of and holding an office of profit and trust under the government of the state of Georgia, to wit, treasurer of Camden county. For these reasons respondents are mere de facto officials of the city, and relators pray that they be ousted. The respondents answered, admitting that they were appointed to the offices of mayor and aldermen, respectively, and that they were discharging the duties thereof, but denied that they were ineligible to do so. They admitted, also, holding the other offices described in the information. They alleged that respondent Rose was appointed mayor subsequently to his appointment as solicitor, and that he was no longer solicitor of the county court. They also alleged that each of them was a resident and freeholder of the city at the time of his appointment and qualification, and so remained. By consent of counsel for both parties the case was heard before the judge of the superior court at chambers on the petition and answer, there being no issue of fact. He denied the prayer of the petition, and dismissed the case. The relators excepted.

W. G. Brantley and Brantley & Butts, for plaintiffs in error. Osborne & Lawrence, for defendants in error.

ATKINSON, J. At common law there was no inhibition against the holding of more than one office, provided they were not inconsistent with each other. In many of the United States there are constitutional provisions or legislative acts on this subject, limiting the power to hold different offices or prohibiting the holding of certain different offices at the same time or rendering certain persons holding offices of a particular character ineligible to offices of another described character. In this state Pol. Code 1895, § 223, declares as follows: "The following per-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sons are held and deemed ineligible to hold any civil office in this state, and the existence of either of the following states of facts is a sufficient reason for vacating any office held by such person, but the acts of such person, while holding a commission, are valid as the acts of an officer de facto, viz.: * * * (4) **Holding Other Offices.**—Persons holding any office of profit or trust under the government of the United States (other than that of postmaster), or of either of the several states, or of any foreign state." This first appeared codified in the original Code which took effect January 1, 1863. By act approved September 11, 1891 (Acts 1890-91, p. 102), an act was passed, the caption of which was "An act to prohibit in this state the holding of more than one county office by one person, at any one time, and for other purposes." It is now embodied in Pol. Code 1895, § 224, as follows: "No person shall hold, in any manner whatever, or be commissioned to hold at one time, more than one county office, except by special enactment of the Legislature heretofore or hereafter made; nor shall any commissioned officer be deputy for any other commissioned officer, except by such special enactment." On behalf of the plaintiffs in error it is contended that the purpose of paragraph 4 of section 223 of the Political Code of 1895 was to prevent one person from absorbing and holding more offices than one, and to prevent the evils which might accrue from professional office seeking; that the state of Georgia is one of the several states of the Union, and the expression, "or of either of the several states," is sufficiently broad to cover this state; that the section referred to renders ineligible "to hold any civil office in this state," any person holding any office of profit or trust under the government of this state; that each of the offices of mayor and aldermen in the city of St. Mary's falls within the designation, "any civil office in this state"; and therefore that the respondents, who held, respectively, the offices of solicitor of the county court, member of the board of education of the county, and county treasurer, and thus held an office of profit or trust under the government of this state, were ineligible to the offices of mayor and aldermen. On the other hand, it is contended that the purpose of the Code paragraph just cited was not to prevent any person in this state from holding more than one office in it, but was to prevent persons who held any office of profit or trust under other governments, and owed allegiance to them, from becoming officials of this state, and thus having a divided allegiance to two masters; that the words "or of either of the several states" meant either of the several states other than this state, and did not include the state of Georgia; and also that, if it were otherwise, the statement that the persons described should be "ineligible to hold any civil office in this state" had reference to civil offices of a state character, and did not include mere officials

of municipal corporations; that officers of the latter character did not hold a "civil office in this state," within the meaning of the Code section to which reference has been made; and that the holding of the offices of solicitor of the county court, member of the board of education of the county, and treasurer of the county, whether they would have rendered the respondents ineligible to hold another state office or county office, or not, did not make them ineligible to hold the positions of mayor and aldermen in St. Mary's.

We think it requires no argument to show that the solicitor of the county court, member of the board of education, and treasurer of the county are offices of trust, and, if they have attached to them salaries or fees, also offices of profit. It is unnecessary to the determination in this case to decide the exact meaning of the expression, "or of either of the several states," as used in the Code, because, whichever of the two contentions above stated should be maintained, the result in this case would be the same. If it should be conceded that the expression "either of the several states" was intended to and did include the state of Georgia, and that thereby persons holding any office of profit and trust under the government of this state were rendered ineligible to hold any civil office in this state, the words employed in the statute declaring ineligibility to hold "any civil office in this state" do not refer to municipal officers such as a mayor and aldermen. In *State v. Wilmington City Council*, 3 Har. (Del.) 294, it was held that "the office of treasurer of a public corporation (such as the city of Wilmington) is not a 'civil office in this state' within the meaning of the constitutional exclusion of the clergy from the civil office." In the body of the opinion, Bayard, Chief Justice, said: "The question presented in the second point is whether the office of treasurer in this corporation comes within the true meaning and import of the terms 'civil office in the state,' as used in the Constitution. The word 'state' has two meanings, and is used in both of them, in different parts of that instrument. In one sense it signifies the territory inhabited by the people; in the other it means the body politic inhabiting the territory. So that the words 'civil office in the state' may mean either civil office within the territory, or civil office in the frame of government or political organization which it was the business of the convention to establish. As the purpose of a Constitution is to establish the principles of government for the community as a body politic, without any particular reference to the territory which they inhabit, the primary and leading sense in which the term 'state' is used is that of the body politic." It must be remembered, too, in construing the language used, that this was not a conferring or enabling act, but a law limiting the right to hold office, or rendering ineligible certain persons who otherwise might have

lawfully done so; and in construing its terms consideration should be given to that fact in determining the legislative purpose, and how far it was intended to exclude municipal officers not necessarily falling within the meaning of the words employed.

In Pennsylvania the Constitution contained a provision that "no member of Congress of this state, nor any person holding, or exercising, any office of trust or profit under the United States, shall, at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state, to which a salary is by law annexed, or any other office which future legislators shall declare incompatible with offices or appointments under the United States." Mr. Dallas was appointed by the President of the United States as attorney for the Eastern district of Pennsylvania. The Governor also appointed him recorder of the city of Philadelphia. Application was made to the Supreme Court for leave to file an information in the nature of a writ of quo warranto, to inquire by what authority the defendant exercised the office of recorder. The court held that the recorder of the city of Philadelphia was not a judge, within the meaning of the eighth section of the second article of the Constitution of the state of Pennsylvania; the section and article above quoted. *Commonwealth v. Dallas*, 4 Dall. (Pa.) 229, 1 L. Ed. 812. As there reported, Chief Justice Shippen said that, although the recorder of the city of Philadelphia possesses some power and performs some duties of a judicial nature, he is not a judge, within the terms, spirit, and meaning of the eighth section of the second article of the Constitution." The same case is more fully reported in *Respublica v. Dallas*, 3 Yeates (Pa.) 300.

In *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239, the following ruling was made: "The office of councilman in a city is an office purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the state. The office of councilman in a city, although a lucrative office in the ordinary sense of the words, is not a lucrative office within the meaning of the ninth section of the second article of the Constitution, which provides that no person shall hold more than one lucrative office at the same time." The Constitution of Indiana contained a provision that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any other office of trust or profit under the state, other than a judicial office." Under the provisions of a general law of that state the mayor of a city was also a judge of the city court, and had jurisdiction to try and determine suits founded on contracts or torts, when the debt or damages claimed or the value of the property sought to be recovered did not exceed \$100; to issue a venire, impanel a jury, re-

ceive the verdict, grant a new trial, or enter judgment thereon; to issue writs of replevin, attachments for property, and ne exeat, capias ad respondendum, and capias ad satisfaciendum. In state transactions his jurisdiction was coextensive with the county, and he had exclusive jurisdiction where the fine assessed could not exceed \$8, and concurrent jurisdiction to try and determine all cases punishable by fine only, or by fine with discretion to imprison. It was held that all this jurisdiction which was not merely incidental to his government of the city, but was a direct conference of additional powers, made him a judicial officer, and he was therefore ineligible to hold the office of sheriff. It was held, however, that "the executive and administrative duties of the mayor of a city, under the act of 1857 (Acts 1857, p. 42), are not within the executive and administrative departments of the state government, as established by the Constitution. In respect to such duties, the mayor is merely an officer of a municipal corporation, and he may discharge such duties and his judicial functions at the same time, without violating section 1 of article 3 of the Constitution" (in regard to keeping separate the three departments of government). *Waldo v. Wallace*, 12 Ind. 569. Perkins, J., concurred in the view that the mayor of Indianapolis, while presiding in the city court, under the laws creating it and conferring jurisdiction upon it, was a judicial officer; but in reference to the fact that the state government and the municipal government are not identical he said: "The powers which are exercised by a city government are, it thus appears, superadded to those exercised by the state in the same locality. The people of towns and cities are governed that much more than are the people of the state generally. This is deemed a necessary incident to a dense population."

A similar ruling, though less clearly expressed, was made in *Howard v. Shoemaker*, 35 Ind. 111. The language there used in reference to lucrative offices might be subject to misconstruction; but it was explained in the opinion in *State v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239, where the same justice who wrote the opinion in the former case said: "It was held by this court, in *Howard v. Shoemaker*, supra, that the office of mayor of a city was a lucrative office within the meaning of the ninth section of article 2 of the Constitution, not because he received compensation for the discharge of such of his duties as were purely municipal in character, but for the reason that he had duties to perform, under the laws of the state, aside from those which are judicial and those of a purely ministerial character," etc. The idea expressed by Perkins, J., in the quotation above made, is recognized in the decisions of this state, where it has been held that an affray within the limits of a municipal corporation might at once constitute an offense against the municipal laws touching dis-

orderly conduct, and also an offense against the state laws in regard to assault and battery or assault with intent to murder, and in other similar instances, thus recognizing the distinction between the general state laws and government and local corporate laws and government, although the municipality could not punish for an infraction of the state law.

The only ground on which it was asserted that one of the respondents was ineligible to hold the office of mayor of St. Mary's was that he was solicitor of the county court. No contention was raised or urged that the mayor had duties other than those incident to that office, or of a character similar to those described in the Indiana cases above cited, or under the state government, and not such as might properly be exercised by a mayor as incidental to the duties of that office, and was therefore ineligible. The same is true of the other two respondents; the sole claim in regard to them being that they were ineligible to be appointed aldermen of St. Mary's because one of them was a member of the board of education of the county and the other was county treasurer.

We have not discussed the doctrine of inconsistent offices, because the pleadings do not raise the question; but the contention is that the defendants were ineligible to hold the second offices. If two offices are merely inconsistent, the acceptance of the second operates as a resignation or relinquishment of the first. If the statute renders the holder of one office ineligible to the second, it prevents his lawfully holding the second at all, and does not operate as a relinquishment of the first. *McWilliams v. Neal*, 130 Ga. 733, 61 S. E. 721. The mere fact that the mayor and aldermen of St. Mary's are appointed by the Governor of the state does not render them officers of the state; that being only a mode of selection of the officials of the municipality under the terms of its charter.

In the light of what has been said above, and of the issues raised by the pleadings, there was no error on the part of the court in denying the prayer of the relators to oust the respondents from the offices of mayor and aldermen of the municipality of St. Mary's.

Judgment affirmed. All the Justices concur.

(132 Ga. 246)

PRICE et al. v. HIGH SHOALS MFG. CO.
(Supreme Court of Georgia. Feb. 27, 1909.)

1. WATERS AND WATER COURSES (§ 63*)—ACTION AGAINST UPPER PROPRIETOR — EVIDENCE—ADMISSIBILITY.

Upon the trial of a suit by one riparian proprietor against an upper riparian proprietor for damages because of the unreasonable diminution and detention of the water in the stream, evi-

dence tending to show that the defendant was using water from the stream sufficient to propel machinery not adapted to the size and capacity of the stream was admissible.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 63.*]

2. WATERS AND WATER COURSES (§ 63*)—ACTION AGAINST UPPER PROPRIETOR — EVIDENCE—ADMISSIBILITY.

In a suit of the kind named in the preceding headnote, where the damages claimed were loss of profits in operating a grist and flour mill from a specified time, testimony, offered by a witness for the plaintiffs, "that he had heard people say that they had quit carrying their grinding to plaintiffs' mill, because they could not get it ground on account of low water," it not appearing that the statements referred to were made since such time, was properly excluded.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 63.*]

3. DAMAGES (§ 62*)—RIPARIAN OWNER—INVASION OF RIGHTS—DUTY TO LESSEN DAMAGES.

Where one riparian proprietor continuously diminishes or detains the water in the stream unreasonably with reference to the rights of another riparian proprietor, who is damaged thereby, there is an illegal invasion of the property rights of the latter, and he is under no legal obligation to exercise ordinary care to avoid or lessen such damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 124; Dec. Dig. § 62.*]

4. DAMAGES (§ 9*)—NOMINAL DAMAGES—INVASION OF PROPERTY RIGHTS.

Where there is such an illegal invasion of the property rights of another as that referred to in the preceding headnote, the injured party is entitled to nominal damages, even though he shows no special damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 7-15; Dec. Dig. § 9.*]

5. WATERS AND WATER COURSES (§ 63*)—ACTION AGAINST UPPER PROPRIETOR—INSTRUCTIONS.

The inaccuracies in the charge referred to in the fifth division of the opinion were not likely to mislead the jury, in view of the entire charge.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 63.*]

(Syllabus by the Court.)

Error from Superior Court, Walton County; H. G. Lewis, Judge.

Action by W. P. Price and others against the High Shoals Manufacturing Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Cobb & Erwin, George C. Thomas, and Napier & Cox, for plaintiffs in error. Hale G. Nowell and Foster & Foster, for defendant in error.

HOLDEN, J. The plaintiffs, under a bond for title, with part of the purchase money paid, were in possession of property on which was situated a mill on the Apalachee river. They brought suit for damages against the defendant, which owns property on the river above the plaintiffs' property, and operates machinery by means of the power

derived from the water of the stream. They alleged that they had lost custom of patrons of their mill, by reason of being unable to operate the same with any regularity, on account of the wrongful conduct of the defendant. This conduct, was alleged to consist in the erection, in 1903, of a reservoir or storage dam on the river above the plaintiffs' mill, creating a pond of water covering a considerable area, which caused the evaporation and absorption of the water, thereby diminishing the supply to which the plaintiffs were entitled; that gates were placed in this dam by the defendant, which were closed at 6 o'clock p. m. every day, thereby shutting off the flow of the water until they were opened next morning, by reason of which a sufficient amount of water to enable the plaintiffs to operate their mill did not reach the mill until 12 or 1 o'clock, and that the bed of the stream between the plaintiffs' mill and the defendant's dam, owing to the fact of it containing only a small quantity of water while the gates were shut down, became dry and absorbed a quantity of water when the flow was turned on in the morning. The plaintiffs contended that the use and detention of water by the defendant was unreasonable and entirely beyond the size and capacity of the stream, and was resorted to by the defendants for the purpose of propelling machinery of a magnitude twice as large as was adapted to the size and capacity of the stream, and that the obstruction, detention, retardation, and diminution of the water were subversive of the rights of the plaintiffs and caused them damage in the sum of \$1,000 per annum. The defendant filed an answer, admitting the construction of the dam and the shutting down of the gates, but denying that the shutting down of the gates entirely cut off the flow of the water, or rendered it impossible for the plaintiffs to operate their mill. Upon the trial a verdict was rendered in favor of the defendant. The plaintiffs moved for a new trial, and to the order denying the same they excepted.

1. One assignment of error in the motion for a new trial is as follows: "The court erred in ruling out the testimony of plaintiffs' witness Hayne, 'They put in 5,000 more spindles after the new dam was built,' the purpose of which was to show that the amount of machinery being propelled was greater than the capacity of the stream, and necessarily took more water than the natural stream afforded; plaintiffs' counsel informing the court that he intended to show that the defendant doubled its machinery, and was running double the amount of machinery with the water from the new dam that it did before the dam was built, and that the machinery in the mill, before this addition, required all the water power of the stream." Under a proper construction of Civ. Code 1895, §§ 3057, 3802, 3879, every riparian owner is entitled to a reasonable use of the

water in the stream. If the general rule that each riparian owner could not in any way interrupt or diminish the flow of the stream were strictly followed, the water would be of but little practical use to any proprietor, and the enforcement of such rule would deny, rather than grant, the use thereof. Every riparian owner is entitled to a reasonable use of the water. Every such proprietor is also entitled to have the stream pass over his land according to its natural flow, subject to such disturbances, interruptions, and diminutions as may be necessary and unavoidable on account of the reasonable and proper use of it by other riparian proprietors. Riparian proprietors have a common right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another; but each is entitled to a reasonable use of the water with respect to the rights of others. What is a reasonable use is a question for the jury, in view of all the facts in the case, taking into consideration the nature and use of the machinery, the quantity of water used in its operation, the use to which the stream can be applied, the velocity of its current, the character and size of the water course, and the varying circumstances of each case. In the case of *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526, it was ruled: "The owner of a mill, whose dam and machinery are suited to the size and capacity of the stream, has the right to the reasonable use of the water to propel his machinery; but he must detain it no longer than is necessary for its profitable enjoyment, and he must return it to its natural channel before it passes upon the land of the proprietor below." See 2 Farnham on Water and Water Rights, p. 1612, § 476; *Id.* pp. 1608, 1609, § 475; Gould on Waters (3d Ed.) pp. 427, 428, § 218; 30 Am. & Eng. Enc. Law, 372, 373. Under the facts of this case, we think the court committed error in ruling out the testimony of plaintiffs' witness that the defendant put in 5,000 more spindles after the new dam was built. In connection with the other testimony in the case, this testimony was admissible for the purpose of illustrating the question as to whether or not the defendant's machinery was adapted to the capacity of the stream, and therefore of throwing light on the question as to whether or not they were making a reasonable use of the water.

2. Another assignment of error is as follows: "That the court erred in ruling out the testimony of plaintiffs' witness Wagner that he had heard people say that they had quit carrying their grinding to plaintiffs' mill because they could not get it ground on account of low water." The plaintiffs sued for damages which they alleged occurred since the erection of a new dam by the defendant in 1903. It does not appear that the statements referred to were made since the new dam was erected by the defendant; and

for this, if for no other, reason there was no error in excluding the testimony.

3. Another assignment of error is that the court committed error in charging the jury that the plaintiffs could not recover, even if they were injured by the conduct of the defendant, if the plaintiffs could have avoided the injury by the exercise of ordinary care and diligence; and it further charging: "It is a question of fact whether ordinary care and diligence required them to build a storage dam, or adopt any other plan to protect them from loss. This is a fixed rule applicable to all cases of similar character." Civ. Code 1895, § 3802, provides: "Where by a breach of contract or negligence one is injured, he is bound to lessen the damages as far as is practicable by the use of ordinary care and diligence; but this does not apply in cases of positive and continuous torts." The conduct of the defendant complained of in this case is not a breach of contract or negligence. It is a positive and continuous tort. We do not think the rule of law announced by the court in the charge complained of was applicable in this case. In the case of *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885, it was held: "Whenever the right to enjoy one's property to its fullest extent is invaded, and injury arises therefrom, he may recover any damages sustained by reason of such invasion; nor is he bound to do anything to avoid the consequences thereof." On page 295 of 80 Ga., page 886 of 4 S. E., the court uses this language: "We do not think that this is a case of negligence. If this company raised their dam, thereby causing water in the creek to run over the plaintiff's land, and thereby injuring and damaging him, that was an invasion of his rights, and a positive act on the part of the defendant, and not a case of negligence; nor was it negligence on the part of the plaintiff not to do anything to avoid the consequences of their act. Every man has the right to enjoy his property to the fullest extent; and whenever that right is invaded by another, and injury accrues to him, he is entitled to his damages therefor. The evidence fails to show that the plaintiff did anything that led to or increased this damage. He did nothing, and he had a right to do nothing; and if they invaded his rights they were liable to him for any damages which he sustained by reason of such invasion." In the case of *Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677, the following ruling was made: "The principle that the defendant may reduce the recovery for an injury resulting from his negligence, by showing that the plaintiff did not exercise ordinary care to diminish or avoid the damages, does not apply where the act complained of is not a mere act of negligence, but a positive, continuous, tortious act, committed by the defendant in carrying dirt and ore from a mine and washing it in a stream flowing through the land of both parties, and thereby produc-

ing continued adulteration of the plaintiff's water."

Riparian proprietors have no title to the water which flows over their land, but are entitled to a reasonable use thereof, and "they may insist that their right to thus use the water shall be regarded and protected as property." Gould on Waters, p. 395, § 204. In 2 Farnham on Water and Water Rights, pp. 1565, 1566, § 462, it is said: "The right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills or forests remain in place. * * * Such flow and use belong to the land through which it passes, as an incident, convenience, or easement which inseparably connects itself therewith as a part thereof, and frequently gives or adds value thereto, and is a private property right in the proprietor thereof, within the protection of the constitutional provision that private property shall be forever held inviolate, subject to the public welfare, and shall not be taken for public use without compensation being first made. The property, therefore, consists, not in the water itself, but in the added value which the stream gives to the land through which it flows. This is made up of the power which may be obtained from the flow of the stream, from the increased fertility of the adjoining fields because of the presence of the water, and of the value of the water for the uses to which it may be put. The right to the continued existence of these conditions is property, to protect which the owner may resort to any or all the instrumentalities which may be employed for the protection of private property rights."

If the defendant by an unreasonable use of the water diminished the supply to which the plaintiffs were entitled at all times, or from 6 p. m. until 1 p. m. detained and withheld from the plaintiffs the water which they were entitled to use, this was an illegal invasion of the plaintiffs' property rights. The shutting down of the gates in the defendant's dam every day at 6 p. m., thereby causing this detention, was a positive tort. We think the court committed error in giving the charges complained of. This charge was of harmful effect to the plaintiff in view of the testimony in the case. One of the plaintiffs testified: "If we had have provided a storage dam, we could have had water all the time. If we had the money that they did, we would have built a storage dam." One of the defendant's witnesses testified: "If Price built a storage dam, he would have storage enough to run until this reached him. If it was not for Price's large wheels, I think he could run anyhow, all the time, as a good many streams run in there." Another one of the defendant's witnesses testified: "The water that runs in from the creeks and branches, with a tight dam he would have enough water to run half a day. We have tested it. He could run till our water got

there. * * * With a good dam, I should think he could run all the morning till the water got there; run a good deal more than they have." In view of this and other testimony in the case, the charge complained of was error of such harmful effect as to require a new trial. If the defendant made an unreasonable use of the water, so as to damage the plaintiffs, it was an illegal invasion of their property rights and a continuous and positive tort, and the plaintiffs could recover whatever damages they sustained, even though by the exercise of ordinary care and diligence they could have avoided the same. In this connection, see *Brown v. Dean*, 123 Mass. 255; *McCarty v. Boise City Canal Co.*, 2 Idaho, 245, 10 Pac. 623; *Gilbert v. Kennedy*, 22 Mich. 117, 132-134.

4. Complaint is made in the motion that the charge of the court was such as not to inform the jury that the plaintiffs were entitled to nominal damages, even though they suffered no actual damage, if there was an illegal invasion of their rights. If there was on the part of the defendant an illegal invasion of the property rights of the plaintiffs, the latter were entitled to recover nominal damages, even though they proved no special damage. *White v. East Lake Land Co.*, 96 Ga. 415, 417, 23 S. E. 393, 51 Am. St. Rep. 141; *Ellington v. Bennett*, 59 Ga. 286; *Hendrick v. Cook*, 4 Ga. 241; *Gould on Waters*, p. 422, § 214; 2 *Farnham on Water and Water Rights*, p. 1674, § 510.

5. Complaint is made of the following charge of the court: "On the other hand, I charge you, if the dam did not result in the diminution of the supply of water for mill purposes, then plaintiffs cannot recover." It is contended by the plaintiffs that this charge excluded the theory of the plaintiffs that they were entitled to recover for an unreasonable detention of the water, even though the quantity was undiminished. Plaintiffs complained that the water in the stream was diminished by evaporation, absorption, and percolation, and that the water was unreasonably detained by defendant, so that plaintiffs did not have sufficient water to operate their mill from 6 p. m. to 1 p. m. The words employed in the charge complained of, namely, "diminution of the supply of water for mill purposes," were not explicit enough to clearly embrace the contention that the supply was entirely cut off from 6 p. m. to 1 p. m.; but in view of the rest of the charge of the court, clearly setting forth the right of the plaintiffs to recover because of any unreasonable detention of the water, we do not think the jury misunderstood the meaning of the court's charge, considered in its entirety. We think, however, it would have been better to have more clearly expressed the contention of unreasonable detention in the charge of which complaint is made.

Complaint is also made of the charge wherein the court told the jury the plaintiffs

were not entitled to recover, when he should have stated they were entitled to recover. In view of the rest of the charge, and what occurred between the court and counsel in reference to this mistake, it was not such error as to require a new trial.

Complaint is also made of the charge, set forth in the amendment to the motion, that if the rules of the defendant in the operation of its machinery, and in turning on and shutting off the water, were reasonable, "in the light of the law I have given you in charge," and damage resulted to the plaintiffs by reason of the enforcement of such rules, such damages should not be recovered. Movants complain of this charge, because it falls to state that such "rules must be reasonable relative to the rights of the plaintiffs, as well as to the rights of the defendant." The use of the water of a stream by one riparian proprietor must be reasonable with reference to the rights of other riparian proprietors. We do not think the charge complained of created on the minds of the jury any impression that this was not the law, in view of the words therein employed, "in the light of the law I have given you in charge," and in view of the rest of the charge, which plainly informed the jury that the use of the water by one proprietor must be reasonable with reference to the rights of other proprietors.

Judgment reversed. All the Justices concur.

LUMPKIN, J. (concurring specially). I concur in the judgment rendered in this case, but I cannot concur in all the reasoning by which the result is reached. Especially is this true as to the third division of the opinion. "The owner of a mill, whose dam and machinery are suited to the size and capacity of the stream, has a right to the reasonable use of the water to propel his machinery; but he must detain it no longer than is necessary for its profitable enjoyment, and he must return it to its natural channel before it passes upon the land of the proprietor below." *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526. Every dam necessarily impedes to some extent the flow of the water. There is some evaporation from every mill pond. If the temporary and reasonable detention of water for the purposes of generating power to operate the mill constitute a positive tort, the result would be paralysis to the manufacturing interests of the state, which cannot operate without some detention of water and consequent loss by evaporation. If the owner of the mill has a right to detain the water reasonably for its profitable enjoyment, the mere allegation that he detained it longer than was reasonable would not constitute a case falling within the class of "positive and continuous torts" referred to in Civ. Code 1895, § 3302, which would free the lower millowner from any necessity or duty to use ordinary care.

Whatever those words may mean, I do not think that they apply to a case where a person has a right to do a thing reasonably (the thing itself being right, if reasonably exercised), because of a charge that the right was unreasonably exercised. The unreasonable exercise of a right more nearly approximates negligence than the commission of a positive, direct, or willful tort. If unreasonable exercise of a right is to be classified rather with negligent torts than those which the Code calls "positive and continuous," unquestionably the rule which requires the exercise of ordinary care on the part of the person claiming to be injured in order to lessen the damages applies.

This is quite different from a case where water is actually backed upon the land of another or caused to overflow his land. Such cases present instances of a direct invasion of the land itself. A person trespasses upon land as much by backing water upon it as he does by entering upon it himself. Thus, in the case of *Athens Mfg. Co. v. Rucker*, 80 Ga. 201, 4 S. E. 885, it was said: "If the company raised their dam, thereby causing water in the creek to run over plaintiff's land, and thereby injuring and damaging him, that was an invasion of his rights, and was a positive act on the part of the defendant, and not a case of negligence." In *Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677, the tortious act complained of was committed by carrying dirt and ore from a mine and washing it in a stream which flowed through the land of other parties, thus producing continued adulterations of such water. The adulteration of a stream, thereby carrying upon the plaintiff's land foreign substances, or deleterious matter, is quite different from the detention of water for mill purposes, though claimed to be unreasonable.

The plaintiff here does not complain as a mere riparian proprietor, using the water in the natural flow of the stream for ordinary uses, but as a millowner of the hydraulic power capable of propelling machinery. He is not suing for damages resulting from a general depreciation in value of land by having water taken from it, but for injury to his mill and the water privileges connected therewith. When he contends that the damages which he has suffered have resulted from the conduct of the defendant, certainly it would be competent to reply by showing that they resulted, not from the conduct of the defendant, but because the plaintiff had built no dam for the purpose of running his mill, or that he had built a totally insufficient dam for that purpose, or that he had allowed his dam to rot down, or that he had permitted a hole to exist in it through which the water escaped, when, if he had built the dam, or repaired it, or stopped the hole, he would not have been damaged. In other words, it is competent to show that the dam-

age resulted, not wholly or partly from the plaintiff's conduct, but wholly or partly from the defendant's conduct, or that it was not the defendant's dam which caused the damage, but the hole in the plaintiff's dam, and that if he had exercised ordinary care he would not have suffered the injury on account of which he complains. In *Grant v. Kuglar*, 81 Ga. 637, 8 S. E. 878, 3 L. R. A. 606, 12 Am. St. Rep. 348, it was said that sections of the former Code—2227, 2231, 2232, 3018 (but erroneously printed 2327, 2331, 2332, referring to what is now embodied in sections 3057, 3061, 3062, and 3879 of the Code of 1895)—made no substantial change in the common-law rights of landowners, with respect to ditching out and protecting their property. And see *White v. East Lake Land Co.*, 96 Ga. 417, 23 S. E. 393, 51 Am. St. Rep. 141; *Coldwell v. Sanderson*, 69 Wis. 52, 28 N. W. 232, 33 N. W. 591.

I am authorized to state that Mr. Justice ATKINSON concurs with me in the views above expressed.

(132 Ga. 307)

STALVEY v. STALVEY.

(Supreme Court of Georgia. March 10, 1909.)

1. DIVORCE (§ 210*)—TEMPORARY ALIMONY—CONDITION OF CAUSE.

Where there is no pending suit for divorce, until there is a proceeding for permanent alimony, the judge at chambers has no jurisdiction of the matter of granting alimony, under section 2467, Civ. Code 1895.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 610; Dec. Dig. § 210.*]

2. DIVORCE (§ 210*)—TEMPORARY ALIMONY—CONDITION OF CAUSE.

Where a petition was filed seeking temporary alimony, the filing of a subsequent independent suit for permanent alimony would not save the former petition.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 610; Dec. Dig. § 210.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Elizabeth Stalvey against G. M. Stalvey and another. Judgment for plaintiff, and defendant Stalvey brings error. Reversed.

Elizabeth Stalvey filed a petition against G. M. Stalvey and the Fourth National Bank, alleging, in brief, as follows: She was married to Stalvey in 1903, and two children were born to them. She has been informed and believes that Stalvey recently married another woman in South Carolina, and is now living with her. He has deserted the petitioner, and has contributed nothing, for some time past, toward the support of herself and her two children, and he and she are now living separate and apart. He has on deposit with the Fourth National Bank the sum of about \$700. He has threatened to withdraw this money from the bank.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It belongs in part to her, she having helped to earn it and save it. "Petitioner claims the whole of said sum as temporary alimony." Stalvey is guilty of a crime involving moral turpitude. She has no recourse at law, and will lose the money unless her prayers are granted. She prayed that Stalvey be restrained from drawing the money from the bank; that the bank be served with a copy of the petition and order granted thereon, and that it be restrained from paying the money to Stalvey; that pending the final hearing on the above petition the defendants be restrained from withdrawing and paying out the money or in any way changing its status; that Stalvey be required to answer, "on such day as may be named by the court, why said sum of money should not be paid over to petitioner"; and that process issue requiring the defendants to be and appear at the next term of the court.

By amendment it was alleged that Stalvey was insolvent and was without the state of Georgia, and that unless injunction should be granted the fund would be withdrawn beyond the reach of the process of the court. She prayed that the amount on deposit in the bank in the name of Stalvey should "be awarded her by the court as temporary alimony for support of herself and children, and that a decree issue requiring the defendant the Fourth National Bank to pay over to the plaintiff the said money, or so much thereof as the court may deem proper, for temporary alimony, and requiring the defendant Stalvey to pay over to the plaintiff said sum of money, or so much thereof as the court may deem proper, as temporary alimony." The presiding judge granted an order requiring the defendants to show cause before him, on a day named, why the prayers of the petition should not be granted, and in the meantime restrained Stalvey from withdrawing from the bank the fund on deposit there, the bank from paying such sum to Stalvey, and both of them from changing its status. The defendants demurred to the petition, and Stalvey filed an answer to it. On the hearing the judge ordered that out of the funds in the bank the sum of \$150 should be paid to the attorney for the plaintiff, and the balance be paid to her for the support of herself and her two children. Stalvey excepted.

W. R. Hammond, for plaintiff in error.
Lamar Hill, for defendant in error.

LUMPKIN, J. (after stating the facts as above). Under the decisions in *Yeomans v. Yeomans*, 77 Ga. 124, 3 S. E. 354, *Stallings v. Stallings*, 127 Ga. 467, 56 S. E. 469, 9 L. R. A. (N. S.) 593, and *King v. King*, 128 Ga. 54, 57 S. E. 227, the judgment of the judge of the superior court, granting temporary alimony and directing a sum which had been deposited in bank by the husband to be paid over by the bank to the wife and her attor-

ney, must be reversed. The petition filed by the wife contained no prayer for permanent alimony, nor did it appear that there was any separate suit for alimony or divorce pending. The petition contained only prayers for temporary restraint against changing the status of the money in bank, that the entire amount be awarded to the wife as temporary alimony, and for process. An application for temporary alimony is only for an allowance ad interim, including counsel fees, if proper. It is interlocutory in its character, not final. It must have as a basis some proper action which will result in a final judgment and terminate the interim. A judge of the superior court cannot on a mere application for temporary alimony, without more, and with no foundation on which to base it, either by way of a suit for divorce or a suit for permanent alimony, grant the temporary alimony prayed, and order funds of the husband in bank to be paid over by the bank to the wife or her attorney.

It was contended on behalf of the defendant in error that the point was not sufficiently raised before the presiding judge, or in this court, to authorize a reversal. In this view we cannot concur. The husband filed a demurrer, one ground of which was because the plaintiff's petition failed to set forth any cause of action against this defendant, and another was because the plaintiff in her petition did not pray for any relief against the defendant, or for the recovery of any judgment against him. The demurrer appears to have been before the presiding judge as a ground of objection to the grant of the temporary alimony. In the bill of exceptions one assignment of error was because the court erred in awarding temporary alimony to the petitioner; there being no prayer in her petition or any in the amendment thereto for permanent alimony, and no prayer on which an award of temporary alimony could properly be based. Error in the judgment awarding alimony was also assigned on other grounds. The point of lack of a sufficient basis was more distinctly made than in *Yeomans v. Yeomans*, supra. In that case Chief Justice Bleckley said in the opinion (page 126 of 77 Ga., and page 355 of 3 S. E.): "There is no intimation of this objection in the husband's answer, and we doubt whether it was distinctly presented to the judge below, although it is substantially developed in the bill of exceptions. But as jurisdiction over the subject-matter is essential to the validity of an order made at chambers, and as to enforce the order may require the use of means that could not be employed without very grave consequences where jurisdiction is wanting, we feel constrained to sustain the exception."

In response to the contention of counsel for the plaintiff in error that the petition did not have sufficient legal foundation, counsel for defendant in error in his brief replied

that there was in the record a petition for permanent alimony, filed on July 11, 1908, which had been sent to this court by the clerk of the superior court as a part of the record, though not specified to be sent up in the bill of exceptions. Counsel differed as to whether this could be considered by the Supreme Court. If it is not considered, then the application for temporary alimony appears to have been filed without the basis of a suit for divorce or permanent alimony. If it is considered, then the record shows on its face that the application for temporary alimony was first begun, and an effort was made to furnish a foundation for it by filing a separate suit for permanent alimony later. This would not save the application for temporary alimony.

As what has been said above necessitates a reversal, we need not consider at length other assignments of error, or deal with the sufficiency of the evidence to authorize the judgment. If a certified copy of the record of the trial and conviction of the defendant, in a court of South Carolina, of the crime of bigamy, was not admitted in evidence as an adjudication of the fact that the defendant had been twice married, as the presiding judge certified, we do not clearly perceive how it was admissible "as illustrative of the defendant's attitude to the plaintiff, of his separation from her, and of his treatment of her, in determining the question of alimony and the amount of it." If the presiding judge treated the proceeding as a general equitable petition, the proposed intervention by a person who claimed to have received a check from the defendant on the same day that the petition was filed and the restraining order granted, and by a bank, other than that of deposit, which also claimed to have cashed a check drawn by him on that day, do not make sufficient allegations to show that the judge erred in rejecting them. The only judgment entered by the court was one awarding alimony and counsel fees to the plaintiff, and directing the fund in bank to be paid over to her and her counsel. No formal order appears to have been passed upon the demurrers, though they were evidently considered as grounds of objection to the granting of temporary alimony. We will not, therefore, pass upon them formally as demurrers.

Judgment reversed. All the Justices concur.

(5 Ga. App. 788)

SINKOVITZ v. PETERS LAND CO. (No. 1311.)

(Court of Appeals of Georgia. March 16, 1909.)

1. NEGLIGENCE (§ 44*)—BUILDING ABUTTING ON HIGHWAY—DUTY OF OWNER.

It is the duty of the owner of a building which abuts upon a public highway to use ordinary care to keep it from being a source of

danger to the public after its construction, as much as it is his duty originally to see that it is not a source of danger to the public by reason of improper or unskillful construction. While the owner of a building abutting upon a public street is not an insurer of the absolute safety of those who pass upon the sidewalk, reasonable care must be exercised by him to keep it in such condition as that neither the building, nor any part thereof, will fall and passers-by be thereby injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 59; Dec. Dig. § 44.*]

2. NEGLIGENCE (§§ 121, 136*) — EVIDENCE — "RES IPSA LOQUITUR."

Where something unusual happens with respect to a defendant's property over which he has control, and by such extraordinary occurrence a plaintiff is injured (the occurrence being such as does not happen if reasonable care has been used), an inference may arise that the injury was due to the defendant's negligence. The maxim *res ipsa loquitur* is a rule of evidence, to be applied by the jury, if applied at all. The inference which may in some cases arise from an unexplained occurrence which has worked an injury to another, that the defendant who had in charge the instrumentality which was the direct cause of the injury was guilty of negligence may or may not be drawn by the jury; but, like the fact of negligence or no negligence, the inference which the jury may be authorized to draw is peculiarly an inference of fact, and consequently, where the inference of negligence may as well be drawn as the inference that the casualty resulted from accident or the act of God, it is error to award a nonsuit.

(a) The maxim, "*Res ipsa loquitur*," is to be applied with the greatest caution, and its application depends greatly upon the circumstances of each particular case. But, where the physical facts surrounding an occurrence are such as to create a reasonable probability that the occurrence and consequent injury resulted from negligence, the physical facts themselves are evidential, and may or may not furnish evidence of the particular negligence alleged.

(b) If the extraordinary character of the occurrence is sufficient to raise an inference of the negligence alleged, a *prima facie* case is established, and the burden of disproving negligence, especially in a case where the parties do not sustain to each other the relation of master and servant, is cast upon the defendant to disprove negligence upon his part; this for the reason that it is more particularly within his power to explain the character and condition of the instrumentality which may have occasioned injury than within the power of the injured party.

(c) In the absence of any satisfactory explanation that the occurrence was accidental and providential, or other sufficient explanation, if something unusual happens in respect to a defendant's property or to something over which he has control, whereby the plaintiff is injured, and the natural inference on the evidence is that the unusual occurrence is due to the defendant's act, the occurrence, being unusual, is said to speak for itself that such act was negligence (citing Words and Phrases, vol. 7, pp. 6137-6138).

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 293; Dec. Dig. §§ 121, 136.*]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Sarah Sinkovitz, by next friend, against the Peters Land Company. Judge

ment for defendant, and plaintiff brings error. Reversed.

Dorsey, Brewster, Howell & Heyman, for plaintiff in error. Smith, Hammond & Smith and E. M. Underwood, for defendant in error.

RUSSELL, J. The plaintiff, by her next friend, sued the Peters Land Company for injuries received from glass falling from a window in the Peters Building in the city of Atlanta, Ga. In her petition she alleges that as she was going up certain steps on Wall street, leading to Whitehall street viaduct (the building in question abutting on Wall street), she was struck by pieces of a window-pane falling from said Peters Building, by reason of which a serious and painful injury resulted to her. The defendant was charged with negligence in three particulars: (1) That the window-pane had not been properly placed or set and secured in the sash. (2) The omission to use flat sprigs to reinforce the putty, and the inferior quality of the putty which was the support of the pane of glass in the absence of the sprigs. (3) That the window-pane itself was defective and not capable of sustaining the force of the usual winds to be expected in Atlanta, and especially those to be anticipated at this particular location.

Upon the trial the plaintiff offered to amend the twenty-first paragraph of the petition by an additional allegation of negligence, but this amendment was refused. Paragraph 21 in the original petition was as follows: "Petitioner shows that said defendant was further negligent, in that said window-pane was itself defective and not capable of sustaining the force of the usual windstorms and furries of wind to be expected in Atlanta, and especially at the place where the Peters Building is located." In response to a demurrer, paragraph 21 was, by permission of the court, amended by amplifying its allegations as follows: "That said window-pane was defective, in that the same was too thin and too brittle, and did not have the tension required for its size; that, on account of said window-pane being so thin and brittle, it was not capable of sustaining the force of the usual windstorms and furries of wind to be expected in Atlanta and at this place. Atlanta is situated from 1,000 to 1,100 feet above the sea level, upon a ridge, where it is exposed to the windstorms and furries that are caused by the changes in climatic conditions; that strong furries of wind moving with great force are frequent in Atlanta; and that the same come up suddenly and unexpectedly, and require window-panes of strong tension to sustain their force. The Peters Building is located on one side of the railroad leading into the Union Depot, and is some eight stories high on the Wall street side."

By the amendment, which was rejected by

the court, it was proposed to add to the twenty-first paragraph of the petition as amended the following: "It is adjacent to the Kimball House, which is about eight stories high. The buildings located on the south side of the railroads form a solid bank, and are three or four stories high. The buildings on Peachtree street west thereof are, respectively, four and sixteen stories high. The height of these buildings with the open space between, forming banks as it were for the currents of air, force these currents of air about and around these buildings with great force. At the southwest corner of the Peters Building, and on the west and south sides thereof, on account of the conditions herein set forth, windstorms and furries of wind are constantly to be expected, and the window-panes should be of such material, with sufficient thickness and toughness, to withstand the same. Petitioner shows that the window-pane in the window complained of was not of such thickness and toughness, and that the failure to have said window-pane of such thickness and toughness required to withstand the usual windstorms and furries of wind was negligence on the part of the defendant. The conditions herein described existed at the time that said injury occurred."

1. We think that the court should have allowed the amendment, which was offered by the plaintiff in error. The amendment was permissible either as a fit and full response to the demurrer or as an additional ground of negligence setting up reasons why the defendant, in the exercise of ordinary care, should have provided these windows with glass of more than ordinary thickness and toughness. We can see no reason why the learned trial judge should have rejected this amendment. It was suggested in the argument that the height of the buildings surrounding the Peters Building, which created the conditions as to the windstorms and furries alleged by the plaintiff in the proposed amendment, had been changed and increased since the original construction of the Peters Building, and, this being conceded to be the fact, the trial judge was of the opinion that it would not be the duty of the defendant company to change its building to meet the exigencies arising from conditions for which it was not responsible. The evidence in the record is meager upon this point; but, granting that the erection of these buildings of 14 stories in height near the Peters Building increased the force of the air currents, and that the panes of glass in the defendant's building before the erection of nearby buildings of great height were suitable and reasonably safe, we are nevertheless of the opinion that it was the duty of the defendant as the owner of the building to still keep its building and all of its appointments just as reasonably safe, if the conditions were so changed as to render w-

had previously been safe unsafe to passers-by.

As was held in *Monahan v. National Realty Company*, 4 Ga. App. 680, 62 S. E. 127, not only must the landlord construct his building so that it will not be unsafe, but it must be so maintained as not to occasion injury to another. Of course, if a change in the condition or in the quality of safety of a building is effected by the unlawful act of another, or by the creation of a nuisance by another, over whose acts the owner of the building has no control, the owner of the building would in neither case be responsible for resultant injury; but there are many cases in which the lawful act of an adjacent landowner would call for the exercise of greater precaution for the safety of passers-by and others than might have been necessary in the original construction of a building. For instance, if an adjoining landowner should excavate a foundation, as he has a right to do upon his own land, by reason of which the wall of another's building might be endangered, it would be necessary for the owner of the endangered building in the exercise of due care for the safety of the public to use efficient means to prevent his building from falling into the street. Ordinarily artificial changes of conditions affecting a building which are legally effected must be regarded and acted upon by the owner of the building as much as the changes of condition which necessarily arise from the lapse of time and the ravages of the elements. To a lesser degree, but in the same sense, that a defendant could not defend against a claim for an injury resulting from the fall of an old wall or from the fall of tiles or slate from a roof which may originally have been perfectly constructed (if the fall of either was occasioned by long usage and decay), so the owner of a building which might, under its previous surroundings and conditions, have been reasonably safe as originally constructed, may, by a lawful change of conditions, have cast upon him the duty of changing his building so as to have it as reasonably safe under the changed conditions as it was originally and before the necessity for change arose. If, in lowering the grade of a street, the foundation should be impaired and the building become a menace to passers-by, the owner of the building might have his remedy in damages against a municipal corporation for the expense necessary to secure the safety of his building, but he could not escape liability in case a passer-by should be injured by the fall of his wall upon the ground that the city, and not himself, was responsible for the changed condition of his building from that of safety to that of danger. Or, if by the raising of the level of a street a sign under which passers-by could formerly go with safety should be brought in contact with the heads of pedestrians, and, by reason of this new danger, one who was walking the street

at night, unaware of the presence of the sign, should be injured, the owner of the building could not absolve himself from liability upon the ground that the city and not himself had brought the sign in contact with the pedestrian's head; for, if the sign was appurtenant to his building, it would be the duty of the owner to so locate it as to avoid injuring a passer-by. It is the duty of the owner of a building which abuts upon a public highway to keep it from being a source of danger to the public after its construction, as much as it is his duty originally to see that the building is not a source of danger to the public by reason of improper or unskillful construction. While the owner of a building abutting upon a public street is not an insurer of the absolute safety of those who pass upon the sidewalk, reasonable care must be exercised by him to keep it in such condition as that neither the building nor any part thereof will fall, and passers-by be thereby injured.

2. Regardless of the refusal to allow the amendment we think the court erred in awarding a nonsuit and dismissing the plaintiff's case. The evidence showed that a pane of glass, without any apparent cause, fell from the window of the defendant's building, and injured the plaintiff. The plaintiff had the right to be where she was, and the duty was upon the defendant to use ordinary and reasonable care in the construction and maintenance of its building so as not to occasion injury to passers-by. Barring human intervention (which was negated in this case), panes of glass do not ordinarily fall from windows unless the glass is either not placed properly in the sash at the start or unless by reason of lapse of time the sash and glass stand in need of repair. When the plaintiff showed that the pane of glass which struck her fell out of the window of the defendant's building, and that its fall was not caused by the occupants of the suite of rooms, or by the agency of any other person, she had made a prima facie case which should have been submitted to a jury to say whether from the circumstances attending the fall of the pane of glass they would draw the inference that the fall of the glass and her consequent injury was due to the alleged negligence of the defendant company, or was a pure accident, or was attributable to such an extremely high wind as that the casualty might be considered the act of God. The maxim, "*Res ipsa loquitur*," is of limited application, but embodies a perfectly sound legal principle. It is frequently difficult to determine when it can be safely said that the thing speaks for itself. However, the process by which it is to be determined whether the physical facts and circumstances accompanying an injury are such that the act may be said itself to speak the negligence of the defendant is to be worked out by the jury, and not by the court. Not only is negligence or diligence in every case where either is involved a question sole-

ly for the jury, but it is also the prerogative of the jury to say in the first instance whether the evidence adduced to raise the inference of fact that an extraordinary and unexplained casualty authorizes an inference that the defendant was negligent is sufficient or insufficient for the purpose.

Few subjects have been more fully discussed than the maxim "*Res ipsa loquitur*." Counsel for defendant in error insists that the maxim is caged, and that the decisions of the Supreme Court in *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 47 S. E. 329, and in the case of *Hudgins v. Cocoa Cola Bottling Co.*, 122 Ga. 695, 699, 50 S. E. 974, practically renders meaningless for all time in Georgia this maxim. We do not so understand these rulings. The decision in the *Hudgins Case* is based upon the fact that the plaintiff was confessedly unable to state the cause of his injury, and thereby failed to charge the defendant with responsibility therefor. In the first appearance of the *Chenall Case*, 117 Ga. 106, 43 S. E. 443, Justice Lamar, delivering the opinion of the court, places upon the maxim, "*Res ipsa loquitur*," as a rule of evidence the same construction that has been applied in the majority of the states of the Union, as well as by the English courts. When the case was first carried to the Supreme Court, the precise point now before us was before that court for adjudication for the first time in Georgia. Upon the second appearance of the *Chenall Case* in the Supreme Court (119 Ga. 837, 47 S. E. 329), the particular question involved was how far the application of the maxim, "*Res ipsa loquitur*," was affected by the fact that the plaintiff was a servant of the defendant, and thereby had assumed the risks incident to his employment, and to the negligence of his fellow servants. In so far as the opinion in the later case, delivered by Justice Cobb, appears to confine or limit the application of the maxim it must be borne in mind that the learned judge was dealing only with that specific point. But there was no retraction or modification of the original holding (where the relation of master and servant does not exist) that "ordinarily extraordinary and external causes may be treated as the exception to be established by the defendant. All that the plaintiff should be required to do in the first instance is to show that the defendant owned, operated, and maintained or controlled, and was responsible for the management and maintenance of, the thing doing the injury; that the accident was of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence. When he has done this, he has cast the burden upon the defendant, who may then proceed to show that the accident was occasioned by vis major, or by other causes for which he was not responsible." *Chenall v. Palmer Brick Co.*, 117 Ga. 109, 43 S. E. 443.

In the *Chenall Case*, 119 Ga. 842, 47 S. E.

329, Justice Cobb, after alluding to the burden which a servant has to carry, says: "The maxim, '*Res ipsa loquitur*,' is simply a rule of evidence. The general rule is that negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injury complained of or the attendant circumstances may sometimes well warrant an inference of negligence. It is sometimes said that it warrants a presumption of negligence; but the presumption referred to is not one of law, but of fact. It is, however, more correct and less confusing to refer to it as an inference rather than a presumption, and not an inference which the law draws from the fact, but an inference which the jury are authorized to draw, and not an inference which the jury are compelled to draw. In the trial of an action by a servant against a master, when it has been shown that the servant was in the exercise of due care, and the manner of the injury or the attendant circumstances are such that the injury could not have resulted unless the master had been negligent in some respect in which the law required him to be diligent for the servant's safety, then the jury might be authorized to infer that the master had been negligent in respect of the matter which was the basis of the suit, and would be authorized to base a finding upon such an inference, in the absence of an explanation which would be satisfactory to them; and it is not necessary that this explanation should satisfy them as to the cause of the injury, but an explanation which satisfies them simply that the master has exercised all the diligence which the law requires of him would be sufficient to rebut the inference of negligence resulting from the happening of the occurrence, although the cause thereof might still be involved in unsolvable mystery. Under our system, where every question of negligence is left for determination by the jury, even in cases where the maxim under consideration is applicable, the judge should not charge the jury that there would be an inference of negligence from a given state of facts, but should instruct them in clear and unequivocal terms that negligence must be proved; and it is for them to consider whether the manner of the occurrence and the attendant circumstances are of such a character that they would, in their judgment and discretion, be authorized to draw an inference that the occurrence could not have taken place if due diligence on the part of the master had been exercised. And they should also be instructed that, while they are not required by the law to draw any inference of negligence from the matter, still it is within their province to determine whether the circumstances are such that such an inference might be properly drawn. If, in a given case, the jury see proper to draw an inference of negligence from the

manner of the occurrence or the attendant circumstances, the drawing of this inference is not necessarily to result in a finding in favor of the plaintiff. It imposes upon the jury the duty of making further inquiry as to whether this inference has been overcome by a satisfactory explanation. If the jury have drawn the inference of negligence, and there is evidence which satisfies their minds, notwithstanding such inference of negligence, that the occurrence was really brought about by the negligence of a fellow servant, the inference is overcome, and the jury should find in favor of the defendant."

In the ordinary case, as well remarked by Blackburn, J., in *Scott v. London & St. Katherine Docks Co.*, 8 Hurl. & C. 596, as to matters which lie more in the knowledge of the opposite party, the fact of the accident may be sufficient to call upon the defendant to prove that there was no negligence. The rule, as stated in the *Scott Case*, supra, by Erie, C. J. (who delivered the opinion of the court, while he himself dissented), is that "there must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care." In *McDonnell v. Central of Ga. Ry. Co.*, 118 Ga. 86, 44 S. E. 840, which was a case of master and servant, the decision is not expressly based on the rule of evidence embodied in the maxim, "*Res ipsa loquitur*," but the court held that the lower court erred in awarding a nonsuit, because, as said by Justice Cobb, delivering the opinion: "The evidence disclosed a condition of affairs which would authorize a jury to find that the boiler was in a dangerous condition, entirely too dangerous for use. The defects in the boiler were shown to be of such a character that an inspection would have disclosed them, and from the evidence it is to be inferred that they must have existed for some time. It is to be inferred that the work in which the plaintiff's husband was probably engaged at the time of his death rendered it usual, proper, and necessary that the engine should be heated and the boiler filled with steam. Under these circumstances, was the plaintiff entitled to have a jury pass on her case? Has she carried the burden which the law imposes upon one suing for the homicide of an employé? There can be no question that there was sufficient evidence to authorize a jury to find negligence on the part of the defendant so far as the condition of the boiler was concerned. It is unnecessary to determine whether the doctrine of *res ipsa loquitur* applies. But see the following cases: *Illinois Central R. Co. v. Houck*, 72 Ill. 286; *Dunlap v. Steamboat Reliance (C. C.)* 2 Fed. 249;

Robinson v. Railroad Co. (C. C.) 9 Fed. 877, 20 Blatchf. 338; *The Reliance*, 2 Fed. 249, 4 Wood's C. C. Rep. 420; *Ill. Cen. R. Co. v. Phillips*, 49 Ill. 234. As boilers properly constructed and properly used do not generally explode, the explosion of a boiler would seem to be evidence of negligence in some one. It may have been that of the boiler maker, or of the one whose duty it was to inspect the boiler before using it, or of the one who was using the machinery to which the boiler was attached. It would seem therefore that, while the mere explosion of a boiler would raise a presumption of negligence on the part of some one, it would not necessarily be evidence of negligence on the part of the owner of the boiler. As we say, however, no decision as to this need be made in this case. There was evidence authorizing a finding that the defendant was negligent in furnishing such a boiler for use by an employé either at work with or upon the machinery with which it was connected. The evidence also authorized a finding that the company ought to have known of the defective condition of the boiler. The plaintiff has therefore successfully carried the burden which the law imposed upon her of showing that there was a latent danger to which her husband was exposed, and which the company ought to have known of before placing her husband at work upon the locomotive, and about which it was its duty to warn him."

The rule in New York seems to be similar to the rulings in Georgia. 7 Words & Phrases, 6137. "The doctrine of *res ipsa loquitur*, as expounded by the Court of Appeals in its latest utterance on the subject, in *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, relates simply to the probative force of evidence. It does not dispense with the necessity of evidence of the defendant's negligence in any case, but, on the contrary, expressly requires it. In its application in those cases where the accident is such as in the ordinary course of business does not happen if reasonable care is used the effect of the rule is that the evidence of the attendant circumstances is sufficient for an inference of negligence without proof of any specific act. But the attendant circumstances shown must be such as will warrant an inference of negligence without proof of any specific act. But the attendant circumstances shown must be such as will warrant an inference not of negligence only, but of defendant's negligence—an inference that the injury is attributable to some violation of defendant's duty. The learned judge who wrote the opinion in *Griffen v. Manice*, supra, in explaining the meaning and application of '*res ipsa loquitur*,' quotes approvingly section 59 of *Shearman & Redfield on Negligence* as follows: 'It is not that in any case negligence can be asumed from the mere fact of the accident and injury, but in these cases the surround-

ing circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of defendant's duty, and his neglect to perform it. The fact of casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer.' The judge in his opinion also quotes approvingly from *Benedict v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; and concludes; "The res includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish or to justify the jury in inferring the existence of the traversable or principal fact in issue—the defendant's negligence. The question in every case is the same—whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue.' Thus it was held in an action for personal injuries that the doctrine did not apply, as, while the circumstances may have shown negligence, there was nothing to suggest that it was the negligence of the master rather than that of fellow servants. *Flink v. Slade*, 66 App. Div. 105, 72 N. Y. Supp. 824."

The doctrine is given a liberal construction in *Breen v. New York Cent. & H. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450. In the *Breen* Case the rule is thus stated: "There must be reasonable evidence of negligence; but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." The application of the maxim as stated by the Supreme Court of Appeals of Virginia, following the ruling in the *New York* case, is as follows: "Where the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms 'evidence of negligence,' in conformity with the maxim, '*Res ipsa loquitur*.'" *Seybolt v. New York, L. I. & W. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75. Thus, where a loud and unusual noise came from an electric car, and a volume of smoke issued therefrom, frightening plaintiff's horse, an instruction that such noise and smoke raised a presumption that it would not have been caused had defendant used proper care in relation to the machinery of the car, and that the jury may infer that the defendant was guilty of negligence, was properly given." *Richmond Railway & Electric Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736, 738. For additional authorities, see citations in 7 Words & Phrases, 6137, 6138.

No exact classification can be made of the

instances in which the maxim, "*Res ipsa loquitur*," as a rule of evidence, is to be applied by the jury. But, in almost numberless decisions in which no specific reference is made to the rule or doctrine of *res ipsa loquitur*, it is not only plain that the existence of this rule of evidence is recognized, but also that the finding reached is supported by nothing else than the conclusion that in the case under consideration the application of the rule was warranted, and that it was properly applied. Among many cases which might be cited, in which this is true, and where the relation of master and servant existed, the leading case of *Byrne v. Boston Hose & Rubber Co.*, 191 Mass. 40, 77 N. E. 696, and *King Mfg. Co. v. Walton*, 1 Ga. App. 403, 58 S. E. 115, may profitably be referred to. In the *Byrne* Case, *supra*, it is ruled that "if a machine, which is stopped by means of a shipper shifting the belt which transmits the power from a tight pulley to a loose one and is started again by reversing the process, after having been stopped in the proper manner by the person operating it, starts of itself and injures the operative, this fact unexplained is evidence of some defect in the machine and of negligence on the part of its proprietor in allowing this defect to exist." The Supreme Court of Appeals of Virginia, upon the necessity, in some cases, for explanation by the defendant, says that "where the thing causing the injury complained of is shown to be under the management of a defendant or his servant, and the occurrence is such that in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the occurrence arose from want of care." *Peters v. Lynchburg Light Co.*, 108 Va. 333, 61, S. E. 745 (1), citing the *Scott* Case and other authorities. A similar ruling is found in *Bice v. Wheeling Elec. Co.*, 62 W. Va. 685, 59 S. E. 626 (3). "This phrase [*res ipsa loquitur*]' * * * is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident." *Benedict v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478.

The maxim, "*Res ipsa loquitur*," is simply a rule of evidence authorizing the jury to infer negligence on proof of circumstances indicating it. *Monahan v. National Realty Co.*, 4 Ga. App. 680, 62 S. E. 127 (3); *Alexander v. Nanticoke Light Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; *Cockrell v. Langley Mfg. Co.*, 5 Ga. App. 317, 63 S. E. 244. Where circumstances are proved from which reasonable men might fairly disagree as to the existence of negligence, the question is for the jury. *Roanoke Ry. & Elec. Co. v. Young* (Va.) 62 S. E. 961 (4). When there is no other rational way to account for the

existence of a fact, the jury may infer that it happened in that way, whether you call it *res ipsa loquitur* or not. *Chesapeake Ry. Co. v. Rowsey* (Va.) 62 S. E. 364, 368 (14); *Smith v. Atlantic Coast Line R. Co.* (Ga. App.) 62 S. E. 1020. A plaintiff who shows that he was injured by the falling of a building into the street (*Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530), or by the falling of a pole of a toll gate as he was passing thereunder (*Hydes Ferry Co. v. Yates*, 108 Tenn. 428, 67 S. W. 69), or by the falling of a brick from defendant's wall (*Murry v. McShone*, 52 Md. 217, 36 Am. Rep. 367), or by an electric shock from one of defendant's poles (*Moglia v. Nassau Elec. Co.*, 127 App. Div. 243, 111 N. Y. Supp. 70), thereby makes out a prima facie case, which, unless rebutted by the defendant, is sufficient to legalize an inference of negligence by the jury. See *Burdick on Torts* (2d Ed.) 427.

We think, therefore, that the plaintiff established a satisfactory prima facie case which should have been submitted to a jury. It was for the jury to determine whether the circumstances were sufficient to authorize them to infer upon the facts at issue whether the defendant was negligent. Learned counsel for the defendant in error insists however, that there was no evidence to sustain either of the three allegations of negligence to which we have referred. Of course, if this be true, the court would not have erred in awarding a nonsuit. We think, however, that the evidence is sufficient to authorize the jury to infer, although they would not be required to draw such an inference, either that the window-pane had not been properly placed in the sash originally, or that the window-pane was defective and not capable of sustaining the force of such winds as are usual in the locality in question. On the other hand, the inference may be drawn from the testimony that the fall of the glass was due to an unusual hurricane. But no one can say which inference would be drawn by the jury, whose experience in such matters is more to be trusted than the more limited knowledge of the profession upon such practical subjects; and it is the peculiar province of the jury to draw all inferences of fact, just as it is the province of the court to draw the inferences of law.

As we see it, there is no force in the argument that testimony could have been brought from the camp of the defendant to show that the glass was secured in the sash, or that the glass was of sufficient thickness. It is well known that glass does not ordinarily fall out of windows that are properly constructed. It is peculiarly within the power of the defendant to show that, for the reason that all ordinary care had been used in the selection of proper glass and in the proper

glazing of the window, the fall of the window-pane could not have been prevented by the exercise of ordinary care. The plaintiff was only required to make a prima facie case. This she did, and her case, was not altered by the fact that the fracture of the glass might have been caused by an excessive draft from the interior of the building, if it was such a draft as was to be expected in the building as it was constructed. It is as much the duty of the owner of a building to see that his building is safe (so far as pedestrians passing by are concerned) from dangers which might arise from the interior construction of his building as from those dangers which depend upon a defective exterior. It is the cause of injury which must be guarded against.

Judgment reversed.

(5 Ga. App. 850)

SIMS v. SCHEUSSLER. (No. 1,385.)

(Court of Appeals of Georgia. March 23, 1906.)

1. CHARGE NOT ERRONEOUS.

The charge of the court submitted fully and clearly the law pertinent to the issue.

2. WITNESSES (§ 897*)—CREDIBILITY—EFFECT OF IMPEACHMENT.

Where it is sought to impeach a witness by proof of contradictory statements, the jury may in its discretion believe the witness, whether corroborated or not.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1265; Dec. Dig. § 897.*]

3. CHATTEL MORTGAGES (§ 91*)—RECORD—CONSTRUCTIVE NOTICE—NOTICE TO MORTGAGEE.

The constructive notice implied from the record of a mortgage does not necessarily import that the mortgagee has actual knowledge of such mortgage, or any interest in the property upon which the mortgage is alleged to create a lien.

[Ed. Note.—For other cases, see *ChatTEL Mortgages*, Dec. Dig. § 91.*]

4. CONTRACTS (§ 48*)—CHATTEL MORTGAGES (§ 243*)—DEFENSES—WANT OF FAILURE OF CONSIDERATION—CONTRACT UNDER SEAL—CANCELLATION OF MORTGAGE—PRESUMPTION OF CONSIDERATION.

Either want of consideration or failure of consideration may generally be pleaded to a contract under seal. There being no requirement that a cancellation of a mortgage should be under seal, the court did not err in refusing to charge that the law conclusively presumed that the mortgagee received a consideration for the cancellation of the mortgage.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 406; Dec. Dig. § 48; *ChatTEL Mortgages*, Cent. Dig. § 508; Dec. Dig. § 243.*]

5. ERRORS REQUIRING NEW TRIAL.

No error required the grant of a new trial. (Syllabus by the Court.)

Error from City Court, Floyd County: Harper Hamilton, Judge.

Action by G. W. Sims against Christine R. Scheussler. Judgment for defendant, and plaintiff brings error. Affirmed.

Denny & Harris, for plaintiff in error. C. N. Featherston and Dean & Dean, for defendant in error.

RUSSELL, J. When this case was here before (2 Ga. App. 466, 58 S. E. 693), the judgment refusing a new trial was reversed upon the ground that the court erred in repelling a certified copy of a mortgage, duly probated and recorded; this court holding that "a copy of an instrument required by law to be recorded, taken from the proper registry and duly certified, is presumptive evidence of the existence of an original," and that "where it appears that due notice has been served on the mortgagee to produce the original mortgage, and that the mortgagor resides beyond the jurisdiction of the court, a sufficient foundation is laid to admit as secondary evidence a properly certified copy of the mortgage." Upon the trial now under review, the errors of the previous trial were corrected, and the jury again returned a verdict in favor of the defendant. The plaintiff's motion for new trial complains of errors in the charge of the trial judge and of his refusal to charge in accordance with certain requests. When the case was here before the judge's charge was approved as submitting fairly, fully, and clearly the issues involved and the law pertinent thereto, and a comparison of the charge in the record now before us with the charge in the record of the former case discloses that the charge in the instant case is practically identical with the charge which we approved. The only changes made are that the judge instructed the jury in the present instance on the subject of impeachment, and included in his charge a principle of law referred to in our previous decision, and supported by the rulings of the Supreme Court in *Daniel v. Royce*, 96 Ga. 568, 23 S. E. 493; *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726; *Atlanta Suburban Land Corporation v. Austin*, 122 Ga. 374, 50 S. E. 124. As we have heretofore critically examined the charge of the court, and found no error in what was said by the judge, we deem it unnecessary to consider the assignments of error which are based upon his charge, and we shall address ourselves to what was left unsaid, so far as the omission of the judge to charge in accordance with the requests presented in the record is alleged to be error.

2. In the fifth ground of the motion for new trial it is insisted that the court erred in refusing to charge the jury that, "if a witness in a case is impeached on a matter material to the issue by proof of conflicting statements made by the same witness, then you could not accept the testimony of such witness on any subject, unless she was corroborated by circumstances or other unimpeached witness." The plaintiff insists that the request to charge contains a sound principle of law, and one applicable to the facts

of the case; that the defendant had testified during the trial that Judge J. H. Lumpkin was not her attorney, and did not represent her at the time the note was given; that in her testimony taken by interrogatories she stated that Judge J. H. Lumpkin was her attorney at the time and represented her; and that these conflicts were not explained by her. The plaintiff further contends that the testimony showed that the defendant had made conflicting statements as to whether her husband was or was not trying to protect her and endeavoring to save the proceeds of his stock of hardware for her, and that this conflict was not explained. The insistence of the plaintiff is that the jury should have been instructed that unless these conflicts were explained the testimony of the witness so impeached could not be received unless corroborated. We think the request was properly refused. We have already adverted to the fact that one of the additions made to his former charge by the judge of the city court was an instruction upon the subject of impeachment. Upon this subject the court charged that "a witness may be impeached by disproving facts testified to by him, or by contradictory statements previously made. The credibility of a witness is a matter wholly for the jury." We think that in the absence of a request more exhaustively embodying the law, or more fittingly adjusted to the evidence, the charge upon this subject is not only correct, but ample. If the plaintiff had desired the general presentation of the subject given by the judge to be more specific and exhaustive, a proper request should have been made. The judge did not err in refusing the request as made, because he was not required to correct the request so as to perfect it, and in the form in which it was presented it did not set forth a correct principle of law. The court correctly told the jury that the credibility of a witness is a matter wholly for the determination of the jury, and that they had the right to impeach the witness by contradictory statements previously made. But he would not have been authorized to have told the jury, as requested, that if a witness was impeached by proof of conflicting statements, and if the conflict was not explained, they could not believe the testimony of such witness on any subject, unless corroborated by circumstances or other unimpeached testimony. This would have been a direction by the court to the jury that, if they believed the witness had made contradictory statements which she had not explained, they must disbelieve her entirely, and the court has no right to take away from the jury any portion of their prerogative in determining the credibility of witnesses sought to be impeached. The whole question of impeachment is one for the jury; and, while it would have been proper for the judge to charge that the jury would be authorized to disre-

gard all of the testimony of a witness whom they believed to be impeached by proof of contradictory statements as to a matter material to the issue, yet to have told them that, if they believed from the evidence that the witness sought to be impeached had made unexplained contradictory statements, they could not accept the testimony of such witness, would have been an invasion of the jury box by the judge. In *Railroad Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66, a similar request was made, and was held to have been properly refused for an additional reason. In that case the request preferred was: "If the jury should believe that any of the witnesses sworn for the plaintiff have been successfully impeached or contradicted in material matters sworn to by him or them, then the jury can disregard the whole testimony of such witness, whether it be the plaintiff or other person." Chief Justice Bleckley, delivering the opinion of the court, held that the request (as is the request involved in the case at bar) "was open to the objection that it would apply as well to a contradiction resulting from honest mistake on the part of the witness attacked as to a contradiction due to willful and corrupt perjury." The request is also open to the further objection pointed out by Judge Bleckley, that "it might be clear to the jury that a witness contradicted in a material matter could be fully credited as to other matters, and, when this is the case, it is not a rule of law that the whole of his testimony can be disregarded. The rule of 'falsus in uno falsus in omnibus' has relation to willful falsehood, and should be restricted in giving it in charge to the jury. *Skipper v. State*, 59 Ga. 63; *Ivey v. State*, 23 Ga. 576." The request to charge in the present instance does not call the attention of the jury to the principle that contradictory statements must have been made knowingly and willfully.

8. In the sixth ground of the motion for new trial it is insisted that the court erred in refusing to charge as follows: "Where a mortgage on a stock of goods is duly probated for record—that is, executed before the proper witness—and is recorded in the place and manner required by law, such record is notice to the world of the existence of such a mortgage." And in the seventh ground of the motion complaint is made that the court refused to charge that "where a mortgage is executed by a husband to his wife, is properly probated and properly recorded, such record, from its date, is constructive notice to the mortgagee named, as well as the rest of the world, of the existence of such mortgage." We treat these two assignments together because they present practically the same point. The question is whether the charge is pertinent to the issue in the case, and whether the plaintiff in error was injured by the court's omission to give what is admittedly a principle of law correct in the abstract. We cannot see how the

rights of the plaintiff could have been affected by the failure of the court to call the attention of the jury to the doctrine of constructive notice. The clear cut issue presented to the jury by the evidence was whether the defendant had actual notice of all the details of the transaction leading up to the execution of the note which she admitted she had signed. The conflict in the evidence was acute as to almost every material point, but there is absolutely no conflict as to the fact that the mortgage in question was executed by the defendant's husband and recorded, and therefore there could be no denial that she had constructive notice of its existence. The case, however, is of such a nature that the only practical issue is whether Mrs. Scheussler, the defendant, had actual notice of the existence of the mortgage, if it was necessary to the plaintiff's case to show that there was a mortgage at all. It was necessary that the plaintiff should show that the defendant, by the cancellation of a mortgage or otherwise, purchased the stock of goods which had been sold by the plaintiff to the defendant's husband, and that she thereby obtained as her property a stock of goods which it would be to her interest and benefit to protect by giving the note to the plaintiff. The only purpose of the introduction of the mortgage, so far as benefit could result to the plaintiff from its introduction, was to use it as basis for proof that in the cancellation of the mortgage Mrs. Scheussler became the owner of the stock of goods which was liable to be subjected to the payment of the note that the plaintiff held against her husband. The omission to give the request could not have been harmful to the plaintiff, because, even if Mrs. Scheussler had had no notice whatever of the mortgage, and even if it had never been recorded, and she had purchased the stock of goods, and had then for the first time ascertained that her husband had executed and recorded a mortgage in her favor, her cancellation of the mortgage (of the existence of which up to that time she had had no knowledge, either actual or constructive) might be a circumstance from which it could be inferred that, having bought her husband's stock of goods, she would have had such an interest in protecting her property from the attacks of Sims as would warrant her buying her husband's notes. She may have believed them to be a lien upon her property. The question involved was not one of priority of liens, but merely one of fact, as to whether Mrs. Scheussler had in any way become the owner of the stock of goods which had been sold by Sims to Scheussler, and for the purchase price of which Scheussler was still indebted to Sims. We think, therefore, that not only was the plaintiff not injured by the failure of the judge to give in charge the requests on the subject of constructive notice, but these requests were really not pertinent to the issues in the case.

4. The court refused to charge: "If you should find from the evidence that the defendant ever executed a paper in the form of a cancellation of a mortgage from her husband to herself, and if you find further that said cancellation was executed by the defendant under seal, then the law conclusively presumes that the defendant received a consideration in said transaction, and the defendant will not be heard in a court of justice, by herself or any other witness, to deny that she received said consideration." The plaintiff insists that the charge requested should have been given because he had introduced in evidence a certified copy of the cancellation, signed by the defendant, in which she declared that she canceled the mortgage in consideration of the transfer to her by her husband of a certain stock of goods described in the mortgage, which cancellation was executed before a notary public and under her seal, and that she is estopped from asserting that the cancellation was without consideration. If the plaintiff's contention is sound, the request should have been given; because, if there was a consideration for the cancellation of the mortgage introduced in evidence, there is ample evidence to warrant a finding that the same consideration constituted a consideration for the note sued upon. The exact question has not been decided by the Supreme Court, but it is clear to our minds that in this state, where there are no distinct courts of law and courts of equity, and where the courts of law may afford equitable relief, there is no reason why the maker of an instrument under seal should be estopped from setting up that the obligation was without consideration. The fact that it has been held that section 3656 of the Civil Code of 1895 declares that an instrument under seal generally imports a consideration does not lead us to the conclusion that, by the terms of section 3656, the makers of many instruments under seal which might be mentioned are estopped from pleading and proving that the instrument in question was without consideration. Especially must it be true that lack of consideration may be proved as to an instrument executed under seal, which is not required to be executed with such formality. Even if the law required that the cancellation of a mortgage should be under seal, we think that for the reasons stated by Starnes, J., in the well-considered case of *Albertson v. Holloway*, 18 Ga. 379, Mrs. Scheussler had the right, regardless of the fact that the cancellation was executed under her seal, to show that the cancellation was without consideration.

What is said by Justice Cobb in *Sivell v. Hogan*, 119 Ga. 170, 46 S. E. 67, upon the point now before us, is obiter, because the learned judge concludes his remarks upon the subject by saying: "We are not, however, to be understood as definitely committing ourselves at this time to the proposition that even want of consideration cannot be

pleaded to a promissory note under seal, though this would seem to be true." Thus, while he previously said that the court was not prepared to adopt the reasoning upon which the decision in the *Albertson Case*, supra, rests, the court declined to overrule that earlier case. For the reason that the earlier case is controlling, as well as for the reason that it has more than once been held that section 3656 of the Civil Code is an adaptation from the common law, it seems to us that the force of the decision in the *Albertson Case*, supra, is not affected by the consideration that the decision was rendered prior to the Code. The language of that section, so far as the section relates to sealed instruments, is: "In some cases a consideration is presumed, and an averment to the contrary will not be received. Such are generally contracts under seal, and negotiable instruments alleging consideration upon their face, in the hands of innocent holders without notice," etc. The use of the word "generally" is to our minds significant of the fact that the framers of the Code had in mind the decision in the *Albertson Case*, and the distinction there drawn between two separate classes of sealed instruments, rather than the distinction drawn by the South Carolina court in *Koster v. Welch*, 57 S. C. 95, 35 S. E. 435, between want of consideration, which could not be pleaded, and failure of consideration, which might be pleaded, and which is adverted to by Judge Cobb in *Sivell v. Hogan*, supra. Especially must this be true when we consider that the *Albertson Case* had been decided before the laws of Georgia were codified, and was, no doubt, perfectly familiar to the distinguished jurists who were engaged in that labor, whereas the decision in the *Koster Case*, 57 S. C. 95, 35 S. E. 435, was not rendered by the Supreme Court of South Carolina until March, 1900. In the absence of binding authority, therefore, to the contrary, we must believe that, by the use of the word "generally" in the Code section, it was at least intended to provide for exceptions from the general rule which conclusively presumes a consideration where an instrument is executed under seal, and that the decision in the *Albertson Case* is the law defining the cases in which the presumption may be rebutted. Therefore the request to charge that the law presumed that Mrs. Scheussler had received a consideration by reason of the fact that she canceled the mortgage under her seal, and that she would not be heard in a court of justice to deny that she received consideration, would, in our opinion, have been properly refused even if the law had required mortgages to be canceled under the seal of the mortgagee. See *Lacey v. Hutchinson* (this day decided) 64 S. E. 106. Inasmuch, however, as section 2737 of the Civil Code does not require the formality of a seal, but provides only that "any mortgagor in this state, who may have paid off

his mortgage, may present the same, together with the order of the mortgagee or transferee, directing that the mortgage be canceled and record the order across the face of the record, to the clerk of the superior court of the county or counties in which the same is recorded," and that such clerk shall thereupon write the word "Satisfied" across the face of the record in the mortgage, together with the date of the entry, and sign his name officially, there is no view in which it can be held that this defendant's right to plead lack of consideration would be affected. In *Martin v. Bartow Iron Works* (D. C. U. S.) 35 Ga. 320, 325, Fed. Cas. No. 9,157, Judge Erskine held that it is "the settled law of Georgia that to an action on what is commonly known as a sealed note or single bill the defendant may plead either a total or (by statute) a partial failure of consideration," and consequently he applied it in the United States court in Georgia as a rule of the local law, controlling as to an instrument made and to be performed in this state.

In the trend of modern jurisprudence, as well pointed out by Judge Lumpkin in *Lowe v. Morris*, 13 Ga. 147, the importance of the seal as an affix to one's signature and as a mark of identity has been greatly diminished. In that case each member of the court wrote an opinion, and one who is interested either in the origin and history of seals or in the reasons assigned for their use will be richly repaid by a perusal of the delightful opinion of Judge Lumpkin, or may even more enjoy the choice satire of the dissenting opinion of Judge Nisbet, who thought the writ of error should be dismissed because the seal of the court was not attached to it, and defended the forms of the common law (which forms he declared to be substantial, because consecrated by time and usage, although they might be in themselves unmeaning or even ridiculous), and, in decrying the prevailing desire for change, declared that the vocation of the age "seems to be to reform everything from the religion of Heaven down through a descending series almost infinite to a certiorari." Judge Lumpkin, in concurring with Judge Warner, who delivered the opinion of the court, shows that the seal goes back to Judah, one of the twelve Princes of Israel ("Moses' Reports, Book Genesis, c. 38, v. 18"), and develops that Ahasuerus was a postmaster general in his day because he sent his letters by post, and says: "I admit that many old things may be good things, as old wine, old wives, ay, and an old world too. But the world is older, and consequently wiser, now than it ever was before. Our English ancestors lived comparatively in the adolescence, if not the infancy, of the world. * * * And yet we, who are 'making lightning run messages, chemistry polish boots, and steam deliver parcels and packages,' are forever going back to the good old days of witchcraft and astrology to discover precedents for

regulating proceedings of courts for upholding seals and all the tremendous doctrines consequent upon the distinction between sealed and unsealed papers when seals de facto no longer exist."

5. It is insisted that the court's charge to the jury entirely failed to present one of the main contentions of the plaintiff, and that, therefore, it was error to refuse the request to charge: "If you find from the evidence that Mrs. Scheussler had a mortgage on the stock of goods of C. S. Scheussler; that plaintiff attempted to collect his notes for \$2,460; that he employed counsel and threatened to attack the mortgage; that thereupon defendant executed the note sued on—then I charge you that this note was a valid contract, and can be enforced against the wife, under the laws of Georgia." It is unnecessary for us to rule whether the court could properly have given this request without altering its verbiage, for the reason that the evidence was undisputed that Mrs. Scheussler had no actual knowledge of the existence of the mortgage prior to Sims' intended attack upon it and the employment of Judge Lumpkin to defend. Whatever conflict there may be as to other points in the case, no evidence contradicts Mrs. Scheussler's statement that she had no knowledge of the mortgage prior to its record. The request, therefore, could perhaps have been rejected as not adjusted to the evidence in the particular case because the mere fact that there may have been a mortgage recorded in favor of Mrs. Scheussler would not necessarily show that it had ever been accepted by her as security for her debt. If a mortgage is recorded, this is generally evidence of its delivery to the mortgagee and of his acceptance. But in a case where it might be contended that a mortgagee was prevented from asserting his rights against a debtor who had made a mortgage in his favor without his knowledge or consent it certainly could not be held that the mortgagor, by such a gratuitous act, could compel an unwilling creditor to forego his existing rights, and be involuntarily remitted to the security afforded by a second or even a third mortgage. The request upon this point was not sufficiently specific, unless the statement that the defendant had a mortgage had been followed by the further statement, and that, by the cancellation of that mortgage, the defendant had acquired property which it was her interest to retain.

But the real point raised by the request was fully presented to the jury by the court in that portion of the charge in which the jury were instructed that "a wife can buy notes of her husband, or she can make a valid obligation in settlement of such notes, if they appear to have been purchased to protect property to which she has title or interest." This statement of the principle upon which the defendant's case depended is full and clear, and is aptly adjusted to the evidence, because the legitimate purpose of the

evidence in behalf of the plaintiff was to show that the settlement of the husband's notes by the wife was occasioned by no intention on her part to pay his debts or to assume his obligations, but was intended to protect property to which she had title or interest. The instructions given in lieu of those requested are in the language used by this court in the prior decision of the case. We held, when the case was here before, that the plaintiff would be entitled to recover if he had proved that the consideration for the note arose from Mrs. Scheussler's attempt to protect any of her property rights. The instruction of the trial judge upon this subject is in accord with our ruling. The request the refusal of which is the ground of complaint in the tenth ground of the motion for new trial is, for the reasons just stated, likewise covered by the charge of the court.

6. As already stated, we approved the charge of the court when the case was here before. By so ruling, of course, we did not intend to be understood as standing sponsor for the exact phraseology employed; nor did we intend to say that the language employed is not subject to verbal criticism, but we hold now, as we held then, that the instructions were remarkably apt, and the language employed so clearly intelligible to the jury that we are warranted in saying that the charge submitted the issues and the law fairly, fully, and correctly. The fact that the words "in good faith" were inaptly transposed or incautiously interjected into the wrong portion of the instructions of the judge did not mislead the jury. The court charged the jury that "if you find from the evidence that Mr. Scheussler was justly indebted to Mrs. Scheussler, and that there was a conflict between the claims of Mrs. Scheussler and a claim of Mr. Sims on the property of the husband, and if you find that, in order to settle these conflicting claims, it was necessary to protect her as a creditor of her husband, that she took all the claims of Mr. Sims, and thereby became the owner of the claims, and the transaction did in good faith benefit her, and that the note sued on was given solely to protect her interests and on her own account, then I charge you that she would be bound on the notes sued on, and you would find your verdict for the plaintiff." The same language was used when the case was here before, but it appeared to us then, as it does now, that, viewing this instruction in connection with other portions of the charge, it was plain to the jury that the mistake of the judge was merely a lapsus linguae, and the jury understood that what the court meant to say was that if the transaction was entered into in good faith, to benefit her (that is, she believing that it would benefit her), the defendant would be bound on the note.

7. The first four grounds of the motion for a new trial covered the usual general grounds, and a review of the evidence convinces us

that a reversal of the judgment, based upon these grounds, would not be authorized. It appears that the plaintiff and the defendant's husband were partners in a hardware business in Atlanta. The plaintiff sold his interest to the defendant's husband, and received notes to the amount of \$2,400. Failing to collect these notes, he accepted in lieu thereof the note of Mrs. Scheussler, the wife of his debtor, for \$1,200, and a certain paper disclaiming a legal obligation, but acknowledging a moral obligation to pay Sims, whenever he was able, the amount of loss he had sustained. As to these points there is no conflict in the evidence. Upon the filing of the plaintiff's suit, the defendant, Mrs. Scheussler, admitted a prima facie case, and assumed the burden of proving that the note was void because it was without consideration, and was given merely as a colorable device for assuming the indebtedness of her husband. In several portions of the charge the court instructed the jury that the burden rested upon the defendant of sustaining her contention by the preponderance of the evidence. So it cannot be said that the jury rendered their verdict in favor of the defendant upon the idea that the plaintiff had failed to establish his case. On the contrary, the verdict must be construed as finding that the defendant successfully carried the burden and successfully rebutted the case made by the plaintiff, which un rebutted necessarily entitled him to a recovery. The evidence in behalf of the plaintiff showed that the defendant, by a written contract of purchase, coincident with and a part of the cancellation of the mortgage executed by her husband in her favor, had become the purchaser of a stock of goods for which the defendant was still indebted. This indebtedness was part of the purchase price, and was evidenced by certain notes held by the plaintiff. The defendant, being fully apprised of the condition of affairs, and acting under the advice of her counsel, and acting in her own interest (as it was apparently to her advantage to protect her property against a lien which might be set up by Sims), purchased the notes of her husband, as she had the right to do, and in payment gave a note which was the basis of the present suit. The evidence in behalf of the plaintiff would have authorized a verdict in his favor. On the part of the defendant, however, there was testimony that she never knowingly had been the holder of the mortgage which purported to create a lien upon the stock of goods in her favor, had never owned the stock of goods, had never been credited any share in the management of the store, had never derived any profits from it, and that the note was given merely as a colorable device by which she bound herself to pay the debts of her husband. According to the defendant's testimony, she consented to sign the note for no other reason than that she wanted to

relieve the embarrassment of her husband. Two apparently disinterested witnesses who were employed in the business both before and after Sims sold his interest to Scheussler, one of whom had had charge of the books, and the other of whom was in general charge of the sales and the cash, testified that the defendant never received any moneys from the business after the execution of the mortgage or after the alleged sale, or at any other time, that the business was conducted in the name of the husband, and that, though they were in charge of the business and conversant with all its details, they never heard of the defendant having any interest in the stock of goods during the entire period in which the business was conducted.

From this testimony and from various other circumstances which it is unnecessary to recount, we think that the jury were fully authorized to find that the making of the note was nothing more than the assumption by the wife of her husband's debt; that the various steps leading up to the execution of the note were means adopted, in the first instance, by the husband in his own interest; and that later on the wife, without a view to any interest of her own, and certainly, so far as the record discloses, without ever having received any benefit therefrom (though that would not matter if her action was influenced by the hope of benefit), simply to relieve the pressure of her husband's creditor, assumed his debt, and gave her note which the husband indorsed. The jury may have considered the circumstance of the husband's indorsement as having some significance in view of the fact that the evidence fails to disclose that, after having sold his business and the stock of goods to his wife, he had no remaining assets which would cause his indorsement to be of value. Without disbelieving the testimony of the eminent counsel who testified in the case, the jury could well infer from the nature of the relationship between husband and wife that, though the circumstances and the statement made at the exact time that the note was given were precisely as stated in the testimony of the counsel who were employed in the case, still that it was not only possible, but even probable, that the attorneys may have seen only the surface indications of a bona fide intention to purchase, while the wife, under the tutelage of her husband and in wifely devotion to his interest, may have concealed what, according to her testimony, the plaintiff was obliged to have known, that she had no interest in the stock of goods, and therefore no interest of her own to protect.

No errors of law having been committed, the trial judge did not err in refusing to set aside the verdict of the jury upon issuable facts, although a different finding would have been authorized.

Judgment affirmed.

(5 Ga. App. 865)

LACEY v. HUTCHINSON. (No. 1,557.)

(Court of Appeals of Georgia. March 28, 1909.)

1. BILLS AND NOTES (§ 90*) — DEFENSES — WANT OF CONSIDERATION—INSTRUMENT UNDER SEAL.

It is a good defense to an action on a negotiable promissory note under seal in the hands of the original payee that it was executed without any lawful consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 163; Dec. Dig. § 90.*]

2. CONTRACTS (§ 48*)—CONSIDERATION—CONTRACTS UNDER SEAL.

The common-law courts of England enforced specialties in the absence of consideration, not because the presence of a seal carried with it any presumption of consideration, but because consideration was not essential to an instrument executed with such formality. The doctrine of enforcing a contract because of the formality of its execution is older than the juridic concept of consideration as an element of a binding promise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 406; Dec. Dig. § 48.*]

3. CONTRACTS (§ 48*)—DEFENSES—INSTRUMENT UNDER SEAL—WANT OF CONSIDERATION.

The courts of equity recognize consideration as an essential element of all contracts, with but few exceptions, and do not recognize formality of execution as a substitute therefor. Hence lack of consideration is a good defense in equity to a contract under seal.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 48.*]

4. BILLS AND NOTES (§ 43*)—NEGOTIABLE INSTRUMENT UNDER SEAL.

A negotiable promissory note under seal is a legal hybrid unknown to the common law.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 63; Dec. Dig. § 43.*]

5. COURTS (§ 189*)—CITY COURTS—PROCEDURE.

In this state an equitable defense not involving affirmative relief or extraordinary remedy may be filed to any action at law in any of the courts. Hence to an action in a city court on a note under seal the defense of lack of consideration may be successfully pleaded.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. H. Nicholson, Judge.

Action by J. H. Hutchinson against J. S. Lacey. Judgment for plaintiff, and defendant brings error. Reversed.

Land & Hall, for plaintiff in error. Hal Lawson, for defendant in error.

POWELL, J. The plaintiff sued upon a negotiable promissory note under seal. The defendant filed a plea showing, in substance, that the note was wholly lacking in consideration. The court refused to allow the defendant to introduce testimony tending to support his plea; and the sole question before this court is whether total lack of consideration is a good defense to a negotiable promissory note under seal.

It has frequently been held that failure of consideration, total or partial, is a good de-

fense to such an instrument in this state. It has been held that fraud in the procurement may also be pleaded to such an instrument (*House v. Martin*, 125 Ga. 643, 54 S. E. 735), but it is said in the case of *Slaton v. Fowler*, 124 Ga. 955, 53 S. E. 567, that it is an open question in Georgia whether the common-law rule which forbade inquiry into consideration in a suit based on a specialty is applicable to promissory notes under seal to such an extent as to forbid recognition of a plea of total absence or want of consideration; and this precise point has not been decided subsequently. There is no question but that the presence of a seal raises a *prima facie* presumption that it is founded upon a consideration. *Weaver v. Cosby*, 109 Ga. 313, 34 S. E. 680; *Rutherford v. Baptist Convention*, 9 Ga. 54; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761.

We have made a painstaking and careful search of the decisions of the Supreme Court, and in no case has the right to plead a total want of consideration to a negotiable promissory note under seal been denied except by way of obiter. There is a case (*Beazley v. Gignilliat*, 61 Ga. 187) in which the opinion expressly recites that the promissory note involved was under seal, and yet the judgment of the court below was reversed for refusing to allow the defendant to file a plea of lack of consideration. This is a full bench decision, but it does not seem to have been cited in any subsequent case. It would probably be subject to the criticism that it is a physical precedent only (as the section of the code on the subject of instruments under seal is not noticed) were it not for the fact that Chief Justice Warner, who wrote the opinion, cited the case of *Albertson v. Holloway*, 16 Ga. 377. In the case last cited (which was decided, however, prior to the adoption of our Code), it was said by the court: "We believe that the rule that a plea of failure of consideration cannot be used as a defense to a specialty applies to no other instruments, save such as were known to the common law as specialties, as deeds, bonds, and instruments executed with like solemnities of sealing and delivery. It has been common for courts to say that such defense cannot be set up to an instrument under seal. But we think that these words were used, or should have been used, with reference to such instruments as were executed with the ceremonies necessary to specialties at common law." In *Sivell v. Hogan*, 119 Ga. 169, 46 S. E. 67, there is a somewhat lengthy review of the authorities by Justice Cobb and the intimation of a personal opinion that a plea of original lack of consideration would not be a good defense to a suit based on a contract under seal, though the court very frankly states that what is said on this subject is obiter.

Section 3656 of the Civil Code of 1895 provides: "A consideration is essential to a contract which the law will enforce. An

executory contract without such consideration is called a *nudum pactum*, or a naked promise. In some cases a consideration is presumed, and an averment to the contrary will not be received. Such are generally contracts under seal, and negotiable instruments alleging a consideration upon their face, in the hands of innocent holders without notice, who have received the same before dishonored." It is said in *Sivell v. Hogan*, *supra*, that this section of the Code is declaratory of the common law; and this is true in the sense that it is not the codification of a statute. However, in so far as the section contains an assumption or indirect statement that at common law contracts under seal were conclusively presumed to be founded on a consideration, it is not an accurate declaration of the common-law principle on that subject. The courts and text-writers who have made the deepest and most philosophical research into the history of the question are in accord upon the proposition that specialties—those formal common-law contracts under seal—were enforced in the absence of an allegation of consideration, not because it was conclusively presumed that they were founded on a consideration, but because consideration was not an essential element to such contracts. Contracts under seal were enforceable at common law because of the formality of their execution, and such contracts were fully recognized and enforced long before the doctrine of consideration appeared in the law. In those early days the courts looked to the form and solemnity attending the execution of the promise rather than to its nature, the subject-matter, and surrounding circumstances in determining whether the promise was enforceable and binding or not. Except in a few cases to which the common-law action of debt was applied, no contract was enforceable at early common law unless it was under seal. An ordinary executory contract not under seal was without a remedy for its enforcement. Later on, by looking at the breach of an executory contract not under seal as a wrong arising *ex delicto*, the courts afforded a remedy by extending to such transactions the action of trespass on the case, a remedy not originally designed for that purpose. For example, a plaintiff would allege that the defendant had done him a wrong and had damaged him, in that he had undertaken to build a house in a good and workmanlike manner, which undertaking the defendant had not kept, whereby the plaintiff was damaged. To afford a remedy in such a case the court looked upon the defendant's conduct as something in the nature of a deceit resulting in damage to the plaintiff, and applied to the transaction the tort action of trespass on the case. Finally this form of action was extended so as to afford a remedy for the breach of every promise which had resulted in detriment to the promisee. Cases arose, however, in which this remedy was invoked,

and it appeared that the plaintiff had given the defendant nothing to induce his promise; that is to say, the plaintiff had suffered no detriment through the promise since he had done nothing or given up nothing therefor, and the court refused to afford such a plaintiff the remedy. This was the inchoation of the doctrine of the necessity for consideration in contracts. The plaintiff was required to show that he had given a consideration before he was allowed to have a remedy for the breach of the defendant's promise. A similar concept attached to the action of assumpsit when it came into use. On the general subject, see Anson's *Law of Contracts*; 2 Pollock & Maitland's *History of English Law*, c. 5; 3 Halsbury's *Laws of England*, p. 83, § 170; J. B. Ames on the *History of Assumpsit*, 2 Harv. Law Rev. 1, 53.

In this connection, it may be pertinent to call attention to the peculiar relation existing between right and remedy at common law. In those times, when the common law was being developed, the courts had a very indistinct concept of an actual wrong in the abstract; indeed, for the most part it seems that they had no concept at all of a legal wrong apart from the forms of action which had been framed and developed from time to time. We recall the familiar Grecian tradition that the robber, Procrustes, had a bed used in the torture of his victims. He placed his captives on this bed, and, if they were short, they were stretched, and if they were tall, they were lopped off so that the length of the body was made exactly the length of the bed. Common-law writs and forms were Procrustean beds, and the rights of parties were the hapless victims that were stretched or cut to adapt them to the measure of the particular forms of action or defense which the courts had invented or permitted. Our doctrine, announced as a fundamental in sections 3076 and 4929 of the Civil Code of 1895, that for every right there is a remedy, and every court having jurisdiction of the one may, if necessary, frame the other, is not declaratory of the common law as actually practiced, though many of the early English judges and law writers claimed that their procedure had reached that stage of proficiency. Members of the profession in this state will probably recall an interesting paper on this subject read before the Georgia Bar Association at its session in 1901 by Hon. Sylvanus Morris, dean of the law department of the University of Georgia.

Until the adoption of the Hilary rules, there was no provision under the administration of the common law in the English courts for pleading either an original lack of consideration or a failure of consideration otherwise than under the general issue; that is to say, the plea of general issue put in issue not only the alleged promise, but also the alleged consideration therefor. 4 Enc. Pl. & Prac. 944. If, therefore, the suit were on a specialty, either by action of debt or covenant, since the prescribed form for either of

these actions contained no reference to consideration, there was no possibility of raising the question of the lack of consideration by the plea of the general issue, as in assumpsit and other similar cases where a recital of consideration was required. The English courts in the early times in which the principles of the common law were taking on their primitive embodiment seem never to have been called upon to frame or permit a plea raising the point that a specialty was without consideration. A reason which promptly suggests itself as to why this state of things should have existed is that in those early times when commercial transactions were few the execution of a deed or bond or other paper at common law known as a specialty was generally attended by such circumstances of solemnity and formality, and with such mature deliberation as to the consequences that but few, if any, cases actually arose in which the person sealing the bond or other specialty did so without receiving from the obligee something which the law in later times called a consideration, and consequently the cases were naturally rare in which a defendant could have been likely to seek to raise, by plea, the defense of want of consideration. The courts, therefore, may not have been called upon to frame a plea for the setting up of want of consideration to an action based on a specialty; the remedy not being created, because there was no need for it.

The foregoing statement relates, of course, to the earlier days of the common law; but those earlier days were nevertheless the formative period. While the courts were developing the doctrine of consideration as a necessary element of a simple contract, specialties continued to be enforced because of the formality of their execution and were considered as entirely without the rule thus more lately applied as to consensual obligations not under seal. McKelvey, in his *Common Law Pleading* (page 21), in discussing the earlier forms of actions, says: "The real fact of the matter was that there were two distinct grounds for holding a promisor liable on his promise, either one of which was sufficient—one, and the earlier, because he deliberately intended to make himself liable and so indicated by the solemnity of the seal; the other, because he had received a consideration which it would be unjust to the promisee to allow him to keep unless he was held liable upon the promise." So rigid was the common-law practice of enforcing contracts under seal on account of the formality and solemnity of their execution that the rule in courts of law was that "a sealed instrument could be discharged only by another instrument of as high a character, or else by the surrender of it so that the creditor could not make profit of it. A debtor who had complied with his bond, but who had failed to take a release under seal, could not defend an action on the bond. On the other hand, the law courts enforced, with

like hardship, the rule that the obligee in a sealed instrument which had been lost or accidentally destroyed was prohibited from maintaining an action upon it, since he could not make the profert which the inflexible rules of legal procedure required." Pomeroy, *Equity Jurisprudence* (3d Ed.) §§ 70, 71, 383. Thus the matter stood in the courts of law. The courts of equity, however, took a broader view more in accordance with common sense and the natural justice of the transaction. "The important part played by the seal in the early common law, and the intensely technical and arbitrary effects produced by it according to the legal rules, are too well known to require any statement. * * * Equity, disregarding such form and looking at the reality, always requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies this doctrine to covenants, settlements, and executory agreements of every description." Pomeroy, *Eq. Jur.* (3d Ed.) § 383; Pollock's *Principles of Contract*, 168, 169; *Ord v. Johnston*, 1 Jur. (N. S.) 1063, 1065; *Houghton v. Lees*, 1 Jur. (N. S.) 862, 863; *Jeffreys v. Jeffreys*, *Craig & P.* 138, 141. In a few of the early chancery cases, as is remarked in the footnote to the foregoing section from Pomeroy's *Equity Jurisprudence*, it was held that voluntary agreements under seal would be enforced, but these decisions and dicta have long since been overruled. It is a well-settled equitable doctrine, resting on innate justice, that in every binding contract there must be a quid pro quo.

Every student of the development of the common-law system has been struck by the fact that between the courts of law and the courts of equity there existed throughout the formative period a juridic jealousy. Whenever courts of equity began to give a remedy which modified the rigor and technicality of any common-law principle especially prolific of hardship and injustice, the law courts would at first protest against the invasion but would finally follow the lead by themselves finding some way to give the same relief against the hardship and injustice. This was frequently done by resort to fictions; at other times by providing new writs, new processes, or new pleas formerly unknown or unrecognized. Usually, in the end, the law courts reached the point that in ordinary transactions they dealt the same degree of substantial justice (as contradistinguished from formal justice) as did the courts of equity. For example, despite the rigid adherence of the early common-law courts to the rule that although the debtor on a bond or other specialty had paid the demand in full, but had failed to secure a release under seal or a surrender of the instrument, even if he had taken an ordinary receipt reciting the payment of the bond, the creditor might still sue and recover the full amount of the bond again, yet, when the courts of equity broke in on the rigor of the law and gave a reme-

dy against this hardship, the common-law lawyers at first inveighed against the courts of chancery for this invasion of legal rules; nevertheless the equitable doctrine long ago became a part of the law enforceable in any and all courts. See Pomeroy, *supra*, § 383, note 2. As showing how reluctance in this respect finally became alacrity, if not eagerness, it is interesting to note the case of *Sturdy v. Arnaud* (1790) 8 T. R. 599, in which the defendant had given to his creditor a bond to secure an annuity, but before this demand became due loaned him a sum of money, and it was agreed that the latter should retain the payments of the annuity as they became due until the same was discharged; and, this creditor having become bankrupt and the defendant being sued by his assignees in bankruptcy, the agreement to retain was held to be well pleaded to an action on the bond for the payments on the annuity accruing after bankruptcy, the pleading of such agreement and the retainer being held to be equivalent to a plea of *solvit ad diem*. Counsel argued that the defendant had no right to retain the arrears of this annuity against the debt due by him to the bankrupt on the ground that the agreement would operate as a defeasance, and there could be no defeasance of a deed or specialty by a mere recital not under seal; and he cited the case of *Blennerhasset v. Pierson*, 8 Lev. 234. Lord Kenyon, C. J., replying to this argument of counsel, said: "Indeed, I should be sorry for the plaintiffs themselves if the law were with them, since their conduct is so unconscientious that, if the defendants were to apply to a court of equity for relief, that court would not only give such relief, but would also decree the plaintiffs to pay the costs both in law and equity, on the same principle on which Sir Thomas More, when Lord Chancellor, proceeded when he first gave relief against the penalty of the bond, the obligee in that case having paid the sum mentioned in the condition after, though not on the day."

So far as we have been able to find, no court of law situated in a jurisdiction administering the unmodified common law has so far departed from the early doctrine as to allow a plea of want of consideration as a defense to a purely legal action on a common-law specialty, and yet to this extent alone the ancient rule seems to have preserved its original rigor. See footnote to the case of *Garden v. Derrickson*, 2 Del. Ch. 386, as reported in 95 Am. Dec. 286. See, also, *Joyce on Defenses to Commercial Paper*, § 217. In this state, while the common law affords the basis of our system of jurisprudence, we have adopted the common law only so far as it is suited to our form of government and to our general juridic policy. We have emancipated substantive law from the form of action, so that the former is no longer dependent upon the latter for its right of recognition. The form and the remedy are now subservi-

ent to the right. The distinctions between law and equity have been to a large extent abolished, and courts of law administer equitable rights, and equitable defenses may be filed to actions at law. We no longer, except in a few very rare cases, resort to those fictions by which the common-law courts were wont to give elasticity to the system, but we do directly and without apology what the common-law courts did indirectly and, in a sense, equivocally.

The common-law rule that a seal attached to an instrument would, by its very presence, dispense with the necessity for consideration—that element which the experience and mature thought of mankind has come fully to recognize as essential to every contract which is to be given legal efficacy—is antiquated and obsolete. In early times the seal was a solemn thing. It was a symbol of the knight's honor pledged to his promise. It was the coat of arms taken from the device engraved on the shield of knight or nobleman and planted upon the bond as a gage of faith. The bond thus sealed was in some sense an imitation of that early form of promise which was secured "by oath and wed and borh." There was a time when the adding of the seal had a distinct religious aspect, and was used to create a binding obligation on the conscience of the promisor rather than to give a specific civil liability against him. In those days only the few had seals. At the date of the Conquest the Norman Duke had a seal, and the late King of England had had a seal, but only these and bishops and counts had them. In France during the times of Bracton the privilege of using the seal was confined to the "gentixhomes." In England in the thirteenth century, when the law for the great had become the law for all, every free and lawful man was permitted to have a seal. 2 Pollock & Maitland, *History of English Law*, 221. It is a far cry from the day when the nobleman placed the device from his coat of arms as a seal upon his bond or his humbler neighbor bit the wax with his foretooth for a like purpose to the "L. S." of everyday use, employed without any circumstance of solemnity, and printed, not by the party himself nor by his lord, but by some printer upon a standard commercial form. Compare *Lowe v. Morris*, 13 Ga. 153, and *Sterling v. Park*, 129 Ga. 311, 58 S. E. 828, 13 L. R. A. (N. S.) 298, 121 Am. St. Rep. 224. Judge Russell, who has written the opinion of the court this day filed in the case of *Sims v. Scheussler*, 64 S. E. 99, involving a like question, has quoted at length from the lucid language of the judges in the *Lowe Case*, supra, and it is not necessary that I should do so here.

So much of the common law as declared that the form alone in which the contract was embodied and the formality with which it was executed was equivalent to consideration or so important as to forbid inquiry into consideration or to dispense with the neces-

sity for it is utterly unsuited to our times and to our commercial activities, and is out of harmony with our system of jurisprudence. It is wholly obsolete. In those days form was everything and substance nothing. In our times we disregard form and look to the substance of transactions. Mutual intention and lawful consideration, and not mere useless form, are with us the cardinals that give to contracts essence and that particular quality which commands and permits courts of law to enforce them. Wherever form has a substantial value it is preserved and regarded; otherwise it is not. The formality of writing required by the statute of frauds serves a useful purpose, and neither law nor equity would raise a hand to destroy it. A will is an instrument which stands or falls according to its formality, and depends not on consideration; and, since there is a useful purpose in preserving this formality, law and equity alike observe it. There may be cases—indeed, we think there are—in which a sealed instrument or specialty will be enforced, though it has no consideration. For instance, it is a principle well recognized that a person desiring to make a gift of money in future cannot accomplish this end effectively by the execution of a simple contract or promissory note and the delivery of it to the proposed beneficiary. Therefore the adoption of a sealed instrument as a means of making a gift of money in the future has sometimes been resorted to and recognized even in those jurisdictions which in other instances deny the validity and sacredness of the seal. See the note to the case of *Richardson v. Richardson*, 26 L. R. A. 308. Thus in New Jersey by statute a seal is not conclusive evidence of consideration. In the case of *Aller v. Aller*, 40 N. J. Law, 446, it was held that a promise under seal to pay money, though voluntary, was still enforceable, even after the death of the obligor, if the intention to make a gift was proved. Our minds give full assent to the correctness of this proposition. So, too, we can conceive of a case, and such cases have arisen, where an office is created without emoluments, and yet a bond for the faithful discharge of the duties of the office have been required. The giving of such a bond may be said in a very fair sense to be without consideration on the part of the obligor, and yet, without any violation of the rule we are seeking to support, a recovery on such a bond may be upheld. Indeed, there is much to support the theory intimated as obiter by Judge Starnes in the case of *Albertson v. Holloway*, 16 Ga. 379, that the common-law rule still applies to those specialties which were known as such at common law; e. g., deeds, single and double bonds, etc.

Commercial negotiable instruments under seal were not recognized at common law. To apply to them the rigor of the common-law rule dispensing with consideration is to apply this rule in a case in which the common law itself did not apply it. A negotiable

promissory note under seal is a legal hybrid; but it is fully recognized in the law of this state. Such a note at common law would not have been a commercial paper, nor would it have been classed as a negotiable instrument. We treat it as a commercial paper, and apply to it all the incidents of a negotiable instrument. The custom of putting a seal upon a promissory note has come about, not through a desire on the part of those making and taking such papers to foreclose the question of consideration, but chiefly to make the period of the statute of limitations applicable thereto 20 years, instead of 6 years. It would seem just and reasonable and highly expedient, therefore, that the presence of the seal on such instruments should have no higher effect than the parties using it intend that it should have, and should not give to it the effect of foreclosing the question of consideration. As showing how any other rule would result in hardship, take the case of A., desiring to borrow money from B., with C. willing to give his accommodation paper to A., that he might transfer it to B., as security for the loan. B. prefers that the note he takes as collateral security shall be sealed, in order that it may not go out of date before the expiry of a period, more than six years, during which the loan is to run. C. therefore executes his note under seal to A., who indorses it as collateral security to B. Afterwards A. pays the debt due to B., and receives back the note signed by C. Shall he then be entitled to collect this accommodation paper out of C.? Our use in this state of promissory notes under seal is so frequent as to make it a matter of the greatest inexpediency and bad policy to allow an inapt and antiquated rule of the common law to stand in the way of inquiry into the consideration for such paper. Whether we look at the question from the view that a sealed contract will be enforced because of its formality, without reference to the question of consideration, or from the view that, when a seal is present, the law, as a rule of evidence, conclusively presumes that there was a consideration, and will hear no proof to the contrary, we should be led into such absurdity that even the stoniest defender of the common-law doctrine would hesitate before carrying it to its limits, if we should attempt to apply it to a case where a debtor had executed under seal a number of voluntary promises to pay and the holders of these promises attempted to enforce them against the debtor's property or estate, in prejudice to the rights of creditors, where the debtor had become bankrupt or had died, or for any other reason his property should be before the court for administration. There is hardly a lawyer or a layman whose innate sense of justice would not be shocked at such a thing, and yet the common law had no exceptions to the rule in favor of third persons, though courts of equity did. The whole temper of our times, the general scheme of

our jurisprudence, is in accord with the policy that a person should not irrevocably bind his property or his estate by voluntary contracts or agreements by promises for which he gets nothing, and which cost the promisee nothing.

We have shown above that courts of equity have always refused to give the same sanctity to a seal as did the courts of law, and have always allowed inquiry into consideration, and have never dispensed with the necessity therefor. We have adverted to the fact that in this state equitable defenses may be asserted in courts of law. Civ. Code 1895, § 5049, provides: "The defendant may, by proper pleadings, raise issues of law, or of fact, legal or equitable, or both." Any equitable defense not necessitating the granting of affirmative extraordinary relief may be successfully filed in a city court. *House v. Oliver*, 123 Ga. 784, 51 S. E. 722; *Gentle v. Atlas Savings & Loan Association*, 105 Ga. 406, 31 S. E. 544; *National Bank v. Carlton*, 96 Ga. 469 (3), 23 S. E. 388. It follows, therefore, that, when a defendant is sued upon a sealed instrument lacking in consideration, he may plead the defense of want of consideration in a court of law as he formerly could have done in a court of equity. This express point was ruled in the case of *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181. In 1834 an act was passed in that state permitting the plea of lack of consideration to be filed to an action founded on a specialty, but this act was subsequently repealed. The Code of Civil Procedure afterwards adopted, provided, however, that "the defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off as he may have, whether they be such as have been heretofore denominated legal or equitable, or both." The court in holding that, if a sealed obligation was executed without consideration, a defendant might under this section plead it as a defense in a court of law, said: "As against a strictly legal cause of action, a defendant, therefore, may now set up an equitable defense, and thereby not only bar the plaintiff's action, but obtain the proper affirmative equitable relief connected with the subject-matter. And, although the common law in requiring a valuable consideration in order to render an agreement valid and binding declared, in its strictness, that a seal was conclusive evidence of such a consideration, yet, in determining rights of parties upon equitable principles, a seal has been divested of the apparent sacredness with which it was clothed by the common law; and equity, looking rather to reality than form, does not permit a seal to supply the place of a consideration, and, notwithstanding the seal, will allow the want or failure of such consideration to be shown in the enforcement of executory contracts of every description. In *Richardson v. Bates*,

8 Ohio St. 264, it was said by Sutliff, J.: 'Under the statute of February 24, 1834, allowing the failure or part failure of consideration to be given in evidence in a suit upon a specialty, the facts stated in the answer would have constituted a perfect defense. And the provision of the Code allowing a defendant to set forth in his answer equitable as well as legal grounds of defense permitted the same defenses to be made in this case; and therefore the failure of consideration, stated in the answer, constituted a good defense.'

Now, summing up: The law courts of England prior to the adoption of the common law in this state enforced, without reference to or thought of consideration, certain contracts executed according to an ancient and solemn form and known as "specialties," deeming the mere formality of execution to be a sufficient reason for their enforcement. This state adopted the law of England (and hence the body of the common law) in force on May 14, 1776, only so far as it was suited to our conditions, form of government, and general policy. Even at common law, as it became more developed, the right and justice of requiring consideration as an element of contracts was recognized, and only a slavery to Procrustean form and ancient precedent upheld the doctrine that specialties might be enforced in the absence of consideration. Equity refused to bow the knee to form, was willing to observe it only when it subserved some useful purpose, and disregarded it when it stood in the way of the erection of just and substantial principles. Hence the equitable doctrine was that, except in certain rare cases, a contract would not be enforced because of the formality of its execution alone. At the date of our adoption of the common law, the tendency was strong in the courts of law to break away from slavery to form and technicality and to approach nearer to the standards of equity jurisprudence even in the administration of what they called legal rights. In this state the distinctions between legal and equitable rights have been largely abolished; for every right there is a remedy, and even in a court of law equitable defenses, not involving relief through some extraordinary remedy, may be pleaded to a strictly legal action. A sealed negotiable promissory note is a form of contract unknown to the common law. Hence it is doubtful that such a contract would even in a court adhering strictly to the common law be regarded as so formal a contract as to deserve enforcement without reference to consideration and for its formality alone. Certainly such a contract, though under seal, would not be enforced in a court of equity if wanting in consideration. Hence under our system which allows equitable defenses in legal actions a plea of total lack of con-

sideration may be successfully pleaded to an action on such a contract, even in a court of law. The ruling of the trial court was therefore erroneous.

Judgment reversed.

(6 Ga. App. 18)

WARREN v. STATE (No. 1,713.)

(Court of Appeals of Georgia. March 23, 1909.)

1. WEAPONS (§ 10*)—CARRYING WEAPONS—MANNER OF CARRYING OR CONCEALMENT.

Ordinarily to conceal a pistol in a sack which is carried under the arm is a violation of section 341 of the Penal Code of 1895, which forbids carrying about the person a weapon concealed. *Boles v. State*, 86 Ga. 255, 12 S. E. 361.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 9; Dec. Dig. § 10.*]

2. CRIMINAL LAW (§ 394*)—EVIDENCE—EVIDENCE OBTAINED BY UNLAWFUL SEARCH—ADMISSIBILITY.

Evidence obtained by the illegal seizure and search of a defendant's person which compels him to incriminate himself is inadmissible against him. But incriminating facts discovered by another from an illegal search of the property or premises of the defendant are admissible against him. *Hughes v. State*, 2 Ga. App. 29, 58 S. E. 890; *Glover v. State*, 4 Ga. App. 455, 61 S. E. 862; *Croy v. State*, 4 Ga. App. 456, 61 S. E. 848; *Rogers v. State*, 4 Ga. App. 691, 62 S. E. 96; *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; *Duren v. Thomasville*, 125 Ga. 1, 53 S. E. 814.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 877; Dec. Dig. § 394.*]

3. CRIMINAL LAW (§ 777*)—TRIAL—REQUESTED INSTRUCTIONS ERRONEOUS IN PART.

It follows from the foregoing headnote that the court properly refused to charge the jury: "If you find from the evidence that the defendant was illegally arrested, and while under illegal restraint his person or property was searched and the evidence was obtained, then you would not be authorized to find him guilty." This is not the law as applicable to the facts discovered by search of defendant's property.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 777.*]

4. CRIMINAL LAW (§ 394*)—EVIDENCE—EVIDENCE OBTAINED BY UNLAWFUL SEARCH—ADMISSIBILITY.

Where the accused was illegally arrested and his person searched, and no weapon was found thereon, but in a sack which he had under his arm when arrested, and which prior to the search of his person he had voluntarily given to another to keep for him, there was subsequently found a pistol concealed, the evidence of this fact was admissible against him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 877; Dec. Dig. § 394.*]

5. SUFFICIENCY OF EVIDENCE.

No error appears, and the evidence supports the verdict.

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

Ed Warren was convicted of carrying a con-

cealed weapon, in violation of Pen. Code 1895, § 341, and he brings error. Affirmed.

J. B. Murrow and J. J. Murray, for plaintiff in error. W. J. Wallace, Sol., for the State.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 18)

WILSON v. STATE. (No. 1,658.)

(Court of Appeals of Georgia. March 23, 1909.)

1. CRIMINAL LAW (§ 593*)—CONTINUANCE—ABSENCE OF COUNSEL.

It is not error to overrule a motion for continuance based upon the absence of leading counsel, where no good and sufficient reason is shown why he is absent. Where there is no attempt to explain the cause of his absence, the motion should be overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1320; Dec. Dig. § 593.*]

2. CRIMINAL LAW (§ 584*)—VENUE—EVIDENCE—SUFFICIENCY.

Venue may be proved by circumstantial evidence; but circumstances which render it possible that an alleged crime was committed within the jurisdiction of the court are insufficient to establish the jurisdictional element of venue where, from the circumstances adduced, it is as reasonable and possible that the crime was committed beyond the jurisdiction of the court. In the absence of any direct evidence as to where an alleged offense was committed, the mere circumstance that the defendant resides in the county in which the crime is alleged to have been committed, or the statement that he was at his home in the county a portion of the day on which the offense was alleged to have been committed, is not sufficient, without more, to establish the jurisdiction of the court; and both circumstances combined are insufficient to prove venue, unless the evidence shows that the crime under investigation was committed at his home. Especially is this true where there is no testimony identifying the particular point, or house, or locality at which the alleged criminal act was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1277-1284; Dec. Dig. § 564.*]

3. CRIMINAL LAW (§ 534*)—CONFESSIONS—CORROBORATION.

Though a confession may be corroborated by proof of the corpus delicti, a conviction based upon an uncorroborated confession cannot be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1222-1224; Dec. Dig. § 534.*]

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Frederick Wilson was convicted of a crime, and he brings error. Reversed.

J. M. Fletcher and R. L. Berner, for plaintiff in error. J. W. Wise, Sol. Gen., and Bloodworth & Bloodworth, for the State.

RUSSELL, J. Judgment reversed.

(5 Ga. App. 846)

SELF v. ADEL LUMBER CO. (No. 1,307.) (Court of Appeals of Georgia. March 23, 1909.)

1. CARRIERS (§§ 235, 240*)—MASTER AND SERVANT (§ 101*)—"CARRIERS OF PASSENGERS"—WHO ARE PASSENGERS—EMPLOYEES RIDING TO WORK—EXISTENCE OF RELATION OF MASTER AND SERVANT.

A corporation engaged in the manufacture of lumber operated an engine and flat cars in connection with its business for the purpose of hauling timber and transporting its employees to and from their places of work. Held: (a) The lumber company was not a carrier of passengers, and its employees while being transported were not passengers. (b) The relation of master and servant existed between the company and its employees while the latter were being transported to and from their places of work, and the company was charged with the duty of exercising ordinary care in furnishing cars and appliances in a reasonably safe condition. Moore v. Dublin Cotton Mills, 127 Ga. 609, 58 S. E. 839, 10 L. R. A. (N. S.) 772.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 235, 240; Master and Servant, Dec. Dig. § 101.*]

For other definitions, see Words and Phrases, vol. 1, p. 973.]

2. MASTER AND SERVANT (§ 246*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EFFORTS TO AVOID MASTER'S NEGLIGENCE.

Where the safety of the servant is put in jeopardy by the negligence of the master, and in attempting to escape the apparently imminent danger the servant is injured, it is no defense to the master that the servant misjudged the danger, provided the facts were sufficient upon which to base a reasonable fear that the danger was impending. Western Ry. Co. v. Winn, 26 Ga. 235; Smith v. Wrightsville & T. R. Co., 83 Ga. 674, 10 S. E. 361; Simmons v. East Tennessee Ry. Co., 92 Ga. 660, 18 S. E. 999, and cases cited.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-794; Dec. Dig. § 246.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTION—NONSUIT.

The allegations of negligence were proved as laid in the petition and presented questions for the determination of the jury, and it was error to grant a nonsuit. Adams v. Haigler, 2 Ga. App. 103, 53 S. E. 330 (2); Corcoran v. Merchants' Trans. Co., 1 Ga. App. 743, 57 S. E. 962; Southern Bauxite Mining & Mfg. Co. v. Fuller, 116 Ga. 695, 43 S. E. 64.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peebles, Judge.

Personal injury action by Lyman Self against the Adel Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hendricks & Christian, for plaintiff in error. Jackson & Jackson and Bule & Knight, for defendant in error.

HILL, C. J. Judgment reversed.

(132 Ga. 349)

BURNS v. VEREEN.

(Supreme Court of Georgia. March 11, 1909.)

1. COVENANTS (§ 102*)—COVENANT OF WARRANTY—EVICTION.

Eviction, or its equivalent, to constitute a breach of warranty of title, must be founded on a title paramount to that conveyed by the warrantor in the instrument containing the warranty in question. *Davis v. Smith*, 5 Ga. 274, 47 Am. Dec. 279 (14); *Clements v. Collins*, 59 Ga. 124 (1); *Osborn v. Fritchard*, 104 Ga. 145, 30 S. E. 656 (2); *Stiger v. Munroe*, 109 Ga. 457, 34 S. E. 595 (1).

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 161; Dec. Dig. § 102.*]

2. COVENANTS (§ 122*)—ACTIONS FOR BREACH—EVIDENCE—SUFFICIENCY.

Consequently when, upon the trial of an action for breach of warranty of title to standing timber, the plaintiff, for the purpose of showing such breach, relies upon a judgment of nonsuit rendered against him in an action of trespass, which he brought against parties alleged to have cut and removed such timber after he had purchased the same, if the judgment of nonsuit can have such effect, he should, in order to make out a prima facie case for recovery, show, from the evidence introduced by him upon the trial of such trespass case, that the court, in rendering the judgment of nonsuit, necessarily passed upon the validity of the title held by the warrantor in question at the date of the warranty sued upon. He fails to do this when he merely shows the institution by him of the action of trespass and a judgment of nonsuit therein, without showing that such judgment was rendered after the introduction of evidence which involved a consideration of the title conveyed by the warrantor in the deed containing the warranty sued upon. *Clements v. Collins*, supra.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 224; Dec. Dig. § 122.*]

3. COVENANTS (§ 122*)—COVENANT OF WARRANTY—EVICTION.

Evidence tending to show the existence of an outstanding paramount title, at the date of the warranty sued upon, is wholly insufficient to show a breach of the warranty, unless accompanied by proof that the plaintiff, or some one claiming under him, has been compelled to yield to such title, or that he is in a situation requiring him to do so presently, as a matter of legal duty. *Clements v. Collins*, supra; *Haines v. Fort*, 93 Ga. 24, 18 S. E. 994 (3).

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 224; Dec. Dig. § 122.*]

4. APPEAL AND ERROR (§§ 1050, 1064*)—HARMLESS ERROR—DECISION CORRECT ON MERITS.

Applying these principles to the present case, the verdict in favor of the defendant was absolutely demanded, with or without the evidence introduced by the defendant; and hence it is unnecessary to consider the assignments of error, made in the motion for a new trial, upon the rulings as to the admissibility of evidence introduced by the defendant, and upon instructions given by the trial judge to the jury, and it follows that there was no error in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. §§ 1050, 1064.*]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by Edward Burns against W. C.

Vereen. Judgment for defendant, and plaintiff brings error. Affirmed.

J. H. Merrill, for plaintiff in error. Shipp & Kline, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

ATKINSON, J. (specially concurring). I concur in the judgment, but hold that the qualification contained in the second headnote, expressed in these words, "if the judgment of nonsuit can have such effect," is unnecessary and misleading.

(6 Ga. App. 6)

COPELAND v. LUCAS. (No. 1,631.)

(Court of Appeals of Georgia. March 23, 1909.)

POSSESSORY WARRANT (§§ 1, 4*)—SCOPE OF REMEDY—EVIDENCE.

Possessory warrant is available as a remedy as against one who takes possession of the personal goods of another without the consent of the latter and without lawful authority. It having been shown in this case that the party who sued out the possessory warrant was in prior peaceable possession of the property found in the defendant's possession, she established a prima facie case. The court was fully authorized to hold that the evidence in behalf of the defendant failed to rebut the case thus made. There was no error in dismissing the certiorari.

[Ed. Note.—For other cases, see *Possessory Warrant*, Cent. Dig. § 1; Dec. Dig. §§ 1, 4.*]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by Hattie Lucas against E. P. Copeland. Judgment for plaintiff. From an order overruling a certiorari, defendant brings error. Affirmed.

Branch & Snow, for plaintiff in error. J. D. Wade, Jr., for defendant in error.

RUSSELL, J. The decision in this case is controlled by the rulings of the Supreme Court in *Marchman v. Todd*, 15 Ga. 25, and *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764.

The only point raised by the plaintiff in error is that possessory warrant is not the proper remedy under the facts of the instant case, and that for that reason the judge of the superior court erred in overruling the certiorari. The insistence of counsel for the plaintiff in error is that, inasmuch as there was no fraud, violence, seduction, or other like means used by the plaintiff in error to get possession of the goods, the defendant in error should have instituted bail trover. The decision of this court in *Dennard v. Butler*, 2 Ga. App. 198, 58 S. E. 297, is relied upon as authority. The ruling in that case, following several decisions of the Supreme Court, is that possessory warrant is not available as a remedy to recover personal

property where the defendant has obtained possession by the consent of the plaintiff. That decision is not in point in a case where, according to the undisputed evidence, the possession of the property was acquired without the consent of the owner or former possessor. In that decision the rulings in *Trotti v. Wyly*, 77 Ga. 684, that "unless it clearly appears that the defendant acquired possession in one of the modes inhibited by the [statute] there is nothing for the proceeding to rest on," and that "under a possessory warrant there is no question as to the title or as to the right of possession, but the sole question is as to the manner in which the possession has been obtained by the defendant," are quoted, and the case of *Brown v. Todd*, 124 Ga. 939, 53 S. E. 678, is also cited, but there is nothing therein which is in conflict with the earlier rulings in the *Marchman* and *Manning* Cases, *supra*. Possessory warrants are available under section 4799 of the Civil Code of 1895, it is true, wherever "any personal chattel has been taken, enticed, or carried away either by fraud, violence, seduction, or other like means from the possession of the party complaining," and most of the reported cases have dealt with this portion of the act of 1821. But while, under possessory warrant, title nor right of possession are not at issue, the terms of the original act of 1821, now embodied in that section of the Code, are equally applicable to instances where a "personal chattel, having recently been in the quiet, peaceable, and legally acquired possession of such complaining party, has disappeared without his consent, and, as he believes, has been received or taken possession of by the party complained against under some pretended claim, and without lawful warrant or authority."

In the *Manning* Case, *supra*, it was held that possessory warrant was the proper remedy for the recovery of the woman's tame canary bird, which, having disappeared without the knowledge or consent of the owner, was received and taken possession of by a man who refused to surrender it because he thought he had been discourteously treated. There was no evidence on the line of the insistence of the plaintiff in error in this case that Mr. Manning obtained the canary bird either by fraud, violence, seduction, or other like manner; but the court held that "a possessory warrant will lie against any one who receives or takes possession of a personal chattel under a pretended claim and without lawful warrant or authority." In the *Marchman* Case, *supra*, Judge Lumpkin, discussing the preamble to the act of 1821, as well as the act itself, shows that the law is not confined to cases where possession has been obtained by fraud, violence, or seduction, and he so analyzes the statute as a whole as to show it has a scope broad enough to include

all cases where the change of the possession of a personal chattel is effected without the consent of the plaintiff and without authority of law. He sums up the ruling of the court as follows: "It will be perceived, moreover, that the law applies to every possession which has been acquired without the consent of the opposite party or without authority of law." The only case cited by counsel for the plaintiff in error which by any construction would appear to be in conflict with the older and controlling authority from which we have just quoted is that of *Owens v. Outlaw*, 105 Ga. 477, 30 S. E. 427, and careful reading of the *Owens* Case shows it to be in accordance with the general principle that where the possession of the party complained against is obtained without the consent of the complaining party, and without warrant or authority of law, possessory warrant may be resorted to as a remedy. In the *Owens* Case the defendant was in possession by virtue of a contract with the plaintiff. His original possession rested upon the plaintiff's consent, and the only question at issue was whether the defendant had the right under the terms of the contract to retain possession for a longer time.

The evidence in the present case was sufficient to authorize the conclusion on the part of the lower court that the plaintiff had never voluntarily parted with possession of her goods, and that they were obtained by the defendant to secure an indebtedness of the plaintiff's husband or father, without her consent and without authority of law. There was no error in dismissing the certiorari.

Judgment affirmed.

(5 Ga. App. 847)

TURNELL v. CARTER et al. (No. 1,316.)

(Court of Appeals of Georgia. March 23, 1909.)

1. APPEAL AND ERROR (§ 485*)—EFFECT OF APPEAL.

Where the maker and the indorser of a promissory note are jointly sued in a county court, and a judgment rendered against the indorser, and a nonsuit awarded as to the maker, and an appeal to the superior court entered by the plaintiff, the entire case is appealed, and the judgment against the indorser is suspended until the termination of the case on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 485.*]

2. SALES (§ 475*)—TRANSFER OF NOTE—EFFECT AS TO TRANSFERRING SECURITY—ACTIONS—DEFENSES.

The transfer of a promissory note given for the purchase money of personal property, the seller retaining title to the personalty until paid for, carried with it the right to the security and the remedy of the vendor against the vendee in reference thereto. After the transfer, the vendor had no title to the property, and its seizure and sale by the transferee of the note under a judgment against the vendor was a mere nullity, by which the transferee gained nothing and the maker of the notes lost nothing. The fact that the holder of the note became the purchaser of the property at this void sale did not release the

maker from his obligation to pay the note, or estop the holder from enforcing payment.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1403; Dec. Dig. § 475.*]

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action in the county court by S. A. Turnell against J. J. Carter, administrator, and others. Plaintiff was nonsuited as to part of the defendants, and appealed to the superior court, where defendants again had judgment, and plaintiff brings error. Reversed.

Turnell brought suit in the county court of Jasper on four promissory notes against the makers and the indorser. There was a nonsuit as to the makers, and a judgment against the indorser. The plaintiff entered an appeal as to the makers to the superior court. On the trial of the appeal in the superior court, the defendants made the following written defense: "That at the trial term in the county court of said case the plaintiff, being nonsuited as to these defendants, took judgment against J. E. Durden as guarantor or indorser, and appealed the case as to these defendants to the superior court; that the plaintiff caused execution to be issued against J. E. Durden, and levy to be made upon the property for which the notes here sued on were given, and said property was sold as the property of J. E. Durden and bought by plaintiff." This plea was allowed by the court over the objection of the plaintiff that it set up no defense. The plaintiff admitted the allegations of the plea, and the court directed a verdict for the defendants, and judgment was entered accordingly. No evidence was introduced, and the judgment was rendered on the pleadings and the admission of the plaintiff. The plaintiff assigns error on the allowance of the plea and on the direction of the verdict.

M. C. Few, for plaintiff in error. A. S. Thurman, for defendants in error.

HILL, C. J. (after stating the facts as above). No brief is submitted for defendants in error, and we do not know upon what theory of the law the trial judge based his judgment. In our opinion, the allowance of the plea and the direction of a verdict for the defendants were manifestly erroneous. The notes sued on recite that they are given for the purchase money of certain personal property named therein, to which title is reserved until the property shall be fully paid for. The notes were payable to the order of J. E. Durden, and were transferred by him, by written indorsement to the plaintiff before maturity. If the allegations of the plea above set out are true, they constitute no defense. The conduct of the plaintiff relied

upon as a defense is wholly insufficient for that purpose for two reasons:

First. The appeal by the plaintiff from the judgment of nonsuit as to the makers carried up the entire case, and the judgment against the indorser was suspended until the termination of the appeal. *Hanle v. Taylor*, 4 Ga. App. 545, 61 S. E. 1054. The issuance of the *fi. fa.*, based on the judgment rendered by the county court against the indorser, and the seizure of the personal property and bringing it to sale thereunder, were mere nullities, by which the plaintiff gained nothing and the defendants lost nothing. Civ. Code 1895, §§ 4462, 4469, 4470, 5340; *Carter v. Buchanan*, 2 Ga. 337; *Lewis v. Armstrong*, 69 Ga. 752 (1). In other words, the appeal suspended the judgment against the indorser, and no execution could be legally issued thereon until the final ending of the appeal case.

Second. The seizure of the property under the *fi. fa.* issued on the judgment rendered by the county court against the indorser was a mere nullity for another reason. When the purchase-money notes containing the reservation of title to the personality therein named were transferred by the payee as indorser, the transfer carried with it the security for their payment. The legal title to the property was transferred from the payee to the purchaser of the notes; but the equitable title to the property remained in the makers of the notes. The holder of the notes became the legal transferee of the title of the payee to both the notes and the security mentioned therein. *Acts 1887*, p. 62; *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292. When the property was seized and sold under a *fi. fa.* against the payee of the notes, nothing was sold except his title, and this title he had already transferred to the plaintiff in *fi. fa.*; and when the plaintiff in *fi. fa.* bought in the property at this sale he got nothing, and the rights of the makers of the notes to the property, when they paid for it, were in nowise affected by these illegal proceedings. The sale of the property was not only premature and illegal, because the appeal suspended the judgment against the indorser, but it was invalid, because the indorser had no title to sell. All the proceedings set out in the plea which the court allowed as a defense were mere nullities. The plaintiff, by such null and void proceedings, by which he gained nothing, and the makers lost nothing, did not estop himself from proceeding with his suit against the makers of the notes.

What was a mere nullity as to the holder of the notes could not operate to release the makers of the notes from their obligation to pay them. *Cooper v. Smith*, 125 Ga. 167, 53 S. E. 1013. We are satisfied that the court erred in holding that the allegations of the plea constituted a defense which upon

their being admitted, authorized the direction of a verdict for the defendants.

Judgment reversed.

(6 Ga. App. 9)

McSWAIN v. EDGE. (No. 1,635.)

(Court of Appeals of Georgia. March 23, 1909.)

1. MALICIOUS PROSECUTION (§§ 36, 47*)—PETITION.

A petition which shows that a landlord maliciously, and for the purpose of injuring and damaging his tenant, whose term had not expired and whose rent was not in default, sued out a dispossessionary warrant and caused the tenant to be evicted, sets forth a valid cause of action for the malicious use of civil process. When the eviction was completed, the action, begun by the suing out of the dispossessionary warrant, was ipso facto ended. Hence a right of action immediately accrued in favor of the injured tenant.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. §§ 36, 47.*]

2. PLEADING (§ 218*)—DEMURRER—SPECIAL DEMURRER—JUDGMENT OF DISMISSAL.

Where demurrers, both general and special, are filed to a petition, and the trial judge at one and the same time sustains all of the demurrers and dismisses the action, and it appears that the petition is not subject to the general demurrer, the judgment will be reversed. A peremptory judgment of dismissal is not the proper disposition of the case upon the sustaining of a special demurrer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 218.*]

(Syllabus by the Court.)

Error from City Court of Columbus; G. Y. Tigner, Judge.

Action by T. D. McSwain against G. J. Edge. Judgment for defendant, and plaintiff brings error. Reversed.

This case comes up on an exception to the sustaining of a demurrer to the plaintiff's petition. Omitting formal and immaterial allegations, the petition set up that the plaintiff had rented from the defendant a dwelling house in the city of Columbus; that her term had not expired, and she was not in default with rent, when on November 3, 1907, she was forcibly evicted from the house by a lawful constable of the county upon a dispossessionary warrant sued out by the defendant before a justice of the peace, the defendant claiming that she owed him a small amount of rent. It is further alleged that the defendant's claim that the rent was due was untrue, and that the warrant was sworn out and served maliciously and for the purpose of injuring and damaging the plaintiff; that at the time she was evicted suitable houses were scarce, and she was put to great trouble and expense in securing one; that she was left houseless until 11 o'clock at night on the day of the eviction, and, on account of the exposure thus incurred, she suffered bodily pain, and contracted cold, from which an illness ensued with which she was still suffering at the time of bringing suit.

D. L. Parmer, for plaintiff in error. S. B. Hatcher, for defendant in error.

POWELL, J. (after stating the facts as above). 1. The general demurrer specifies as the particular reasons why no cause of action is set forth that there is no averment that the defendant acted maliciously and without probable cause; also, that it is not alleged that the suit instituted by the defendant against the plaintiff had terminated. The action is based on the malicious use of civil process. In such cases it must appear that the former action was prosecuted maliciously and without probable cause, and that it is no longer pending. We think that all three of these elements appear from the present petition. The allegation that the dispossessionary warrant was maliciously sworn out is directly and unequivocally made. From the alleged facts that the plaintiff was a tenant, that her term had not expired, and that her rents were paid, it prima facie appears that the warrant was prosecuted without probable cause. Since it further appears that the warrant was executed and the eviction completed, it follows that the action begun under it is no longer pending; for, after eviction, there is no way provided by law for arresting the process or for converting it into mesne process, or for the forming of an issue thereon otherwise. *Sturgis v. Frost*, 56 Ga. 188; *Cruselle v. Pugh*, 71 Ga. 744 (2). The case of *Sturgis v. Frost* is on all fours with the present one. The case of *Clement v. Orr*, 4 Ga. App. 117, 60 S. E. 1017, is distinguishable from the one sub judice by reason of the fact that the distress warrant, for the suing out of which that suit was instituted, had been converted into mesne process by the filing of the statutory counter affidavit, and it did not appear that the issue thus formed had ever terminated. In the present instance no such issue had been formed, and all the reasoning of Judge Bleckley in the case in 56 Georgia is applicable. It therefore follows that the judge erred in sustaining the general demurrer.

2. Where a court at one and the same time passes upon a demurrer containing both general and special grounds, and sustains the demurrer and dismisses the action, without giving the plaintiff opportunity to amend, the judgment will be reversed if it appears that the general demurrer was improperly sustained. The proper judgment on a special demurrer, going only to the meagerness of the allegations, is not a peremptory judgment of dismissal of the action, but a judgment requiring the plaintiff to amend and to make his petition more certain in the particulars wherein he has been delinquent; and then, if he refuses to amend, the petition may be dismissed if the delinquency relates to the entire cause of action. However, if the special

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

demurrer goes only to some particular part of the petition without which a valid cause of action would still be set forth, the result of finally sustaining the special demurrer would be not to dismiss the action, but to strike the defective portion. This is also the proper course where the special demurrer attacks some particular portion of the pleading for irrelevancy or impertinence. For example, in the present case, there was a special demurrer to the third and fourth paragraphs of the plaintiff's petition, in which it was alleged that the defendant had previously sworn out another dispossessory warrant and had failed to have it executed; and the special demurrer was to the irrelevancy and impertinence of this allegation. Let it be admitted for the sake of argument that this special demurrer was well taken, yet a judgment dismissing the entire petition should not follow. Only these paragraphs should be ordered stricken. As a matter of fact, however, in the present case, the contents of the paragraphs of the petition thus attacked, when considered in connection with the other allegations of the petition, were not irrelevant, being properly alleged by way of inducement and aggravation of the specific cause of action declared upon. Indeed, we find only one of the special demurrers well taken—the one in which the insistence is made that the nature of the rent contract and its terms and expiration are not distinctly set forth. Direction is given that the court require the plaintiff to make the allegation specific and definite in this respect.

Judgment reversed, with direction.

(6 Ga. App. 12)

DRAPER v. STATE. (No. 1,641.)

(Court of Appeals of Georgia. March 23, 1909.)

1. CRIMINAL LAW (§ 15*)—OFFENSES—REPEAL OF STATUTES—EFFECT.

Although, as held in *Glover v. State*, 4 Ga. App. 455, 61 S. E. 862, all laws allowing the sale of intoxicating liquors in this state, of force prior to January 1, 1908, were repealed by the passage of the prohibition law (Acts 1907, p. 81), it is nevertheless legally possible to indict and convict for violations of any of the statutes repealed by the enactment of the general prohibition law, provided the offense is shown to have been committed prior to January 1, 1908.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 17; Dec. Dig. § 15.*]

2. INDICTMENT AND INFORMATION (§ 147*) — DEMURRER—GROUNDS—OFFENSES — REPEAL OF STATUTE—EFFECT.

Where an offense is charged under a statute regulating the sale of liquors, which has been repealed, the accusation is demurrable if the offense is alleged as having been committed on a day subsequent to December 31, 1907. Likewise the conviction of a defendant upon such an accusation would be unwarranted and contrary to law if the only criminal acts shown by the evidence were done after the repeal of the law which he was alleged to have violated.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 147.*]

3. INDICTMENT AND INFORMATION (§ 196*) — DEFECTS—WAIVER.

If, however, the allegation that the offense was committed after the law had in fact been repealed is introduced warranting a finding that the defendant committed the offense at a time prior to the repeal, the allegation as to the date becomes immaterial, and the conviction of the defendant is authorized. The allegation that the offense was committed on a day subsequent to the repeal of the law upon which the criminal accusation is based is in effect the allegation of an impossible date, and is demurrable; but the defect cannot be reached by motion for new trial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 628; Dec. Dig. § 196.*]

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

Henry Draper was convicted of selling intoxicating liquor at retail without a license, and he brings error. Affirmed.

H. B. Strange and R. Lee Moore, for plaintiff in error. Fred T. Lanier, Sol., for the State.

RUSSELL, J. The plaintiff in error was tried upon an accusation in which it is alleged that on the 5th day of July, in the year 1908, he "unlawfully, * * * without license, and without taking the oath prescribed by law, and without license from the proper authorities," either of the county or of any city, "did sell * * * brandy, rum, gin, whisky, and spirituous and intoxicating liquor, and did sell by retail, for a valuable consideration, a certain quantity of wine, contrary to the laws of said state, the good order, peace, and dignity thereof." This accusation was filed at the August term, 1908, of the city court of Statesboro, and was tried at the October term of that court. The accusation is plainly one for retailing without license. All existing laws upon that subject were repealed in the passage of the prohibition bill of 1907 (Acts 1907, p. 81), which became effective January 1, 1908. *Glover v. State*, 4 Ga. App. 455, 61 S. E. 862 (1). Inasmuch as the accusation, upon its face, charged no offense against the laws of the state, it was subject to demurrer, and if a demurrer had been interposed the accusation should have been quashed. The defendant, however, did not demur. He went to trial, and after his conviction moved for a new trial upon the ground that the verdict finding him guilty is contrary to the evidence and contrary to the law. The trial judge overruled the motion for new trial, and exception is taken to his judgment.

Upon the trial, although there was evidence that the defendant sold some wine in 1908, several witnesses testified that they had bought wine from the defendant during the year 1907, and at various times during that year. The case is controlled by our ruling in

Newsome v. State, 2 Ga. App. 392, 58 S. E. 672, and the trial judge did not err in overruling the defendant's motion for new trial. The defendant could not have been convicted for either of the sales alleged to have been made in 1908, because, as held in *Glover v. State*, 4 Ga. App. 455, 61 S. E. 862, the passage of the general prohibition law, which, by its terms, became effective January 1, 1908, repealed all existing statutes regulating the sale of intoxicating liquors in this state. If the defendant had objected to the testimony regarding sales said to have been made by him in 1908, it would have been the duty of the trial court to repel this testimony; but there is no reason why one who may have violated any of the criminal statutes superseded and repealed by the general prohibition law may not still be legally indicted and convicted for the offense, provided the evidence demonstrates his guilt. Although, as held in *Glover v. State*, supra, all laws allowing the sale of intoxicating liquors in this state prior to January 1, 1908, were repealed by the passage of the general prohibition law, it is nevertheless legally possible to indict and convict for violations of any of the statutes repealed by the enactment of the general prohibition law, provided the offense is shown to have been committed prior to January 1, 1908. The present case is distinguished upon its facts from the *Glover Case*, supra. In the *Glover Case* the undisputed evidence was that the sales were made January 7, 1908, after the penal statutes upon the subject of retailing without license had been superseded by the general prohibition law. If the only sales shown by the testimony in this case had occurred subsequent to January 1, 1908, the defendant could not legally have been convicted.

2. Where an offense is charged under a repealed statute regulating the sale of liquors, the accusation is demurrable if the offense is alleged as having been committed on a day subsequent to December 31, 1907. Likewise the conviction of a defendant upon such an accusation would be unwarranted, and contrary to law, if the only criminal acts shown by the evidence were done after the repeal of the law which he was alleged to have violated. *Glover v. State*, 4 Ga. App. 455, 61 S. E. 862.

3. The case at bar is similar in principle, as well as in fact, to that of *Newsome v. State*, 2 Ga. App. 392, 58 S. E. 672, in which the accused was convicted in May, 1907, upon an accusation charging him with selling intoxicating liquors on October 29, 1907, but in which the evidence showed that he had unlawfully sold intoxicating liquors on October 29, 1906. We held that the indictment was properly demurrable, but that the exception which might have been urged to it came too late after the verdict. In that case it was insisted that the accusation upon which the defendant was tried charged the

crime as having been committed on a day subsequent to the filing of the accusation and the trial thereon, and that for that reason the verdict and judgment were void; and after reviewing a large number of the decisions of the Supreme Court we held that the day on which the offense is laid is immaterial, unless the defendant, before pleading to the merits, demurs thereto. "The defendant must demur before pleading, or else he will be held to waive his right to have the essential elements of time and place stated with the certainty required by the Code." There can be no doubt that the accusation in the present case would have been good if the date of the alleged sale had been stated to be July 8, 1907, and in the absence of a demurrer raising the point the accusation would have been good if no date had been stated at all. *Phillips v. State*, 86 Ga. 427, 12 S. E. 650; *Braddy v. State*, 102 Ga. 568, 27 S. E. 670.

It was impossible for the offense of retailing without license to have been committed by this defendant on July 8, 1908; but the case is not any stronger when an impossible date is alleged than when no date is alleged. So that in the absence of demurrer the accusation presented a valid charge for the offense of retailing without license, and upon the trial several witnesses testified to having purchased wine from the defendant during the year 1907, which was within the statute of limitations and antedated the repeal of the law upon that subject by the general prohibition law. If, as in the *Glover Case*, supra, the only sales shown to have been made by the defendant had taken place in 1908, the defendant should have been granted a new trial, because his conviction would have been contrary to law. As, however, the allegation that the offense was committed after the law had in fact been repealed was not demurred to, and evidence was introduced warranting a finding that the defendant committed the offense charged at a time prior to the repeal, the allegation as to the date became immaterial, and the conviction of the defendant was authorized. The allegation that an alleged offense was committed on a date subsequent to the repeal of the law upon which the criminal accusation was based was, in effect, the allegation of an impossible date, and was demurrable; but the defect could not be reached by motion for new trial. *Newsome v. State*, 2 Ga. App. 392, 58 S. E. 672.

An error in the charge of the court (for the judge charged broadly that if the jury believed that the defendant sold, as alleged in the indictment, at any time within two years, the jury would be authorized to convict) would perhaps have required the grant of a new trial; but no exception is taken thereto; and, of course, an error in excluding from the jury, as a basis of conviction, sales which it was testified that the defendant had made since January 1, 1908, is not

reached by the general assignment that the verdict is contrary to law.

Judgment affirmed.

(65 W. Va. 283)

BEARD v. INDEMNITY INS. CO.

(Supreme Court of Appeals of West Virginia.
March 9, 1909.)

1. INSURANCE (§ 665*)—ACCIDENT POLICY—EVIDENCE—SUFFICIENCY.

In an action on a policy of accident insurance, evidence that insured was found lying at the bottom of a wall, badly injured, near the unrailled top of which he was reclining on a bench only shortly before, alone, and in the darkness of night, makes a prima facie case of injury by violent, external, and accidental means.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 805.*]

2. INSURANCE (§ 648*)—ACCIDENT POLICY—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

In such case, unless the injury is shown to have been intentionally self-inflicted, or intentionally inflicted by some other person, the legal presumption is that it was accidental.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1664; Dec. Dig. § 646.*]

3. INSURANCE (§ 460*)—ACCIDENT POLICY—ACTIONS—DEFENSES—INTOXICATION.

Where an accident policy is conditioned against liability for injury happening while insured is intoxicated, and where plea in that behalf is to be successfully relied upon, the evidence must show that insured was actually intoxicated at the time the accident befell him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1179; Dec. Dig. § 460.*]

4. EVIDENCE (§ 132*)—INTOXICATION—APPEARANCE BEFORE AND AFTER TIME.

Evidence as to appearances of intoxication, or their absence, by witnesses who saw insured immediately before or after the injury, is proper and admissible in that behalf.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 182.*]

5. EVIDENCE (§ 129*)—SIMILAR ACTS OR CONDITION.

It is a general rule that, where the issue is whether a person did a particular thing, or was in a particular state, the fact that he did a similar thing, or was in a similar state, at some other time is inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 129.*]

6. INSURANCE (§ 451*)—ACCIDENT POLICY—RISKS AND EXCEPTIONS—BEING ON RAILWAY OR BRIDGE.

In an accident policy, excepting liability for injury to insured while on the roadbed or bridge of a railway, the manifest intention is to exempt the insurer from responsibility for injury caused by collision with moving trains thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 451.*]

7. INSURANCE (§ 461*)—ACCIDENT POLICY—"VOLUNTARY EXPOSURE TO UNNECESSARY DANGER."

In an accident policy which exempts liability as to an injury caused by the insured's "voluntary exposure to unnecessary danger," those words are properly interpreted to refer only to danger of a real, substantial character, which the insured recognized, but to which he

nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1180; Dec. Dig. § 461.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7346-7350; vol. 8, p. 7830.]

8. INSURANCE (§ 146*)—ACCIDENT POLICY—EXEMPTIONS FROM LIABILITY—STRICT CONSTRUCTION.

Words of exception from liability, in an accident insurance policy, are construed liberally in favor of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

9. INSURANCE (§ 461*)—ACCIDENT POLICY—EXEMPTIONS—CONSTRUCTION—"VOLUNTARY OR NEGLIGENT EXPOSURE TO UNNECESSARY DANGER."

The phrase "voluntary or negligent exposure to unnecessary danger," in a policy of accident insurance exempting the insurer from liability for injury from cause so expressed, is a cumulative or redundant expression, and is properly interpretable as "voluntary exposure to unnecessary danger."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1180; Dec. Dig. § 461.*]

10. INSURANCE (§ 461*)—ACCIDENT POLICY—"VOLUNTARY EXPOSURE TO UNNECESSARY DANGER."

Sitting or lying on a bench at the side of a building, near the top of an unguarded wall, on a dark night, it not appearing that insured in so doing was conscious of the pitfall, or had knowledge of his surroundings, is not "voluntary exposure to unnecessary danger," within the meaning of those terms in a policy of accident insurance, exempting the insurer from liability for injury caused by such exposure as is defined by said terms.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 461.*]

11. NEW TRIAL (§ 68*)—VERDICT—SETTING ASIDE.

A verdict fairly rendered, in a case fairly submitted to a jury, should not be set aside by the court, unless manifest injustice has been done, or the verdict is plainly not warranted by the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135-140; Dec. Dig. § 68.*]

(Syllabus by the Court.)

Error to Circuit Court, Cabell County.

Action by Thomas Beard against the Indemnity Insurance Company. There was a verdict for plaintiff, and from an order setting the same aside and granting a new trial, plaintiff brings error. Reversed, and judgment rendered.

Wyatt & Graham, for plaintiff in error.
McComas & Northcott, for defendant in error.

ROBINSON, J. On the trial of an action upon a policy of insurance against death resulting from bodily injuries caused by external, violent, and accidental means, a verdict was rendered by the jury in favor of the beneficiary for the amount to be paid by the insurer upon the happening of such contingency. That amount was \$1,000. The verdict was set aside as contrary to law and the evidence, and a new trial was awarded.

To that action of the court below this writ of error is prosecuted.

To justify the aforesaid action of the court it must be found that errors were committed at the trial to the prejudice of the defendant, or that the verdict was contrary to law and the evidence. *Robinson v. Kistler*, 62 W. Va. 489, 59 S. E. 505. The defendant does not complain that errors to its prejudice were made at the trial of the case. It relies upon the assertion that the verdict was contrary to law and the evidence. Then it is as to this assertion only that we are called upon to inquire.

The real substance of the evidence is as follows: The insured was found, some time between 9:30 and 10:30 o'clock at night, badly injured, at the foot of a high wall where Sixteenth street, in the city of Huntington, passes under the tracks of the Chesapeake & Ohio Railway. He was unconscious at the time, and died a few hours later in a hospital, never having regained consciousness. Just before he was found injured, insured was seen lying on a bench by the side of the telegraph office, which is situated at the top of this wall, very near its edge, and just above the point at which he was found. The telegraph office is near the railway tracks, and on a level therewith, it seems. The wall is one necessary to the lowering of the street so as to make the street cross the railroad under grade. At the telegraph office it was not guarded by a railing. The night on which the injury occurred was dark, and the electric light at the intersection of Sixteenth street and the railroad was not burning. The insured was an extra locomotive fireman of the railway company. His run was from Russell, Ky., to Handley, W. Va. He frequently stayed with his brother, the beneficiary of the policy, who resided in Huntington; but he had not been there for several days. The road foreman of engines testifies that men making such run out of Russell, but living in Huntington, frequently board trains at the telegraph office above designated to deadhead to Russell. There is no direct evidence, however, that the insured was ever at this telegraph office before. The yard clerk, whose duties were at that place, and whose office was located there, when asked if he had ever seen the insured come there to take a train, replied: "I don't know whether I ever saw him; no, sir." No one knows just how the injured man came to fall from the wall. A hostler who was attending some engines there saw the insured lying on the bench as he passed into the office. The insured was still lying there when this hostler came out of the office, and walked to the upper end of the railway bridge over the street. When he reached that part of the bridge, he heard an unusual noise. He at once returned toward the office, and noticed that the insured was not on the bench. An investigation was immediately made, and insured was found below the wall as mentioned above.

The yard clerk testifies that he saw the insured sitting on this same bench near the same hour above named, that he addressed him in a friendly way, and that the insured answered. He did not know the insured personally. It was this yard clerk and the hostler who found him at the bottom of the wall. Both testify that they observed no evidence of intoxication, either before or after they found him. By the police judge it was proved that two or three days before the accident the insured had been brought into his court on a charge of drunkenness. Insured was comparatively sober at the time he was tried. He was not again seen by said official. The secretary of the insurance company testifies that he saw the insured the day before he was injured, and that he was then intoxicated. A policeman testifies that he saw him near a saloon some time after supper the evening on which the accident occurred, and adds that it was "between 8 and half past 10 o'clock. I can't tell just exactly what time." The policeman says the insured "looked like he was intoxicated right smartly when he came through." It seems that the insured passed through the saloon. The policeman, however, says that he was not drunk enough to be arrested; that he was not disturbing the peace; that he did not smell insured's breath; and that he did not see him drink anything. He testifies that the saloon was crowded, but can name no other of the many people there; nor can he tell how the insured was dressed, what kind of hat he wore, or whether or not he had on his working clothes. The physician who attended the injured man as a witness for plaintiff described the extent of the injuries, and the result thereof. This witness, though, was not examined by either party as to whether or not any evidences or appearances of intoxication were manifest.

The policy provided that it did not cover any injury occasioned wholly or partly, directly or indirectly, by many things, among them being intoxication, and voluntary or negligent exposure to unnecessary danger. And it also provided no insurance against injury received while the insured was on a railroad bridge or roadbed, except as to railway employes while on duty incident to their occupation.

The insurance company defended under the general issue and by three special pleas, relying upon the averments that the insured was intoxicated at the time of the injury to him, that such injury was due to voluntary or negligent exposure to unnecessary danger by insured, and that the injury was received while the insured was on a railroad bridge or roadbed at a time when he was not on duty incident to his occupation as a railway employe. These defenses, except the last named, were further availed of by three instructions asked and given on behalf of defendant. The first instruction was to the effect that the jury should find for the defendant if they believed from the evidence that the insured

was in a state of intoxication at the time he received the injury which caused his death. The second instruction was that the jury should find for the defendant if they believed from the evidence that the insured voluntarily or negligently exposed himself to the unnecessary danger which resulted in the injury that caused his death. The third was to the effect that the jury should find for the defendant if they believed from the evidence that at the time of the accident complained of the insured was intoxicated, and that by reason of such intoxication he stepped or fell from the top of the east wall of the Sixteenth street undergrade crossing, receiving the injury which resulted in his death.

Thus we see the issues submitted to the jury were plain. The plaintiff sought to establish injury, from which death resulted to the insured, by violent and accidental means. The defense sought to establish intoxication, voluntary or negligent exposure to unnecessary danger, or that the insured was on a railroad bridge or roadbed, at the time of the injury. The sufficiency of plaintiff's evidence was not challenged by defendant at the trial. The defendant rested the case with the jury, relying upon instructions given in its behalf, as we have noted. Plaintiff asked no instructions, relying solely on his evidence. But after the verdict had been found against defendant on motion for a new trial, and now upon this writ of error to the order setting aside that verdict, much is argued as to the insufficiency of the case made to sustain plaintiff's issues. It is now insisted that it is not proved that the insured met his death by accidental means, that he may have committed suicide, or that another may have pushed him over the wall. The testimony on this point was sufficient to go to the jury. As we have seen, the insured, alone, was lying on the bench when the hostler, who later evidently heard him fall, passed into the office and out again going to the bridge. The distance this witness went before he was attracted by the noise was very short. It seems conclusive that the noise was caused by the insured's fall over the wall. There is no evidence of the presence of another at this time, or of the retreat of any murderer. Neither does the evidence reasonably indicate suicide. The jury could well believe from this evidence, and it seems satisfactorily so, that the insured rose from the bench in the darkness and walked over the wall. There is no evidence that he was acquainted with his surroundings. The jury were justified in finding, from the facts and circumstances, that his death was due to violent and accidental means. A *prima facie* case of accidental death was made. Defendant did not even undertake to rebut such *prima facie* case. Directly pertinent to this case is Niblack on Insurance, § 877. Therein it is stated: "In an action on an accident policy testimony of physicians that the assured bore on his back marks of extreme vio-

lence, apparently recently inflicted, and that his injuries produced his death, is *prima facie* evidence of death resulting from bodily injuries, 'through external, violent, and accidental means.' Unless such injuries were intentionally self-inflicted, or intentionally inflicted by some other person, the legal presumption is that they were accidental. No presumption can be indulged that the law has been violated, as it would have been were the injuries inflicted by another. There may be a *prima facie* case of accidental death, but the burden of proving accidental death is on the plaintiff. Where it appears that a violent death was either the result of accidental injuries, or of a suicidal act of the deceased, the presumption of law is against the latter."

Is there in the record evidence of intoxication of the insured at the time of the injury? The mere fact that he had been drunk before does not prove that he was drunk at the time of the injury. Drunkenness at that time must be established if it is to avail as a defense. The only testimony that he was intoxicated near the time of the accident is that of the policeman, and that witness cannot definitely fix the time so as to bring it near enough the time of the accident to justify the jury in believing that he was drunk when the accident happened. The jury saw this witness, heard his cross-examination, and had a right to accept or reject his credibility. He confesses, as shown by that cross-examination, that he took little notice of the insured when he saw him. He says that he was intoxicated, yet he could not tell how insured was dressed. Nor can he tell what else he saw at the saloon. It seems that he noticed only that this man was drunk. The jury could well say that his statement that the man was drunk was improbable. The fact that the insured was about the saloon and had been drunk on two former occasions is not evidence that he was intoxicated when the injury befell him. It is a general rule that, where the issue is whether a person did a particular thing, evidence as to the fact that he did a similar thing at some other time is inadmissible. 1 Wharton on Evidence, § 29. The two witnesses who saw insured just before and after the injury say that they saw no evidence of intoxication. And such evidence, as compared with that relied upon herein to establish intoxication, was for the consideration of the jury. Evidence of appearances as to intoxication is proper in this class of cases. Niblack on Insurance, § 390.

The claim of the defendant that the insured was on the bridge or roadbed of the railway company is in no wise sustained. And at the time of asking instructions to the jury this claim seems to have been abandoned by the defendant. There is not the slightest evidence to sanction defense on this ground. Insured was not on the roadbed or bridge of the railway. Besides, as to a

clause exempting from liability for injury to insured while on such roadbed or bridge, it is wisely said that "the manifest intention is to exempt from responsibility for damages caused by collision with moving trains thereon." *Burkhard v. Insurance Co.*, 102 Pa. 262, 48 Am. Rep. 205.

Was there a voluntary or negligent exposure to unnecessary danger on the part of insured? It is insisted that the injury was caused by his negligence, and that the insurer is therefore not liable. In this case the clause of the policy conditioning recovery by the words "voluntary or negligent exposure to unnecessary danger" is at least different in phraseology from that usually found in accident policies and met with in judicial interpretation. The most usual expression passed upon in the reported cases is "voluntary exposure to unnecessary danger." A clause similar to the one last mentioned was under consideration by this court in *Diddle v. Continental Casualty Company* (decided at this term) 63 S. E. 962. It was therein held that "either reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent man would have observed and avoided it, if the circumstances were not such as necessitated the encountering thereof," constituted such voluntary exposure. That holding is clearly sustained by authority and principle. Vance on Insurance, § 240, says: "It is a familiar principle that the insurer assumes the risk of the insured's negligence, provided there be no bad faith on the part of the latter. Accident insurers, however, have essayed to change this rule, and to import into the insurance contract the doctrine of contributory negligence by inserting a provision excepting themselves from liability for 'injury or death caused by the voluntary exposure of the insured to unnecessary danger,' or other words of similar effect. This exception merely imposes upon the insured the duty of exercising ordinary care in order to avoid sustaining any sort of injury. He is not required to exercise any unusual degree of care." The eminent Mr. Justice Harlan, in *Travelers' Ins. Co. v. Randolph*, 78 Fed. 761, 24 C. O. A. 812, said: "What do the words 'voluntary exposure to unnecessary danger' in the contracts in suit import? * * * The words 'voluntary exposure to unnecessary danger,' literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable

to the assured, does no violence to the words used, is consistent with the object of accident insurance contracts, and is therefore the interpretation which the court should adopt." In *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787, it is held, most sensibly we think, "that if a man acts so recklessly and carelessly that he shows an utter disregard of a known danger, he may be said to have exposed himself voluntarily to danger." The same case further affirms that, "If the risk of danger is so obvious that a prudent man, exercising reasonable foresight, would not have done the act, then he may be said to have voluntarily exposed his person to danger."

Now, does the use of the word "negligent" in the clause demand from the insured a greater degree of prudence and care than that enunciated in these authorities? The rule is now firmly established that limitations on the liability of the company are construed most strongly against the insurer, or liberally in favor of the insured. *Niblack on Insurance*, § 367; *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432. Chancellor Kent says that the true principle of sound ethics is to give a contract the sense in which the person making the promise believes the other party to have accepted it, and a just sense should be exercised in so interpreting it as to give due and fair effect to its provisions. 2 Kent, Com. 555. This just principle of interpretation applies fittingly to contracts of accident insurance. Are we to say that the use of the word "negligent," as aforesaid, is to exempt the insurer from all liability because perchance some slight negligence of the insured has contributed to accidental injury? To do so would result in the destruction of the real purpose of indemnity of this character. It has been pertinently said: "A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, where it can readily be seen afterwards that a little greater care on their part would have prevented it. * * * It is true that accidents often happen from such kinds of negligence. But, still, it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle—the servant fills the lighted lamp with kerosene—a hundred times without injury. The next time the gun is discharged, and the lamp explodes. The result was unusual, and therefore as unexpected as it had been in all the previous instances. So there are un-

doubtedly thousands of persons who get on and off from cars in motion without accident, where one is injured. And therefore, when an injury occurs, it is an unusual result, and unexpected, and strictly an accident." *Schneider v. Insurance Co.*, 24 Wis. 28, 1 Am. Rep. 157. And here we approvingly quote from *Rustin v. Insurance Co.*, 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136: "Accident insurance is not designed to furnish indemnity only in cases where the policy holder orders his conduct with grave circumspection and provident foresight of consequences. Mere contributory negligence is no answer to an action on a contract of insurance." Therefore an insurer against accident must not be relieved from liability because of mere contributory negligence, unless the contract is plain and unequivocal that it should be. Surely we shall not say that the word "negligent" is to be given a meaning indicating a degree of exposure less than that indicated by the word "voluntary," which is used before it in the clause in the policy under consideration. To give it such construction would grant almost limitless scope to the ingenuity of insurance companies in framing contracts of this character so as to make the exceptions in fact destroy the real purpose for which the insurance was obtained. Used, as it is, in connection with the word "voluntary," it is fairer to say that it is simply cumulative to that word, meaning no more than that word. Or its use in the clause may fairly be said to be redundant, since in a practical sense every exposure of one's body to an unnecessary danger is a negligent exposure to such danger. In view of the well-established rule of construction in such cases, the true purposes of such contracts, and the connection in which the word "negligent" is used we hold that its use is simply cumulative or redundant, and that the clause means no more than "voluntary exposure to unnecessary danger." Using the language of Mr. Justice Harlan, as quoted above, "the latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the objects of accident insurance contracts, and is therefore the interpretation which the court should adopt."

The evidence does not justify the conclusion, as a matter of law, that the insured voluntarily exposed himself to unnecessary danger, within the meaning of those terms as applied to cases of this character. Whether he did so expose himself, therefore, was a proper question for the determination of the jury from all the facts and reasonable inferences in that regard. Nor can it be justly said that the jury's evident finding that he did not so expose himself to such danger is plainly wrong, amounting to a miscarriage of justice. Really it was not proved that insured was even guilty of contributory negligence, to say nothing of the degree of negligence required to be shown under

such clause as the one under which exemption from liability is claimed. It does not appear that the insured had knowledge of his surroundings, or of any danger near him, when the accident befell him. Where the danger is unknown, the injury is accidental, not the result of voluntary exposure. The mere custom of railroad employes who make runs out of Russell to catch trains for that place at the telegraph office near which the injury occurred does not prove that the insured ever followed that custom. That circumstance of itself is insufficient. Yet it is all there is in the evidence from which it can be said that insured was ever at the bench on a previous occasion. Nobody says that he was there before, or that he was acquainted with the surroundings. It is true that his run as fireman was by this place, but he cannot be reasonably charged with knowledge of situations at places in view of which he passed as such employe, engaged in duty requiring his attention to the train. For all that is known, he may have prudently gone to this place for the first time, found the bench, and occupied it reasonably believing himself perfectly safe on that which was evidently provided for others. The electric light was not burning. Its accidental failure to burn may have prevented his observing the pitfall. That he was about a city at night is not negligence, unless it were shown that he went to a place which he knew to be dark and dangerous, or that he should reasonably have known it. Sitting or lying on a bench near the top of an unguarded wall is not voluntary exposure to unnecessary danger within the meaning of those terms in a policy of accident insurance, even if it were shown that the insured knew of the wall and the lack of railing on it. Prudent men do such things. There is no danger while one's faculties are present. Sudden loss of those faculties would be merely accidental, unexpected. It is not shown that insured was asleep on the bench, or that he intended to sleep there. He may have never intended to sleep on it, yet he may have accidentally gone to sleep. And it may have been that while in that state he rose from the bench and fell over the wall. In *Schneider v. Travelers' Ins. Co.*, 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618, injury under similar circumstances is held not to be the result of voluntary exposure to unnecessary danger. And elsewhere it is held: "One who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger from escaping steam from the safety valve." *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 59 S. W. 7, 95 Am. St. Rep. 374. In all the cases there runs the demand that the danger shall be of a substantial kind, shall be unnecessary, known, or obvious, and

that the exposure to it shall be of a reckless or deliberate character.

These observations upon the evidence are sufficient, we think, to show the insufficiency of the evidence relied upon to sustain exemption because of voluntary exposure to unnecessary danger. By the sound inferences to be drawn from all the facts and circumstances it is not established that there was exposure to danger of the substantial kind that will excuse from liability, or to any danger that was obvious to insured. In *Travelers' Ins. Co. v. Clark*, supra, it is held: "The words 'voluntary exposure to unnecessary danger,' when employed in a contract of life and accident insurance, relate to dangers of a substantial character which the insured recognizes, and to which he, nevertheless, consciously and purposely exposes himself, intending at the time to assume the risk of the danger."

Upon the evidence adduced in the case the issues were properly to be disposed of by the jury. The verdict is not against the decided weight and preponderance of the evidence. The case was fairly submitted to a jury. A verdict was fairly rendered by that jury. No manifest wrong or injustice appears. The verdict is not unwarranted by the evidence. Under such circumstances what justification can there be for disturbing the verdict and denying to plaintiff the result thus fairly gained? There is none. The action of the circuit court in setting aside the verdict and awarding a new trial is contrary to well-established law. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Smith v. Railway Co.*, 48 W. Va. 69, 35 S. E. 834; *Young v. Railroad Co.*, 44 W. Va. 218, 28 S. E. 932; *Miller v. Insurance Co.*, 12 W. Va. 116, 29 Am. Rep. 452, and many other cases.

The action of the trial court in setting aside the verdict and awarding a new trial is erroneous. It is therefore reversed. This court now proceeding to render such judgment as the circuit court should have rendered, it is considered that the plaintiff recover from the defendant the sum of \$1,000, with interest thereon from the 17th day of April, 1906, and his costs about the prosecution of his case in the circuit court expended.

(150 N. C. 827)

STATE v. HINSON.

(Supreme Court of North Carolina. April 1, 1909.)

1. CRIMINAL LAW (§ 814*) — INSTRUCTIONS — SUPPORT BY EVIDENCE—ESSENTIALITY.

An instruction unsupported by evidence is error, especially where accused has or may have been prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1982; Dec. Dig. § 814.*]

2. HOMICIDE (§ 808*) — MURDER — INSTRUCTIONS.

Where the evidence showed that accused was making a determined assault on decedent, who was backing away from him, that he knocked the decedent down and struck him with a knife three or four times after he got up, it supported an instruction submitting an issue of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 808.*]

3. CRIMINAL LAW (§ 806*) — EVIDENCE—RES GESTÆ—DECLARATIONS.

In a murder trial, the state could show, as part of the res gestæ, that near the end of the combat decedent exclaimed, "I am cut," and that the father of the parties, who tried to separate them, said, "I told you to quit; you are going to get cut."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 806.*]

Appeal from Superior Court, Anson County; Long, Judge.

Tom Hinson was convicted of murder in the second degree, and he appeals. Affirmed.

Before the jury was impaneled, the solicitor stated to the court, in the presence of the prisoner and his counsel, that he would not ask for a verdict of murder in the first degree, but for a verdict of murder in the second degree or of manslaughter, as the facts might warrant. In apt time the court was requested, for the prisoner, to charge the jury: "(1) That if the state has failed to satisfy you beyond a reasonable doubt that Tom Hinson made the wound that caused the death of Earnest Hinson, you will find the defendant not guilty. (2) The court charges you that you shall render a verdict of not guilty. (3) Proof to convict in this case must be such as to exclude every other reasonable hypothesis than that of the defendant's guilt; and if the state has failed, by its evidence, to exclude every other reasonable hypothesis than that the defendant killed the deceased, you will find the defendant not guilty." The court gave the first and third, and declined to give the second, prayer for instructions, and defendant excepted. In a portion of the charge the court instructed the jury as follows: "That if the state had furnished evidence from which the jury found and were satisfied beyond a reasonable doubt that the prisoner and his brother, the deceased, engaged in a mutual affray and entered into a mutual combat by consent, on equal terms, and without use of deadly weapons, and without serious injury to each other, and that, during the progress of the fight, their father interfered, came between them, endeavored to separate them, and pushed the deceased off; that, if the jury further found beyond a reasonable doubt that the prisoner followed up and pressed the fight, and used a knife and stabbed and cut his brother, and inflicted the wound described by the witnesses, from which he soon thereafter died; and that the deceased was at the time unarmed and going back, or in retreat, or in the act of quit-

ting the combat at the entreaty of his father—that the offense of the prisoner in taking life, and with a knife, and inflicting the wound described, under these circumstances, if so found by the jury, would be murder in the second degree.” To this instruction the defendant excepted. There was verdict of guilty of murder in the second degree, and from judgment on the verdict the defendant appealed.

J. A. Lockhart, for appellant. The Attorney General, for the State.

HOKE, J. It was chiefly urged for error that the portion of the charge set forth was predicated on evidence suggested therein, and entirely without support in the testimony. The position contended for is sound as a general rule, certainly where it appears that the prisoner's cause has, or may have been, prejudiced by the course indicated; but we are of opinion that the facts presented do not bring the case within the principle. On the trial, Landy Edwards, a witness for the state, testified as follows: “I looked and saw the defendant and Earnest and Wyatt Hinson. Earnest was backing out, and Tom was advancing on him. Both knocking. Earnest didn't get more than five or six steps. I next saw his father, Wyatt, come between the boys. He pressed Earnest off. Defendant hit at Earnest. I thought this lick hit Wyatt. Then Tom, the defendant, ran around his father, and struck Earnest with his fist, and knocked him down. Earnest got up. Then the defendant hit him (Earnest) two or three times. Did not see what the defendant had in his hand. If he had a knife, I could not tell. Was not close enough. Then Earnest went to the doctor's shop, and saw cut in his breast, right on left breast. It was bad-looking place. The defendant's father was holding the wound while the doctor was working on the place. Blood was oozing out of the place. Earnest is dead now. Cutting took place between 9 and 12 o'clock.” Duncan Patterson, for the state, testified: “Boys were fighting when I saw them. Earnest come out of the shed backwards six or eight feet, and defendant advancing and fighting with fist. Defendant advancing. Couldn't say whether either had knife. The father came between them and pressed Earnest south. Was pushing Earnest more than Tom. Then Tom reached back and got a piece of plank about one inch thick, and four inches wide, and four or five feet long, and hit Earnest or his father. Then the father pressed them apart. Then Tom, the defendant, run around and hit Earnest with his fist, and knocked Earnest down. When Earnest got up, the defendant hit Earnest three or four times on the shoulder. Don't know whether he had a knife or not. About this time I said, ‘Quit boys,’ and Earnest said, ‘I am cut.’ The father then put his hand on Earn-

est and pressed the gash, and said, ‘I told you to quit, you are going to get cut.’ Then they quit. Earnest stooped for his hat. Told me to get his hat. I did so. He clutched his breast and went to the doctor. He was cut in the right side of the breast. He was gashed to the hollow near the middle of the side of the breast. Didn't notice clothing. I saw the wound at the doctor's. Fight took place about 10 or 11 o'clock a. m. He lived near a day. He died that night. Saw the corpse between 11 and 12 that night. Died at the doctor's office.” The doctor testified: “That the deceased died from a wound in the right side of the breast, entering below the second rib, ranging downward, cutting the third and fourth ribs completely in two, and partially into the fifth rib. The wound was two or three inches deep, and into the lung from one-half to one inch. That he died from wound in the breast.”

The mere statement of this evidence affords a complete answer to the objections urged for the prisoner. Here was testimony showing that the prisoner was making a violent and determined assault on the deceased, who was backing away from him; that he knocked the deceased down, and struck him three or four times after he got up. Near the end of the fight, if it can be properly termed a fight, the deceased exclaimed, “I'm cut,” and just at the close the father, who had interfered in an effort to separate his sons, was heard to say, “I told you to quit, you are going to get cut,” and he died soon thereafter from a fatal cut into the lung. These exclamations of the deceased and the father come clearly within the principle and simplest instances of declarations competent as part of the *res gestæ* (State v. Jarrell, 141 N. C. 722, 53 S. E. 127; State v. McCourry, 128 N. C. 594, 88 S. E. 883; McKelvey, Ev. [2d Ed.] 343), and, taken in connection with the other facts, fully justify the action of the court below in refusing the prisoner's second prayer for instructions, and in the charge as given.

There is no error, and the judgment below is affirmed.

No error.

(150 N. C. 370)

HICKS v. KING et al.

(Supreme Court of North Carolina. April 1, 1909.)

1. LANDLORD AND TENANT (§ 92*)—OPTION TO PURCHASE.

Plaintiff by written lease rented his farm to defendant for a term of 10 years for a yearly rental of 5 bales of cotton, with provisions that if the rent and taxes were promptly paid defendant could purchase the land upon payment of 50 bales more, and that, if any installment of rent were not promptly paid, defendant's rights should be forfeited, and plaintiff should have the right of re-entrance thereon. Held, that the lease was a contract for sale on installments, and, upon plaintiff having attempted

to enforce a forfeiture for default in payments, defendant could assert his equity under the contract, and cause the land to be sold to pay the balance due on the purchase price.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 92.*]

2. LANDLORD AND TENANT (§ 92*)—OPTION TO PURCHASE.

Contracts for sale of land on installments are similar to mortgages, in that in neither is the purchaser's equity destroyed by noncompliance with a stipulation for prompt payment, but upon default he is entitled to have the balance ascertained, and a sale ordered, and to receive surplus, if any.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 92.*]

Appeal from Superior Court, Duplin County; Lyon, Judge.

Action by F. D. Hicks against Marshall King and others. Judgment for defendants, and plaintiff appeals. Affirmed.

On January 1, 1907, the plaintiff leased his farm in writing to the defendant (a colored man) for the term of 10 years at a yearly rental of 5 bales of good middling cotton of 500 pounds each, with a further provision that if said rent was promptly paid, together with the taxes on the land, then the defendant could become purchaser of the land upon payment of 50 bales more, with provision for forfeiture if any installment of rent is not promptly paid by lessee, and right of re-entrance thereon. During the first 5 years the defendant one year paid his rent, one year he overpaid 1,500 pounds of cotton, and the other years he fell behind; but the plaintiff did not assert the right to re-enter till the end of the fifth year, at which time the defendant was in arrears for the five years \$63.51. On December 30, 1901, the plaintiff began this action for recovery of the land and balance due on rent. A receiver was appointed, who rented the land to the defendant pending litigation. The cause was referred to A. McL. Graham, upon whose report the judge rendered judgment for the balance of rent due to date, and for the value of the additional 50 bales of cotton, and ordered that upon nonpayment of above sum the property be sold for payment thereof and costs, including allowances to receiver and referee. The plaintiff appealed.

E. K. Bryan and H. E. Faison, for appellant. Stevens, Beasley & Weeks, Rountree & Carr, Walter Clark, Jr., Aycock & Winston, and Bunn & Sprull, for appellees.

CLARK, C. J. The appeal presents practically but one point. The plaintiff contends that the court should have held that punctual payment of rent was of the essence of the contract, and that upon default the plaintiff was entitled to re-enter and take possession. But this would ignore the other features of the contract. This case is almost identical with *Crinkley v. Egerton*, 113

N. C. 444, 18 S. E. 669 which held that, as long as the lessor treated the lease as continuing, he was entitled as lessor to the landlord's lien for rent; but that, whenever he put an end to it by seeking to resume possession, the defendant could assert his equity under the contract to convey, and could cause the land to be sold. Similar contracts have been construed to be contracts to convey. *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682; *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 574; *Barrington v. Skinner*, 117 N. C. 47, 23 S. E. 90; *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214; *Mfg. Co. v. Gray*, 121 N. C. 168, 28 S. E. 257; *Wilcox v. Cherry*, 123 N. C. 79, 31 S. E. 369; *Thomas v. Cooksey*, 130 N. C. 148, 41 S. E. 2; *Hamilton v. Highlands*, 144 N. C. 283, 56 S. E. 929.

When, as here, the full period for installments has passed at the date of the judgment, it is necessary only to deduct the payments made and direct a sale of the property to pay the balance due. When there are installments which have not fallen due, the present value only of such should be charged against the purchaser. Contracts for sale on installments are similar to mortgages. In neither is the equity destroyed by the stipulation for prompt payment; but the debtor is entitled to have the balance ascertained, and a sale ordered, and to receive surplus, if any.

Affirmed.

(150 N. C. 367)

HARRIS et al. v. MARTIN et al.

(Supreme Court of North Carolina. April 1, 1909.)

WILLS (§ 302*)—PROBATE—IDENTITY OF TESTATRIX—EVIDENCE.

Proof that a woman making her will announced herself as a certain person to the attorney who drafted the will and to a witness thereto, neither of whom had met her before, not only by accepting an introduction to them as that person, but by signing herself as such in the will, constituted prima facie evidence of her identity as that person.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 302.*]

Appeal from Superior Court, Wake County; Neal, Judge.

Application by C. H. Martin, administrator, and others, for probate of the will of Sarah C. Harris. J. T. Harris and others interposed a caveat. From a judgment for proponents, caveators appeal. Affirmed.

Aycock & Winston, R. N. Simms, and J. N. Holding, for appellants. Armstead Jones & Son and Pou & Brooks, for appellees.

CLARK, C. J. This is a caveat of the will of Sarah C. Harris. The complaint alleges that said paper writing "was not and is not the last will and testament of the said Sarah

C. Harris, deceased, for the reason that the signature of the said Sarah C. Harris thereto was obtained by undue and improper influence and duress upon the said Sarah C. Harris," and, as a further ground, alleges that, "at the time of the execution thereof and continuously thereafter until her death, the said Sarah C. Harris did not have the capacity to make and execute a will, for the reason that she was not of a sound and disposing mind and memory at and during said time."

W. H. Ruffin, Esq., attorney at law of Louisville, testified that he received a message from Mrs. Jennie Martin, who resided in the same town, that her sister, Miss Harris, wished him to come to her (Mrs. Martin's) house to draw Miss Harris' will; that he went, and was introduced by Mrs. Martin to Miss Harris as her sister; that Mrs. Martin then stated to witness that this was her sister, who wanted her will drawn, and Mrs. Martin stated what the terms of the will were, the witness took notes, then turned to Miss Harris, read the notes to her, and asked her was that the way she wished the will drawn, and she replied "Yes"; that the witness went off and drew the will, and returned, bringing, as requested, Dr. O. L. Ellis, as a witness. Miss Harris and Mrs. Martin came into the room. Witness read the will to Miss Harris, and asked her if that was the way she wished her will drawn, and she said, "Yes," and requested him and Dr. Ellis to witness it. She then signed the will in their presence, and they signed it in her presence. On cross-examination witness said he met Miss Harris only on those two occasions, and knew her only by the introduction above stated, and that she seemed physically and mentally capable of making a will.

Dr. Ellis, a practicing physician, testified that he accompanied Mr. Ruffin on this last occasion, was introduced to Miss Harris, whom he had never met before, and knew only by this introduction; that Mr. Ruffin read the will over to her. She said that was her will. She signed it in the presence of Mr. Ruffin and himself, and they signed it as witnesses in her presence. He was asked to sign by Mr. Ruffin in her presence. The caveators introduced no testimony. The jury found that the paper writing was the last will and testament of Sarah C. Harris.

The caveators contend that the court should have instructed the jury, as requested, that there was not sufficient evidence to answer the issue "Yes," and that they should answer it "No." There was no evidence whatever tending to show as the caveators contend that another person had fraudulently and falsely impersonated Miss Harris. There

was no allegation of that nature in the complaint. On the contrary, it was averred that "the signature of Sarah C. Harris thereto was procured by undue influence and duress," and that "at the time of execution" of said will "the said Sarah C. Harris did not have the capacity to make and execute a will." Upon the averments in the complaint there was nothing that required the respondents to put in evidence of an identity that was not questioned, and which, indeed, was admitted by the pleadings. Indeed, when the propounders rested, after putting in evidence of the formal execution of the will, it must have been a distinct surprise to raise the question of identity of the testator without any allegation in the complaint. The testatrix announced herself as Miss Sarah C. Harris, not only by accepting the introduction, but by signing herself by that name. Where a cartman took goods to the house of L., not knowing the owner, asked a person he found there for Mr. L., and the person said "I am Mr. L.," it was held by Lord Lyndhurst that this was *prima facie* evidence of the identity of Mr. L. *Wilton v. Edwards*, 6 Car. & P. 677; *Harris, Identification*, §§ 75, 99, 115. When one is asked who he is, his reply that he is S. is some evidence of that fact. *Reynolds v. Staines*, 2 C. & K. 745. Where at an auction a person was addressed by several as "R.," and his name was so written upon the board, *Wilde, C. J.*, held that this was *prima facie* evidence that such was his name. *Collier v. Nokes*, 2 C. & K. 1012.

The facts in evidence were sufficient to submit the case to the jury upon the identity of the testator, and, there being no evidence to the contrary, it satisfied the jury. It would have been easy for the caveators, the nearest relatives of the deceased, to have shown from the description of her person, from her handwriting, by their knowledge of her whereabouts at that time, and other circumstances, whatever reason, if any there was, to throw doubts upon the identity of the testator. The transaction took place in the usual manner. The witnesses were two gentlemen of standing in their respective professions, and there is nothing whatever in the attendant circumstances to cast a doubt upon the bona fides of the transaction.

Strangers must frequently execute wills when no better known to the witnesses than the testator was in this case. Had the question of the identity of testator been raised by the pleadings, doubtless the proof would have been complete, but, as it was, there was a *prima facie* case and no evidence to the contrary. The other exceptions require no discussion.

No error.

(150 N. C. 383)

GRAVES v. JACKSON.

(Supreme Court of North Carolina. April 1, 1909.)

1. TRIAL (§ 267*) — GIVING INSTRUCTION IN LANGUAGE REQUESTED.

The court is not required to give an instruction in the exact words used by counsel; but, if the instruction is given substantially as requested and the change of language does not weaken the force of the instruction, it is sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672; Dec. Dig. § 267.*]

2. JUDGMENT (§ 712*) — CONCLUSIVENESS OF ADJUDICATION—PERSONS CONCLUDED.

A person who is not a party to a suit is not concluded by a judgment in that suit that one of the parties to it is the owner of certain property in dispute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1233; Dec. Dig. § 712.*]

Appeal from Superior Court, Moore County; Long, Judge.

Action by G. C. Graves against W. K. Jackson. Judgment for defendant, and plaintiff appeals. Affirmed.

U. L. Spence, for appellant. R. L. Burns, for appellee.

WALKER, J. This action was brought to recover two mules which the plaintiff alleged the defendant unlawfully withholds from him, or for the value thereof. The mules were taken into possession by the sheriff under a requisition issued in an ancillary proceeding of claim and delivery, and the defendant gave bond for the return of the property, and the same was delivered to him by the sheriff. The judgment below was in favor of the defendant, and the plaintiff appealed.

It appears that the controversy in the trial below was confirmed principally to the "dark horse mule." The defendant had agreed with one W. B. Tyson in 1903 that, if Tyson should pay him \$125 on or before November 1, 1903, the mule should then be his property. Tyson failed to pay the money, being unable to do so, and the agreement was canceled by the parties, and afterwards he "hired" the mule to Tyson. The evidence tended to show that the title to the mule was to continue in Jackson until the \$125 was paid. In 1904, after the agreement between Jackson and Tyson had been canceled, Tyson mortgaged the mule to the plaintiff, and the plaintiff relied upon the

mortgage to establish his title to the mule. It also appeared that, in an action between the plaintiff and Tyson to recover this mule and other property, the court adjudged that Tyson was indebted to the plaintiff on the mortgage debt in the sum of \$238.21, and that the property seized in the action under the requisition in the claim and delivery proceeding was worth \$35. The mule was not seized, and the court merely adjudged that the plaintiff recover of Tyson the said sum of \$238.21 and interest, and, further, that plaintiff is the owner of the mule and other property described in the complaint, as between him and Tyson. The defendant was not a party to that suit.

The respective parties submitted prayers for instructions which we think were substantially given by the court. The judge is not required to give an instruction in the very words used by counsel in the request for it, even if the instruction be a proper one. If he gives it substantially, and does not, by any change of language, weaken its force, it is a sufficient compliance with the law. *Rencher v. Wynne*, 86 N. C. 268. The court, by its instructions, left the facts to be found by the jury, and correctly explained to them the law arising upon the evidence. We do not see why Jackson and Tyson could not cancel their agreement if Tyson found that he was unable to pay the price of the mule, and thereby restore the absolute or unconditional title to Jackson. All the evidence tended to show that at the time Tyson executed the mortgages to the plaintiff the title to the mule was in Jackson. The jury evidently found this to be the fact.

As to the suit between the plaintiff and Tyson, the defendant was not bound or concluded by any adjudication therein, not having been made a party to the action.

There was no error in the instructions as to the amount due on the plaintiff's mortgages. This was an issue of fact which was properly left to the jury. Indeed, the plaintiff by his fifth prayer appears to have so regarded it.

We find no reversible error in any of the rulings of the court to which the plaintiff excepted. The case was fairly submitted to the jury by the court. It practically involved an issue of fact, which the jury upon the evidence found against the plaintiff.

No error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(6 Ga. App. 55)

SOUTHERN RY. CO. v. FREEMAN.
(No. 1,424.)

(Court of Appeals of Georgia. April 15, 1909.)

1. MASTER AND SERVANT (§§ 227, 265*) — INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE.

Under the law of this state an employe of a railroad company cannot recover damages for personal injuries against the company, when his own negligence, however slight, contributes in an appreciable degree to the cause of his injury. Therefore, in a suit for such a purpose, no presumption against the company arises until the employe shows affirmatively that he was himself without fault; and it is error to give in charge to the jury section 2321 of the Civil Code of 1895 in such a manner as to make it appear applicable, irrespective of this limitation. *Georgia Railroad & Banking Co. v. Hicks*, 95 Ga. 301 (2), 22 S. E. 613.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 663, 878; Dec. Dig. §§ 227, 265.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Whether the commission of acts other than those which the law makes negligence per se constitutes negligence is a question of fact, to be determined by the jury, and not by the judge. Therefore in this case it was error to charge as follows: "If you find that the engine ran back and bumped the car in which he was working, or at which he was working, and caused this plank to fall out, and this was the reason he was injured, I say the plaintiff would be entitled to recover." *Hopkins' Law of Personal Injuries*, §§ 25, 26, and the many decisions of the Supreme Court there collated.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 465, 466; Dec. Dig. § 194.*]

(Syllabus by the Court.)

Error from City Court of Baxley; Levi O. Steen, Judge.

Action by Schofield Freeman against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Jno. F. De Lacy, for plaintiff in error. Jas. R. Thomas and W. W. Bennett, for defendant in error.

HILL, C. J. Judgment reversed.

(6 Ga. App. 54)

PAINTER v. MCGAHA. (No. 1,421.)

(Court of Appeals of Georgia. April 15, 1909.)

TROVER AND CONVERSION (§ 16*) — WHEN MAINTAINABLE.

Where one in possession of personal property under a conditional sale is wrongfully deprived of its possession, he has a right to institute an action of trover against the wrongdoer to recover possession of the property either on the ground of title or of right of possession.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 122, 133; Dec. Dig. § 16.*]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Action by G. R. McGaha against Sam

Painter. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Mann, for plaintiff in error. M. C. Tarver, for defendant in error.

HILL, C. J. McGaha brought trover against Painter in the city court of Dalton to recover possession of a horse. The jury found a verdict for the plaintiff, and the defendant's motion for a new trial was overruled.

The facts in the case, which are not controverted, briefly stated, are as follows: McGaha and Painter swapped horses; McGaha relying upon Painter's statement that the title to his horse was free from any lien or incumbrance. Soon after the exchange was made, the horse which Painter had swapped to McGaha was levied upon under a mortgage *fi. fa.* against Painter, and seized and sold thereunder, whereupon McGaha instituted his trover suit. It developed on the trial of the suit that the horse which McGaha traded to Painter was bought by him from his mother-in-law, who retained title to the horse until he paid her for it. This reservation of title was not in writing, and it was not shown that McGaha had paid anything for the horse; but it was admitted that he had possession of the horse under this sale. Under these facts, it is contended by the plaintiff in error that trover did not lie, as the evidence showed that the plaintiff did not have title to the horse when he filed suit.

We do not concur in this view. The plaintiff did have a special property in the horse at the time the action was commenced, and did have a title subject to be defeated by the vendor only upon failure to pay the purchase price. This was sufficient to justify him in bringing an action of trover on this ground. *Mitchell v. Georgia & Alabama Railway*, 111 Ga. 790, 36 S. E. 971, 51 L. R. A. 622, and cases there cited. Besides this, the plaintiff was in possession of the horse at the time the exchange was made, and this possession was good against all the world, even the vendor, and entitled him to maintain an action of trover for the possession of the horse, which had been wrongfully and fraudulently taken from him by the defendant. To maintain an action of trover the plaintiff must show title in himself, or the right of possession wrongfully withheld from him by the defendant. *Groover v. Iler*, 1 Ga. App. 77, 57 S. E. 906.

It is the general rule that peaceable and lawful possession of personal property, even where the holder has no title to the same, gives him a right to sue in trover a wrongdoer who has deprived him of that possession. *Mitchell Case*, supra. And Civ. Code 1895, § 3886, declares that mere possession of a chattel, if without title or wrongful,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

will give a right of action for interference therewith. The plaintiff, therefore, had a right to institute a suit of trover to recover this horse, both because he had a special property in the horse and because he had a right to the possession of the horse, as against one who had obtained the possession of the horse from him by the false and fraudulent representations that the horse which he exchanged for the horse of the plaintiff belonged to him and was unincumbered. *Fudge v. Kelley*, 4 Ga. App. 630, 62 S. E. 96. Both good law and sound morality on the facts were on the side of the plaintiff, and the jury did right to give him the horse, and the judge did not err in refusing to grant a new trial.

Judgment affirmed.

(6 Ga. App. 105)

WEST v. STATE. (No. 1,726.)

(Court of Appeals of Georgia. April 15, 1909.)

1. ARSON (§ 2*)—ELEMENTS.

In a case of arson, the corpus delicti consists of two fundamental facts: First, the burning of the house described in the indictment; and, second, the fact that a criminal agency was the cause of the burning.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 1, pp. 507-509; vol. 8, p. 7582.]

2. ARSON (§ 27*)—EVIDENCE—PRESUMPTIONS.

On a trial for arson, if nothing appears but the mere fact that the house was consumed by fire, the presumption is that the fire was the result of accidental, or natural, or providential cause.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 55; Dec. Dig. § 27.*]

3. CRIMINAL LAW (§ 535*)—CONFESSION—CORROBORATION—NECESSITY.

It is well settled in this state that while a confession freely and voluntarily made may be sufficient to convict, when corroborated by proof of the corpus delicti, yet, before it can be sufficient for this purpose, there must be proof aliunde of the essential facts constituting the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1225; Dec. Dig. § 535.*]

4. CRIMINAL LAW (§ 534*)—SUFFICIENCY OF EVIDENCE—EXTRAJUDICIAL CONFESSION.

In this case there is no proof whatever tending to show that the crime of arson was committed by any one, and the conviction of the defendant is based alone upon his mere extrajudicial confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1222; Dec. Dig. § 534.*]

(Syllabus by the Court.)

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Will West was convicted of arson, and brings error. Reversed.

Busbee & Busbee, for plaintiff in error. W. F. George, Sol. Gen., for the State.

HILL, C. J. Will West was convicted of arson, and his motion for a new trial was

overruled. There is no controversy over any question of law; the only issue in the case being as to the sufficiency of the evidence.

It is insisted by the plaintiff in error that there is no proof of the corpus delicti. In cases of arson, as in every other crime, it is absolutely necessary that the evidence, whether direct or circumstantial, should show, to a moral and reasonable certainty and to the exclusion of every other reasonable hypothesis, that the crime was committed by some one. No universal and invariable rule can be laid down as to what would amount to proof of the corpus delicti. Each case depends upon its own peculiar circumstances. But in every case of arson two fundamental facts must appear: First, a burning; and, second, some criminal agency which caused the burning. In other words, the corpus delicti in a case of arson is not merely the burning of the house in question but that it was burned by the willful act of some person, and not as a result of natural or accidental cause; for, if nothing appears but the mere fact that the house was consumed by fire, the presumption is that the fire was the result of accident, or some providential cause. *Phillips v. State*, 29 Ga. 105; *Williams v. State*, 125 Ga. 741, 54 S. E. 661; *Bines v. State*, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33; *Ragland v. State*, 2 Ga. App. 492, 58 S. E. 689.

The burden is, therefore, on the state to prove, first, a burning; and, secondly, that it was a criminal burning. The facts in this case show beyond doubt that the house described in the indictment was consumed by fire. The facts and circumstances set out in the brief of the evidence do not in any manner indicate any criminal agency in the burning, and wholly fail to overcome the presumption that the burning was the result of accident or some natural or providential cause. The circumstances relied upon by the state, aliunde the confession, as being sufficient to show some criminal agency in connection with the burning, are wholly inconclusive for that purpose. These circumstances, briefly stated, are as follows: The house burned was an unoccupied dwelling house, within sight of the dwelling house of the prosecutor. It was burned about 12 o'clock on Sunday night. The door of the house was open and in plain view of the residence of the prosecutor. There was no fire used in or about the house, and, so far as was known to any one, there was no fire about the house late in the afternoon or in the early part of the night of the burning. The house had in it at the time of the burning some seed cotton and about 100 bushels of cotton seed. There were some tracks, apparently made during the night, in the public road, going by the house that was burned and by the residence

of the prosecutor. Outside of the confession claimed to have been made by the defendant, these are the only circumstances which the state relied upon to prove the corpus delicti. It must be apparent that, taken all together, they fall far short of proof of any criminal agency in the burning of the house. Certainly it cannot be claimed that they in any degree tend to overcome the presumption of an accidental burning, and to establish beyond a reasonable doubt the hypothesis of unlawful burning.

It is insisted that generally it is impossible to prove by direct evidence the corpus delicti in arson cases. This may be true; but it furnishes no reason for any relaxation of the imperative rule, founded not only in the humanity of the law, but supported by principles of abstract justice, that in every case of alleged crime the proof must show the fact of the crime beyond a moral and reasonable certainty, to the exclusion of every other reasonable hypothesis. The crime of arson is not within any exception to the rule; indeed, there is no exception to this salutary rule of evidence. In this case it is claimed that the defendant confessed the crime; but this confession is of no probative value whatever until and unless, by some evidence outside of the confession, the crime is shown to have been committed by some one. The statute law of this state declares that a confession alone, uncorroborated by other evidence, will not justify a conviction. Pen. Code 1895, § 1005. And while it has been declared that proof alunde that a crime was committed would in law be sufficient corroboration of a confession, yet it is equally well settled that a mere confession is not sufficient to establish the corpus delicti (*Murray v. State*, 43 Ga. 256); in other words, that, before a confession will authorize a conviction, it must be corroborated by evidence which, independently of the confession, tends to establish the corpus delicti (*Bines v. State*, supra; *Wimberly v. State*, 105 Ga. 188, 31 S. E. 162; *Davis v. State*, 105 Ga. 808, 32 S. E. 158; *Schaefer v. State*, 93 Ga. 177, 18 S. E. 552).

Cases can be imagined in which a confession might disclose independent facts or circumstances which would furnish sufficient proof of the corpus delicti. But in this case no such independent facts or circumstances are disclosed by the confession. The confession consists of the simple statement that the defendant, in company with another negro, set fire to the house in question. There is no evidence of the existence or whereabouts of this alleged accomplice. No threat is shown to have been made by the defendant in reference to the prosecutor or his property, and no motive appears for the commission of such a crime by the defendant. It is significant that the prosecutor himself, according to the evidence, was "stunned" by the confession of the defendant. In some juris-

dictions it has been held that a confession is sufficient to warrant a conviction, where there is additional proof that the crime charged has been committed; in other words, that the confession may be taken and considered in connection with other evidence, if there be any, either positive or circumstantial, tending to prove the commission of the crime charged. Even if this rule of evidence is applicable under the law of this state, it would not fit the facts and circumstances of the present case; for here the confession, as before stated, furnishes no independent fact or circumstance tending to show the commission of the crime, or which, when taken in connection with any other fact or circumstance in the case, tends to show that any crime was committed, and the rule as declared in this state is that the corpus delicti must be fully proved, independently of the confession.

We are reluctant at all times to interfere with the verdict of a jury; but, after giving the facts and circumstances in this case a most careful consideration, we are perfectly clear that nothing appears in the evidence, outside of the confession, that even remotely tends to show the essential predicate upon which all criminal prosecutions must be based, to wit, the existence of the crime charged, and for this reason we are compelled to reverse the judgment refusing to grant another trial.

Judgment reversed.

(132 Ga. 316)

TOWN OF MAYSVILLE et al. v. SMITH et al.

(Supreme Court of Georgia. March 10, 1909.)

1. MUNICIPAL CORPORATIONS (§ 46*)—BOUNDARIES—STATUTORY PROVISIONS.

The act approved September 30, 1879 (Acts 1878-79, p. 809), incorporating the town of Maysville, and the various amendatory acts, considered. The territorial limits of the town of Maysville are fixed by the act approved August 18, 1905 (Acts 1905, p. 993), and extend three-fourths of one mile in every direction from the "center of the old Northeastern Depot site."

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 46.*]

2. STATUTES (§§ 76, 120*)—RELATING TO MORE THAN ONE SUBJECT—EXPRESSION OF SUBJECT IN TITLE—SPECIAL LAW.

The act approved August 7, 1906 (Acts 1906, p. 121), providing for a change in county lines lying within the limits of incorporated towns or cities of more than 500 population, is not unconstitutional as referring to more than one subject-matter in its title, or as containing matter different from that contained in its title, or as being a special law operating upon a subject-matter provided for by an existing general law.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 77½, 168; Dec. Dig. §§ 76, 120.*]

3. COUNTIES (§ 10*)—CHANGE IN BOUNDARIES—POPULATION.

The act of August 7, 1906 (Acts 1906, p. 121), authorizing an election to determine a change of county lines in towns or cities having a population of more than 500, applies only

to towns or cities whose population has been ascertained to exceed 500 by an authorized official census. In the absence of a census taken under proper authority from the state, resort will be had to the last census of the United States to ascertain whether the provisions of the act are applicable to a given town or city.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 7; Dec. Dig. § 10.*]

4. COUNTIES (§ 10*)—CHANGE IN BOUNDARIES—INJUNCTION.

As no census under authority of the state has been taken in the town of Maysville, and the last census of the United States gives that town a population less than 500, the act of August 7, 1906 (Acts 1906, p. 121), is inapplicable. The attempt of the officials of that municipality under color of the act to change the county lines within the municipal limit is an ultra vires act, and will be restrained by a court of equity.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 7; Dec. Dig. § 10.*]

(Syllabus by the Court.)

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action for an injunction by J. N. Smith and others against the Town of Maysville and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. J. Griffin, O. Brown, and J. J. Strickland, for plaintiffs in error. J. A. B. Mahaffey, J. S. Ayers, and Cobb & Erwin, for defendants in error.

EVANS, P. J. The town of Maysville is located partly in Banks county and partly in Jackson county. On April 13, 1908, an election was held in this town under the act approved August 7, 1906 (Acts 1906, p. 122), which provides that whenever the boundary lines of one or more of the counties of this state shall lie within the corporate limits of any town or city having more than 500 inhabitants, and it is desired to change the county lines and bring the town and city wholly within the limits of one county only, the change of such count lines may be effected by an election called and held pursuant to the terms of the act. The greater number of votes cast at this election having been in favor of the future location of the town in Banks county, the town authorities so declared the result, and were proceeding to certify this result to the authorities of the two counties for the purpose of having the county lines readjusted in accordance with the terms of the act, when certain citizens of Jackson county, residing in the town of Maysville, applied for an injunction to restrain the authorities of the town from proceeding further to carry the election into effect. Prior to the hearing Jackson county was made a party plaintiff and Banks county was made a party defendant. At the hearing the judge granted the injunction prayed for, and defendants excepted.

1. One of the attacks made by the plaintiffs in the court below upon the validity of

the election was that the various acts incorporating the town of Maysville were so confusing in their definition of the corporate limits of the town that the territory intended to be embraced within the municipality could not be ascertained with certainty. The town of Maysville was incorporated by an act approved September 30, 1879, "with the corporate limits of said town extending three-fourths of one mile in every direction from the Northeastern Railroad depot in said town." Acts 1878-79, p. 309. By an act approved October 13, 1885, this act was amended "in the fourth line thereof by striking out the words 'three-fourths of one mile,' and inserting in lieu thereof the words 'one-half mile of one mile,' so that said section as amended shall prescribe the corporate limits of said town one-half mile in every direction from the Northeastern Railroad Depot." Acts 1884-85, p. 418. On December 6, 1902, an act was approved wherein it was enacted that "an act approved September 30, 1885, entitled an act to amend the charter of the town of Maysville, in Jackson and Banks counties, be and the same is hereby amended by striking all of section 1 of said act." Acts 1902, p. 277. Again, by an act approved August 18, 1905, it was enacted that "section 1 of the act entitled 'An act incorporating the town of Maysville, in the counties of Jackson and Banks,' approved September 30, 1879, be amended in the fifth line thereof by striking out the words 'one-half' and by inserting in lieu thereof the words 'three-fourths'; also, by striking out the word 'Northeastern' in the seventh line of said section, and by inserting in lieu thereof the words 'center of the old Northeastern depot site,' so that said section, when so amended, shall prescribe the present incorporate limits of said town of Maysville, Ga., as extending 'three-fourths' of one mile in every direction from the center of the old Northeastern depot site." Acts 1905, p. 993. It is contended that the amending act of 1902 is invalid because it purports "to amend an act approved September 30, 1885, entitled 'An act to amend the charter of the town of Maysville,'" in certain particulars, whereas there is in fact no act of that date amending the charter of this town, and the act of 1902 therefore fails sufficiently to identify the act to be amended. In *Adam v. Wright*, 84 Ga. 720, 11 S. E. 893, followed by *Fullington v. Williams*, 98 Ga. 807, 27 S. E. 183, it was held that the recital of the title of an act, coupled with the date of its approval satisfies the provision of the Constitution which forbids an act to be amended or repealed by mere reference to its title. In those cases the date of the approval of the act, as well as its title, were given, and the fact of the date appearing was stressed as furnishing matter other than the title of the act, and as descriptive of the act to be amended. The act of 1902

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

merely refers to the title to the act of 1885 for its description, adding thereto the date of its alleged approval. Were this date of approval correctly stated, it would, under the authorities just cited, be sufficient to satisfy the constitutional inhibition against amending an act by mere reference to its title. But here, this date being incorrectly given, it is rather matter of misdescription, and there is merely left a reference to the title of the act to be repealed, which by the terms of the Constitution is insufficient. Civ. Code 1895, § 5779. The title of the act of 1905 is "An act to amend an act to incorporate the town of Maysville, in the counties of Jackson and Banks, so as to extend the incorporate limits of said town one-fourth of one mile in every direction beyond the present corporate limits of said town of Maysville, Ga., and for other purposes." The first section purports to amend "an act incorporating the town of Maysville, in the counties of Jackson and Banks, approved September 30, 1879," by striking certain words in certain lines and inserting other words, and ends as follows: "So that said section, when so amended, shall prescribe the present incorporate limits of said town of Maysville, Ga., as extending three-fourths of one mile in every direction from the center of the old Northwestern depot site." The words referred to as to be stricken from certain lines are not in those lines of the act of 1879, but will be found in the act of 1885, which is amendatory of the act of 1879. The amendatory act of 1885 reduced the municipal territory from a circle having a radius of three-fourths of a mile to one with a radius of one-half of a mile; and, as the act of 1902 was invalid, this was the territorial limit of the town in 1905. The purpose of the act of 1905 was to amend the act of 1879 as amended by the act of 1885, so as to extend the municipal limits from a circle with a half mile radius to one with a radius of three-fourths of a mile. After referring to certain verbal changes to be made in the act of 1879, the body of the act summarizing the effect of such changes states that the section when so amended "shall prescribe the present incorporate limits of said town of Maysville, Ga., as extending three-fourths of one mile in every direction from" its designated center. The misdescription of the act of 1879 did not affect the real purpose of the amending act, as expressed in its title and body, and did not render it inoperative, since the means of identifying the thing intended to be accomplished and described are clear, certain, and convincing. The act of 1905 was therefore effective to change the limits of the town from those expressed in the act of 1885 to those of the original act of 1879. *Lee v. Tucker*, 130 Ga. 51, 60 S. E. 164.

2. The act approved August 7, 1906 (Acts 1906, p. 121), providing for a change of county lines lying within the limits of incorporated towns or cities of more than 500 popu-

lation, was attacked as unconstitutional as referring to more than one subject-matter in its title, as containing matter different from that contained in its title, and as being a special law operating upon a subject-matter provided for by an existing general law. This act is not unconstitutional for any of these reasons. *Manson v. College Park*, 131 Ga. 429, 62 S. E. 278.

3. The plaintiffs in the court below contend that the defendants should be enjoined from further proceeding under the act of 1906, for the reason that the act by its terms applies only to towns and cities having a population of more than 500, and by the last official census of the United States—which is the only official enumeration to which recourse could be had to determine its population—Maysville had a population of only 453, and there has been no other authorized official census since 1900. The act of 1906 does not provide how the number of inhabitants shall be determined. On the hearing the plaintiffs introduced the United States census of 1900 showing the population of Maysville to be 453. The defendants introduced an affidavit of the town marshal, to the effect that, under authority and direction of the mayor and council of the town of Maysville, in the year 1907 he took a census of the population of the town, and found 642 white and 109 colored persons within a radius of three-fourths of a mile from the center of the old Northeastern Railroad Depot site. This was the only evidence submitted as to the population at the time of the election. The plaintiffs in the court below contend that population under the act of 1906 is to be determined by an official census, while the defendants contend that it may be established by evidence as any other fact is established. An attempted enumeration, without power to require and compel answers, would be a mere farce. If a municipality may designate any individual it sees proper to enumerate its inhabitants, by simply taking a poll and reporting the result of his count, the accuracy of such an enumeration from the nature of things would be problematical. When the General Assembly authorizes municipal action based upon population, surely reference could not be made to such a primitive, faulty, and informal method. This is particularly true where it is declared that a law shall be applicable only to localities of a particular population. When the domicile of a citizen residing in a town or city lying in two counties is proposed to be changed and the political rights of such citizen effected by machinery applicable only to towns or cities containing a given population, it is to be presumed that the Legislature intended that such machinery should be put in motion only in cases where the population had been ascertained in some manner authorized by the state law or by the official census of the United States. In *re Assessment*, etc., City

of Passaic, 54 N. J. Law, 156, 23 Atl. 517. The Legislature of this state has frequently recognized the United States census as an official method of determining population. Civ. Code 1895, § 4102, provides for jurisdiction of justices' courts within the corporate limits of any of the cities of this state having "by the United States census a population of over five thousand inhabitants." The act providing for compensation of commissioners of roads and revenues in all counties having a population of 75,000 provides that the number shall be ascertained "according to the census of the United States." Acts 1904, p. 96. During the session of 1906 the Legislature amended the act providing for the salaries of judges of the superior courts in counties having a population of not less than 54,000 nor more than 75,000 (Acts 1904, p. 73) by providing that this shall be determined by the last United States census. Acts 1906, p. 56. This same Legislature also, in passing the act to regulate the compensation of judges of the superior court for services rendered outside of their own circuits in those judicial circuits of this state having therein a city with a population of not less than 75,000 inhabitants, provided that the number should be determined "according to the census of 1900." Acts 1906, p. 57. So, also, with reference to salaries of judges of city courts in cities of prescribed population (Acts 1906, p. 59), and stenographers in certain city courts (Acts 1906, p. 59), it is provided that the population shall be determined with reference to the United States census. In providing for the apportionment of the school fund on the basis of school population, the General Assembly has made provision for an official school census. Civ. Code 1895, §§ 1389-1391. The Legislature has also made provision for taking the census in cities having a population of more than 5,000 intermediate of the decennial census of the United States, and it is expressly provided that such census shall be recognized as the state census of the population of the city "until a new census shall thereafter be taken by authority of the United States government, or of the state government." Acts 1896, p. 72. Both the official state and United States' census appear to be recognized in the Legislature of this state as standards of enumeration. It is true that alongside of these enactments, and sometimes in the same volumes, may be found acts of the Legislature which depend for their operation upon a city or county having a specified population wherein the method of enumeration is not stated. Still it seems from the statutes above enumerated, and many others not here referred to, that it has been the legislative policy of this state to reckon population from an official census; and, as the only official census for towns in this state of less than 5,000 inhab-

itants is the United States census, that was the proper basis for ascertaining the population of the town of Maysville in determining the applicability of the act of 1906.

4. Having reached the conclusion that as no census under the authority of the state has been taken in the town of Maysville, and the last census of the United States gives that town a population less than 500, the act of 1906 is not applicable. Any attempt by the officials of the town to effect a change in the county lines within the municipal limits by virtue of the act is ultra vires, and may be enjoined by a citizen and taxpayer of the municipality. Town of Roswell v. Ezzard, 128 Ga. 43, 57 S. E. 114.

The foregoing disposes of the case irrespective of the merits of the other assignments of error.

Judgment affirmed. All the Justices concur.

(65 W. Va. 321)

LORD & McCRACKEN v. HENDERSON
et al.

(Supreme Court of Appeals of West Virginia.
March 16, 1909.)

1. ASSUMPSIT, ACTION OF (§ 5*)—RECOVERY IN ASSUMPSIT—PLEADING.

Where a contract, though in writing, has been fully executed, and nothing remains to be done by defendants under it except payment to plaintiffs of the price stipulated for the work and labor done by them under the contract, in an action of assumpsit to recover the same, a special count on the contract is unnecessary. Recovery may be had on the common counts in assumpsit, and bill of particulars filed therewith.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. § 17; Dec. Dig. § 5.*]

2. APPEAL AND ERROR (§ 692*)—EXCLUSION OF EVIDENCE—REVIEW.

This court will not reverse a judgment of the circuit court for sustaining objections to questions propounded to a witness on the trial, unless it affirmatively appears from the record what the answers of the witness thereto would have been, or it is shown what was proposed to be proven by the witness in response to the questions, and that the party complaining has been prejudiced by the rulings of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

3. TRIAL (§ 414*)—MOTION TO EXCLUDE EVIDENCE—WAIVER OF OBJECTION.

If, at the close of plaintiffs' evidence in a trial before a jury, defendants move to exclude all of plaintiffs' evidence relating to certain specific matters in controversy or items in the bill of particulars filed, and if after their motion has been overruled defendants proceed with the trial and offer evidence on the same matters in issue, they will be deemed to have waived their motion to exclude, and the rights of the parties must then be tested by reference to all the evidence in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 979; Dec. Dig. § 414.*]

(Syllabus by the Court.)

Error to Circuit Court, Randolph County. Action by Lord & McCracken against S. S. Henderson and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Talbott & Hoover, for plaintiffs in error. W. B. Maxwell, for defendants in error.

MILLER, P. In an action of assumpsit, on the common counts and a special count, with bill of particulars, the plaintiffs obtained a verdict and judgment against defendants for \$875. In the special count a contract in writing between plaintiffs and defendants, dated November 7, 1903, was alleged, whereby, in consideration of the prices stipulated to be paid them therefor, the plaintiffs contracted with defendants to pile, peel, properly cure, and load on cars, according to railroad regulations, all the merchantable bark from green hemlock timber standing on lands of the defendants and to be designated by them, and to cut into suitable log lengths all the merchantable saw timber on said land from which bark could be peeled, and to deliver said logs either at convenient places for loading at the railroad of the defendants, or in a dam accessible to defendants' sawmill, and also to cut, trim, and deliver at defendants' railroad, at a point suitable for loading same, all spruce pulp wood. The bark was to be paid for at the rate of \$3.50 for every cord of 2,000 pounds, the weight to be determined by the tannery weight. The logs were to be scaled by the defendants or a competent agent by the Doyle or Scribner rule before being sawed at defendants' mill, and were to be paid for at the rate of \$3.50 per 1,000 feet for spruce and hemlock, and \$4 per 1,000 feet for hardwood logs. The pulp wood was to be paid for at the rate of \$2 per cord of 128 cubic feet, and according to the measurements which the defendants should receive from the pulp company. In the bill of particulars filed defendants are charged by plaintiffs as follows: To cash, charged plaintiffs not received, \$1,000; to 350,000 feet spruce and hemlock timber cut and delivered, not accounted for, at \$3.50 per 1,000, \$1,225; to damage done roads, \$500; to damage done plaintiffs by taking timber nearest dam and railroad, \$200; to tan bark in woods and at railroad burnt by negligence of defendants, \$100.

Early in the trial below plaintiffs, in proof of the first item of their account, endeavored to show by the witness McCracken that in their statement rendered for the month of October, 1903, defendants had shown as the balance due them at that time \$6,103.60 and that in the statement for the month of November, 1903, they had brought down this balance as \$6,500.98, a difference of \$397.38. When plaintiffs' counsel asked the witness whether he could explain why defendants had made this difference against his firm, he answered: "I cannot." The motion by

defendants to exclude this question and answer was overruled. Immediately afterwards, however, when plaintiffs' counsel asked the witness to state when he, in fact, began work for the defendants under the contract, and why the written contract bore date of November 7, 1903, the objection by defendants' counsel thereto was sustained. And thereafter, for a time at least, the court limited plaintiffs in their evidence to transactions subsequent to that date. Later, when it began to appear that the evidence thus restricted might show an erroneous condition of the account between the parties, counsel for defendants, on cross-examination of plaintiff McCracken, endeavored to extend the investigation back of that date, and to show that although the contract bore date of November 7, 1903, it, in fact, was a mere reduction to writing of a prior verbal contract under which the plaintiffs had been operating since about April, 1903. But objections thereto by plaintiffs' counsel were sustained. The above ruling of the court on defendants' motion to exclude the question and the answer thereto of the witness McCracken, relating to the difference in the balance shown in the statement of October, and that brought down in the statement of November, 1903, and the subsequent rulings of the court on the several questions propounded said McCracken on cross-examination, are made the subject of defendants' bills of exceptions Nos. 2, 3, 4, and 5, relied on, which will be considered together. These rulings of the court we think were based on the erroneous theory that plaintiffs were necessarily limited in their proof to the matters alleged in the special count. The allegations of the special count and the evidence on the trial show a contract fully executed on the part of the plaintiffs, and that nothing remained to be done on the part of the defendants except to pay plaintiffs the balance, if anything, due them, and that the contract no longer remained executory. A special count therefore was unnecessary. The plaintiffs, if entitled to recover anything, were entitled to recover upon the common counts. *Railroad Co. v. Lafferty*, 2 W. Va. 104; *Railroad Co. v. Polly, Woods & Co.*, 14 Grat. (Va.) 445; *Tuttle v. Mayo*, 7 Johns. (N. Y.) 132—all cited with approval in *Bannister v. Coal & Coke Co.*, 63 W. Va. 502, 507, 61 S. E. 338. In the latter case we quote from *Tuttle v. Mayo*, supra, that "where the party declares on a special agreement, seeking to recover thereon, but fails altogether, he may recover on a general contract, if the case be such that, supposing there had been no special contract, he might still have recovered." We think, therefore, that the rulings of the court in so limiting the evidence of the parties were erroneous, and that the action of the court below overruling defendants' motion to strike out, set forth in defendants' bill of exceptions No. 2, was right. But whether de-

fendants were prejudiced by the ruling of the court shown in their bills of exceptions numbered 3, 4, and 5, and whether they are in a position to take advantage thereof, presents quite a different proposition. We do not think they were prejudiced for several reasons: First, they were the first to obtain the adverse ruling of the court, and, as a general rule, ought not afterwards to be heard to complain when the same ruling was applied to them; second, it does not affirmatively appear what the answers to the several questions propounded to the witness McCracken, objections to which were sustained, would have been. There was no proffer of counsel in either instance to show what was proposed to be proven by the witness. Wherefore we cannot say that the court committed error. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634. If the witness had answered, as he likely would have done, that the transactions began prior to November 7, 1903, the result would have been to benefit or prejudice the defendants, depending on whether a larger or a smaller balance or no balance in favor of the plaintiffs would be shown thereby. But as, in the subsequent progress of the trial, all the transactions between plaintiffs and defendants seem to have gotten fairly before the jury by the evidence of the witnesses and documentary evidence introduced, including a statement of all the accounts rendered by defendants to plaintiffs, and the tally sheets showing the scaling of the logs, we are unable to see that the rulings of the court were in any way prejudicial to the interests of the defendants.

The sixth bill of exceptions relied on relates to the testimony of plaintiff Lord that at one time when at defendants' mill he had observed the scaler employed in scaling logs make a mistake of some nine feet or more in scaling a particular log, and that not long before that this scaler had told witness that he had never known anything about scaling logs, and that witness had asked him if he was scaling the logs that were on the ways there. The court below overruled defendants' motion to exclude this evidence. Defendants claim the log in question was not shown to be one that plaintiffs had cut; but plaintiffs had already offered evidence tending to show mistakes due to incompetency of scalers, and the omission on the part of defendants to scale at all some of the logs delivered by them, and the purpose of plaintiffs by this evidence was to show that defendants had incompetent men in charge of the scaling of logs, and, by referring to the logs on the ways, witness was evidently pointing to logs delivered by plaintiffs. Taken in connection with the evidence that had been and was subsequently introduced by both parties, we see no prejudicial error in refusing to exclude this testimony.

The seventh bill of exceptions relates to the motion of the defendants, made at the

close of the plaintiffs' testimony, denied by the court below, to exclude certain evidence of the plaintiffs. The motion was first applied to the exclusion of the evidence relating to the number of feet claimed in the logs delivered by them, defendants claiming that the tally sheets were the best evidence thereof, and that plaintiffs had not offered these in evidence; second, to the evidence of the plaintiffs as to loss of bark burned, because of want of negligence of the defendants shown in allowing the fire to escape; and, third, to the evidence of plaintiffs relating to logs cut by defendants from the lands which defendants had marked out for them under their contract. This was not a motion in terms to strike out all of plaintiffs' evidence, but it applied to all the evidence relating to all the items in plaintiffs' account, except the item of cash, charged as not having been received; but we see no reason why the general rule of waiver announced in *Trump v. Coal & Coke Co.*, 46 W. Va. 238, 32 S. E. 1035, and other cases, should not apply; for defendants afterwards introduced all their evidence relating to the same subject, thereby supplementing the evidence of plaintiffs.

And this brings us to the consideration of the eighth or last bill of exceptions containing the certificate of evidence, and the motion of the defendants, overruled by the court below, to set aside the verdict and grant them a new trial, the only other error relied on. On this question it is practically conceded that the verdict and the judgment thereon to the extent of \$425.40 are sustained by the evidence. This concession is based upon the evidence of plaintiffs that the reports and statements made by defendants to them from time to time of the logs, bark, and pulp wood delivered showed them entitled to \$22,472.65, and that the bill of sets-off of defendants shows and defendants admitted they had paid plaintiffs on account only the sum of \$22,047.25, leaving a balance of \$425.40. But, as to the residue of the verdict and judgment, namely, \$449.60, it is insisted there is absolutely no evidence to support them. In determining this question, we must confine ourselves to the evidence relating to the several items in the plaintiffs' account filed. The only evidence offered to support the first item is that defendants' statement of October, 1903, showed debits \$6,103.60, while the statement for November following brought this balance forward as \$6,500.98, an error against plaintiffs of \$397.38, and that the debits shown in the November statement were \$5,678.55, while this balance was brought forward in the December statement as \$5,770.60, an error of \$92.03, and it was claimed that another error against plaintiffs of \$80 was shown in the defendants' statement for October. The plaintiffs kept no books of account. The defendants claim to have kept accurate books of account, and to have rendered monthly

statements and generally daily reports of the logs scaled and delivered, and of the bark and pulp wood delivered, which statements, with tally sheets, from the beginning of the transactions in April or May, 1903, to the conclusion by plaintiffs of their contract, were offered in evidence, and that there was little, if any, evidence showing or tending to show any objection by plaintiffs at any time to these reports and tally sheets. The bookkeepers of defendants showed that these errors relied on to support this cash item were subsequently corrected and reported to plaintiffs. Their testimony was not contradicted, and no effort is made in support of the argument here by plaintiffs' counsel to show anything to the contrary, nor are we referred to any other evidence in support of this cash item. We think, therefore, it must be rejected for want of proof. On the second item, 350,000 feet of spruce and hemlock timber not accounted for, we find no appreciable evidence to support it, except only in so far as it may be covered by the sum of \$425.40 covered by the verdict. The only other evidence relied upon to swell the quantity of logs delivered and not accounted for is certain indefinite testimony of plaintiffs and other witnesses that incompetent scalers had been at work at the mill, and that possibly, in the absence of the regular scaler, some of the logs delivered at the railroad may not have been scaled at all, and that there were probably certain logs in the millpond, separated from the main body of the logs delivered, that had not been scaled. But there was no evidence showing or tending to show as a matter of fact that any of the logs delivered by plaintiffs had not been scaled or incorrectly scaled. On the contrary, the testimony of the scalers and bookkeepers of the defendants is positive and unequivocal that all the logs delivered by plaintiffs had been properly scaled and reported, as shown by the monthly statements and daily tally sheets furnished plaintiffs, reference being made by them in their testimony to the statements and tally sheets where particular logs supposed by plaintiffs not to have been measured were reported and accounted for, and there was no evidence offered by plaintiffs to show the contrary, or to contradict these witnesses. It is true that the testimony of Reed, defendants' bookkeeper, and that of McCracken, conflict as to the quantity of logs reported and shown by these reports and tally sheets. McCracken claimed one amount, Reed another, the difference amounting to \$425.40, and without this conflicting evidence there is absolutely no appreciable evidence of any character to support this second item of the account.

The third item of the account, \$500 for damages to roads of plaintiffs, is unsupported by any appreciable evidence. The plaintiffs have failed to give in evidence a single fact showing actual damages and justifying the jury in including anything therefor in

their verdict. That some trees were cut by defendants for use in building their sawmill and making other necessary preparations for their lumbering operations is admitted, and there is some little evidence tending to show some little delay and inconvenience to plaintiffs resulting therefrom; but there was nothing in the contract providing against use of the timber by defendants or inconveniences to plaintiffs therefrom. Defendants were obliged to have timber to build their mill and make other necessary preparations. This fact we think must have been contemplated by the parties at the time of the contract. The jury therefore was not justified by the evidence in including anything in their verdict on account of this item.

The fourth item, damages to plaintiffs by taking timber nearest the dam and railroad, is an item of the same character. Plaintiffs assume that there was some covenant or agreement implied, that defendants were not to invade for the purposes shown the territory marked out on their land for plaintiffs' operations; but in this we think they are in error. The proof is that some 15 trees, near the location of the mill, were cut down and used in the construction thereof; but there is not the slightest evidence to show that any actual damages resulted to the plaintiffs therefrom. They did not cut and deliver this timber to the plaintiffs, and were not entitled to the price stipulated in the contract therefor, and even upon their theory there was no attempt to establish by competent evidence or any evidence whatever what profits they would have realized on this timber if they had cut it. Wherefore the jury were not justified in including in their verdict anything on account of this item.

The fifth or last item, tan bark burned in the woods and at the railroad by defendants' negligence, has little, if any, competent evidence to support it. Plaintiffs estimate the amount of this bark at about two car loads. The bark did not belong to them. By the terms of the contract, they were entitled upon delivery to the price stipulated for peeling, piling, and curing the same. That which was in the woods, though peeled and piled, had not yet been delivered, and by the terms of the contract the measurement at the tannery was to control the amount to be paid plaintiffs. The actual amount of damages, if any, sustained by plaintiffs, was left uncertain. But whether defendants are liable for such damages depends on whether the fire causing the loss of the bark was due to their negligence. The testimony of the plaintiff McCracken is that the fire originated, to the best of his knowledge, from a house occupied by one Smith, located some 400 yards from defendants' mill, and he says he does not know what Smith was doing when the fire got started; he does not know whether it was Smith or some other person who was cleaning away the brush. He did not know what the brush

was being cleared away for, but thought it might have been because the brush was piled up against the house. The plaintiff Lord says that bark was burned in the woods, and at the railroad, but he does not attempt to say by whose negligence it was burned. He does say that, when cleaning up the lumber yard, they would have fire during the day, that would burn all night, and that along in the night there was an unusually large fire down by the camp along the railroad where there was quite a large pile of bark that nearly burned up. He judges that there was a car load of bark at the railroad, and, as he and McCracken estimated two car loads in all, one car load must have been in the woods. The defendants' evidence shows that the fire originating at the Smith house was due to the cleaning up of the yard by Smith for a little garden. Whether the burning of the bark resulted from this cause was not known. But the uncontradicted evidence of defendants is that no claim was ever made by plaintiffs for any loss or damage for the burning of bark until the institution of this suit. We are of opinion, therefore, that the jury were not justified by the evidence in concluding that the burning of this bark was the result of any negligence of defendants. The evidence does not show that the fire on the millyard caused the bark to burn along the railroad, nor that the fire at the camp was the cause thereof. Without more definite evidence as to the responsible cause of the damages, the jury were not justified in including in their verdict against defendants anything for this item.

An effort is made by counsel in argument here to support the general verdict on the ground that by limiting the items in the mutual accounts between the parties to those covering their transactions subsequent to the date of the written contract a balance is shown in favor of the plaintiffs of some \$5,000; but we do not think the verdict should be sustained on any such basis.

Practically all the facts relating to all the transactions prior and subsequent to November 7, 1903, got before the jury, and inasmuch as the verdict was without evidence to support it beyond \$425.40, the defendants, we think, should have a new trial, and it will be so ordered.

(65 W. Va. 330)

REDD et al. v. CARNAHAN et al.

(Supreme Court of Appeals of West Virginia.
March 16, 1909.)

EVIDENCE (§ 513*)—EXPERT EVIDENCE—ADMISSIBILITY.

Expert evidence is admissible on the character and sufficiency of work done in drilling an oil well.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.*]

(Syllabus by the Court.)

Error to Circuit Court, Marion County.

Action by Charles Redd and others against John E. Carnahan and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Wm. S. Haymond, Leroy Taylor, B. L. Butcher, and Edmond Engler, for plaintiffs in error. Powell & Brant, W. S. Meredith, and U. N. Arnett, Jr., for defendants in error.

BRANNON, J. Charles Redd, Charles A. Kelly, Joseph D. Kelly, and John C. Dillon, partners doing business in the name of Charles Redd, made a verbal contract with John E. Carnahan, Uriah H. Debendarfer, and Oren C. Bradley, partners doing business in the name of the Carnahan-Debendarfer Company, by which the Redd Company agreed to drill for the Carnahan Company making a form of contract known as the "Carnegie Natural Gas Company form" govern as to terms the well to be drilled, the well to be 2,500 feet below the Pittsburgh vein of coal. The well is called the "Alpheus Sine well No. 1" on the Alpheus Sine farm. For work done on this well the Redd Company sued the Carnahan Company in assumpsit, and recovered a verdict for \$10,700, for which judgment was rendered. The defendants, in addition to the plea of non assumpsit, filed specification of offset and recoupment; but the court refused to allow evidence of the same. The defendants bring the case to this court.

The Redd Company claims that the bill of exceptions does not bring up the evidence; but we think it does. They also say there was no exception to the action of the court in refusing a new trial at the time of that action, and not until after the judgment. This objection is sought to be supported by the mere fact that the statement that such exception was made comes in the judgment order after the words of judgment, but that order testifies that such exception was made, but does not say just when. It may have been at the very time when the new trial was refused. What if it was not? If made, no matter at what point of time in the proceeding in the case, we think it would be sufficient. It would negative all idea that exception was waived. We must not defeat hearing on appeal by technicality.

Coming now to the merits so far as presented on this writ of error. The well was drilled to a depth of 2,150 feet when oil was struck. The defendants by telephone directed the plaintiffs not to drill any deeper until the defendants could come to the well, but to close in the well, and connect it with the tank, and procure proper connections and a casing head to shut the oil in and cause it to flow into the tank. When the owners of the well came, they requested the Redd Company to move the engine, boiler.

and machinery from the well to a location on another tract of land in the vicinity for which they held a lease from Myers, and begin boring a well within a few days, so as to save the lease from forfeiture. The Redd Company objected, saying they were unwilling to leave the Sine well in its then condition without casing, as it might cave in, and then the defendants agreed that they would assume all responsibility for any damage that might result from so leaving the well, and the plaintiffs then did remove the engine, boiler, and tools to the Myers location, and began that well. After five days the plaintiffs returned to the Sine well, and resumed work there, putting in casing. By the contract the plaintiffs were to put in the casing. Some of the casing separated and dropped into the well, and later some tools. The plaintiffs sought to get them out by fishing for them. After a time, the plaintiffs, learning that the defendants would not pay for this work of casing and fishing after the discovery of oil, and, claiming that the defendants had told them to drill no further, but to close in the well, had taken the well off their hands as completed, and that work thereafter was not done under the original contract, but was done as if under a new contract express or implied, refused to go further. Then the parties met, with the result that the parties executed a writing stating that, in consideration that the Carnahan Company agreed to employ the Redd Company to drill two wells for the Carnahan Company and other consideration, the Redd Company "agreed to go on and continue the work upon and complete well No. 1 located on the Alpheus Sine farm of King's run, Manongalia county, now being drilled, without any expense whatever to said parties of the first part, * * * and fully finish and complete the same according to the contract heretofore entered into." After making this contract, the Redd Company went on for some time with the fishing for tools lost in the well and endeavoring to clear out and case the well, but later quit and wholly abandoned the work. On the trial the court refused to admit this contract in evidence. We think it was admissible as tending to repel the claim that the owners of the well had, on finding oil, accepted the well as completed and absolved the drilling company from casing and going down to other sands to the stipulated depth, and, if there had been such acceptance, as tending to show the renewal of the obligation of the original contract, a recognition by the drilling company of its duty to go further with the work under that contract. It was a question of fact whether the owners of the well had accepted the well and discharged the drilling company from further work; but by excluding this contract the court seems to have assumed as a finality that such acceptance had been made; whereas, the jury should

have been left to say on all the evidence, including this contract, whether there had been such acceptance, whether there was a still continuing duty to go on with the well. This contract tends to show, if it does not conclusively show, that, even if there had been an acceptance, there was a duty to go on imposed by it on valuable consideration. The contract was admissible to show that, if the drilling company failed to go on to finish the well as demanded by the original contract, the owners could recoup for money expended by them in necessary work of fishing out tools and completing the well. We think the contract ought to have been admitted in evidence, and that evidence of money so expended by the owners of the well in such work should have been admitted under the specifications of recoupment. *Natural Gas Co. v. Healy*, 33 W. Va. 102, 10 S. E. 56.

The rejection of the second contract and of evidence under the specification of recoupment is sought to be justified by two clauses in the first contract. One is that, if the owners of the well should desire at any time before completion to abandon the same, they should give notice in writing to the drilling company of intention to do so, and then the drilling company should cease further drilling, and receive certain compensation. This relates to abandonment of the work by the well owners, a cancellation of the contract by them. There is no claim that they abandoned the enterprise. It is said that, because they did not give notice in writing, they could not claim any offset or recoupment; that they could not go on after abandonment of the work by the drilling company. The well owners never gave up the work, never abandoned it. And was not this a question of fact? The other clause is that if there should be unnecessary delay in the work, or breach of covenant, the owners should have the option to terminate the contract by written notice of election to do so, whereupon they should have the right to take possession of the well and drill the well to completion. For want of this notice it is said the owners had no right to complete the well and charge the outlay consequent. But what if the drilling company abandoned the work? Is it possible that if the owners did not choose to exercise this option, but, on the contrary, as the evidence shows, refused to exercise it, and demanded that the drilling company finish the well, the owners were required to let their well go to loss, lie uncompleted? This clause was intended for remedy for delay of work; but the owners did not complain of delay. They did not elect to exercise this option. They could exercise it or not if there should be delay; but they did not complain of this, but insisted upon the drilling company going on. These clauses have no reference to the case of a total abandonment of the work. It is not denied that the drilling company quit

the work. It is admitted by Redd on the stand. Abandonment waived right to written notice.

The defense offered evidence by experts to prove bad work by the plaintiffs, but the court rejected it. The witnesses offered were clearly proven to have had experience and knowledge fitting them to give evidence as experts. The art or mechanical skill of properly drilling oil wells hundreds and hundreds of feet through the different strata into the hidden bowels of the earth, the character of the strata, the proper treatment of them, the appropriate tools best suited for them, the proper casings, the cleaning the well, the fishing for and extrication of broken casings and lost tools, and other incidents in the work, are not within the knowledge of people generally. Indeed, there is no more intricate work; none requiring more special capacity, skill, and experience. Clearly expert evidence as to the character of the work is admissible upon the character of the work done. The evidence of mechanics is receivable in matters of technical skill pertaining to their trade. Rogers on Expert Testimony, §§ 110, 111; 12 Amer. & Eng. Ency. L. 428, 429; McKelvy v. C. & O. R. Co., 35 W. Va. 500, 14 S. E. 261; Sebrell v. Barrows, 36 W. Va. 212, 14 S. E. 996. Delmar Oil Co. v. Bartlett, 62 W. Va. 700, 50 S. E. 634, clearly sustains this position. We do not decide finally any questions of fact. We deal with the evidence only so far as to give our opinion as to admissibility. We hold that the writing dated January 24, 1905, and evidence to prove recoupment or set-off, and the expert evidence as to the character of the work, should have been admitted.

Judgment reversed, verdict set aside, and remanded for new trial.

(65 W. Va. 335)

STATE v. ALLEN et al.

(Supreme Court of Appeals of West Virginia.
March 16, 1909.)

1. TAXATION (§ 47*)—DOUBLE TAXATION.

The state is not entitled to double taxes on the same land under the same title.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 47.*]

2. TAXATION (§ 47*) — DOUBLE TAXATION — SUFFICIENCY OF PAYMENT.

In case of two assessments of the same land under the same claim of title for any year, one payment of taxes under either assessment is all the state can require.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 47.*]

3. TAXATION (§ 47*)—PAYMENT OF TAXES—DOUBLE TAXATION.

Payment of taxes upon an assessment of a tract of land as a whole nullifies a tax sale of a parcel which has been conveyed therefrom and separately assessed for the same year.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 47.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by the State against Samuel V. Allen and others. Decree for R. E. Vickers, and defendant Pauline H. Buffington appeals. Reversed and remanded.

Simms & Enslow, for appellant. Geo. J. McComas, for appellee.

ROBINSON, J. A tract of land, embracing 9½ acres, in the city of Huntington, was owned by Garland Buffington in 1891. From it, in that year, the owner conveyed to Elizabeth Higgins a small parcel, describing it by metes and bounds, and, further, as "being part of what would be lot 1 of block 290." Contiguous to the 9½-acre tract lay land belonging to the Central Land Company, which had been platted as an addition to said city. Lot 1 of block 290 of that addition, adjoining the Buffington tract, was incomplete, according to the plan of the addition, unless that plan should be extended into the tract of 9½ acres. The applicability of the latter description of the parcel sold to Elizabeth Higgins out of the Buffington tract was, therefore, contingent upon the extension of the plan of the aforesaid survey and the completion of lot 1 of block 290. But the extension was not in fact made. Lot 1 of block 290 was, as we have stated, a lot on the official and recorded plan of the Central Land Company's addition to said city. As such lot, adjoining the 9½-acre tract and immediately contiguous to the parcel conveyed to Higgins, it had an official designation, as will be seen by reference to the recorded plat. Yet no such official designation ever made the Higgins parcel to become a part of lot 1 of block 290. That name was given it only by the aforesaid deed to Higgins. On the land book no deduction for the portion of the 9½ acres conveyed to Higgins as aforesaid was made from the assessment of the Buffington tract. The 9½-acre tract continued to be assessed as a whole. The parcel conveyed to Higgins was entered for taxation on the land book in her name as "part of lot 1 of block 290." Garland Buffington conveyed the residue of the 9½ acres, in 1892, to other parties. Still the assessment of the original tract of 9½ acres as a whole continued on the land book in his name. In 1893 the Higgins parcel was reconveyed to Garland Buffington, and, described as "part of lot 1 of block 290," was charged with taxes in his name. He again conveyed it, but assessment of the Higgins parcel continued on the land book in his name, notwithstanding subsequent conveyances thereof. So assessment of the whole tract of 9½ acres continued on the land book in his name, as former owner thereof; and assessment of the Higgins portion of the 9½ acres continued on the land book in his name, as former owner of it, also. The taxes on said assess-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment of the whole tract of 9½ acres were at all times paid by the owners of the residue of the 9½ acres; and during the year 1896 at least one of the two parties owning the said residue also had ownership of the Higgins parcel, subject to the deed of trust hereinafter mentioned. However, for the year 1896 the taxes on the assessment of the Higgins parcel became delinquent, and upon such delinquency the said lot was sold to the state, as "part of lot 1 of block 290," and was not redeemed. It was thereafter, by such description only, brought into this suit for the sale of forfeited lands for the benefit of the school fund. A decree directed the sale of "part of lot 1 of block 290." R. E. Vickers became the purchaser. A deed was made to him by the commissioner of school lands. That deed conveyed "lot 1 of block 290."

During the time that Elizabeth Higgins owned the parcel conveyed to her as aforesaid, she executed a deed of trust thereon, and, notwithstanding the subsequent conveyances of that parcel, the same was sold under the deed of trust. Title thereto by such sale became vested in Pauline H. Buffington, who entered into possession of the same. She was in possession of the same, and her deed therefor was of record, at the time of the institution of this suit for the sale of that parcel as forfeited land. Yet she was not made a party to the suit or proceeding. Vickers, the aforesaid purchaser, failing to oust her from possession by an action of ejectment, because his deed called for "lot 1 of block 290," which we have seen was entirely different property, filed his petition herein, praying that he be given a deed for the land purchased by him as aforesaid, containing a description, by the metes and bounds which he set out as the correct ones of the lot of which he alleged he became such purchaser. This description was a particular one of the Higgins parcel, and one that had not appeared in the suit or proceedings upon which he claimed title. To this petition Pauline H. Buffington was made a party. She thereupon answered, denying his right to relief in the premises. She asserted that her property had not been sold as aforesaid, and purchased by Vickers; that it was a part of the 9½ acres, and that it had been duly charged with taxes as such, and that the taxes had been actually paid thereon for the year of the alleged delinquency upon which the Vickers purchase rested; that the said property of which she was in possession, and to which Vickers claimed title and prayed for a deed, never was a part of lot 1 of block 290; that such numbered lot was one belonging to the Central Land Company's addition, adjoining her property, but that her parcel was never part thereof; that her property, as designated in her deed for the same, was not described or set out in this suit for the sale of forfeited land prior

to the filing of the petition of Vickers, and that all taxes thereon had been paid under its assessment as a part of the 9½ acres. She denied that by the alleged delinquency the state ever acquired any title to the Higgins parcel owned by her, and that, therefore, Vickers acquired no title thereto. She prayed for relief consistent with her situation in the premises—that the deed to Vickers be held to interfere in no wise with or affect her said property, and that her possession of the same be quieted. The relief prayed for by Vickers was granted. That prayed for by Pauline H. Buffington was denied. The latter has, therefore, appealed.

It clearly appears that the Higgins lot was never a part of what was actually lot 1 of block 290. By no survey or merger of title had the two become one. The latter was a certain and definite lot on the said recorded plat. It belonged to Josie G. Smith, who had possession of the same. There was no extension of this plat so as to include the Buffington tract of 9½ acres. If there had been, it was supposed that the Higgins parcel would complete said lot 1 of block 290, or become a part of it. The deed to Higgins did not call the parcel conveyed thereby merely a part of lot 1 of block 290, but called it, after using definite bounds, "part of what would be lot 1 of block 290." So it is, indeed, doubtful whether it can be said that an entry on the land book as "part of lot 1 of block 290" related to the Higgins parcel. Did it not in fact relate to that which was really such numbered lot, having an official and recorded existence? One may surmise that it was intended to relate to the Higgins parcel, since Garland Buffington's name was connected with such assessment. Is such uncertain, if not to say mistaken, description sufficient? We need not say. For certain it is that it appears that there was an assessment of the Higgins parcel, and an actual payment of taxes thereon, by its inclusion in the assessment of the original tract of 9½ acres. In the agreed statement of facts in the case, it is conceded that there was such assessment of the whole, and payment of taxes thereon, for the year of the delinquency under which Vickers claims; and it is shown that this payment of taxes was by the owners of the larger tract, one of whom owned the Higgins parcel. Then did the delinquent return of "part of lot 1 of block 290," and the sale to the state thereunder, vest any title which could be acquired by Vickers? Granting that the separate assessment of a "part of lot 1 of block 290" was clearly an assessment of the Higgins parcel, we answer the question in the negative. The state received its taxes on the Higgins parcel by a payment on the whole tract by a party interested in both, for the very year as to which it proceeded to sell that parcel. The receipt of these taxes by the state saved the Higgins parcel from delinquency.

There was no hostility between the title to

the whole and that of the parcel. The title to the latter was the same as that to the former, having been derived from the same source; and "where there is privity of title one payment is sufficient and full satisfaction, whether the land is charged in the name of one as a whole, or the various interests separated and charged to the respective owners, dividing the valuation equitably between or among them." *State v. Low*, 46 W. Va. 451, 33 S. E. 271. "The state is not entitled to double taxes on the same land under the same title. A man cannot be held to lose his estate under the rigid principles applicable to tax titles from such an unjust cause." *Bogges v. Scott*, 48 W. Va. 321, 37 S. E. 661. There was a double assessment of the property. In such case one payment of taxes, under either assessment, is all that the state could require. *Gerke Brewing Co. v. St. Clair*, 46 W. Va. 93, 33 S. E. 122.

Actual delinquency is a condition precedent to the right to sell land under a tax assessment. There is no such delinquency when the taxes have in fact been paid, by the owner himself or by any other person entitled to make such payment. It is plain that an owner of the residue of the 9% acres was entitled to pay the taxes charged against the whole tract, since he clearly had an interest in the whole to the extent of all of it but the Higgins parcel, included in the assessment thereof. And then one of the owners of that residue, for the year of the payment, owned the Higgins parcel. Such person was entitled to make payment of the taxes assessed upon the whole acreage, with the effect to render the subsequent sale of the Higgins parcel invalid. *Black on Tax Titles*, §§ 156, 161.

By proceeding to sell land for nonpayment of taxes, the state is simply proceeding to enforce its lien on the land for those taxes. If the taxes have in fact been received by the state, even upon some other assessment of the same land, which it has made or at least recognized by receipt of the taxes thereunder, the lien has been relinquished. And where there is no lien there can be no valid sale. By its receipt of the taxes under the assessment of the whole tract, which included the Higgins parcel, the state was estopped to deny the validity of that assessment in its relation to the Higgins parcel, and was estopped from proceeding further toward collection of taxes on that parcel, even under color of the separate assessment for the same year. Its lien was released. It had none that it could enforce. Its subsequent sale of the Higgins parcel to itself, for nonpayment of taxes thereon, was a falsehood and a nullity. Equity, in whose forum the parties now are, countenances neither untruth nor enforces invalidity.

The tax sale upon which Vickers claims title was invalid, because there was no de-

linquency, and he took nothing by his alleged purchase. This fact being established, the prayer of his petition should have been denied, and relief granted to Pauline H. Bufington, the owner of the parcel. The decree is, therefore, reversed, and the cause remanded to be proceeded in according to the principles herein announced.

(82 S. C. 333)

FULLERTON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 9, 1909.)

CARRIERS (§ 20*)—REGULATIONS—PENALTIES— DELAY IN TRANSPORTATION.

Under Act March 25, 1904 (24 St. at Large, pp. 671, 672), imposing a penalty on railroads for delay in transporting freight, to be recovered "by any consignee who may be injured in any way by such delay or by the owner or holder of the bill of lading," a consignee, not shown to be either the owner or the holder of the bill of lading, cannot recover the penalty without proving that he was injured by the delay.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Bamberg County.

Action by Mike Fullerton against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

R. C. Hardwick and B. W. Miley, for appellant. S. G. Mayfield and J. T. Barron, for respondent.

JONES, J. This action was commenced by Mike Fullerton, Prince Kennedy, Henry Clifton, and Josephine Odom against defendant company on two causes of action: First, for statutory penalty of \$5 per day for every day of delay in excess of the time prescribed under the statute of March 25, 1904 (24 St. at Large, pp. 671, 672), amounting to \$150 for 30 days' delay; second, for damages for unreasonable delay in transporting said merchandise, consisting of 18½ tons of fertilizers. Plaintiff accepted a nonsuit as to the second cause of action and secured an order of amendment leaving Mike Fullerton sole plaintiff. At the close of the testimony, Judge Prince directed a verdict for defendant upon the first cause of action, and plaintiff appeals.

It appears from the undisputed facts that J. B. Gillam, a merchant, agreed to sell Fullerton, Kennedy, Clifton, and Odom 18½ tons of fertilizers, to be delivered at Lancaster Siding, on the Seaboard Air Line near Denmark, S. C. This siding was a private sawmill siding near the farms of Fullerton and the others, but was not listed on the schedule of the Seaboard Air Line. Gillam ordered the fertilizers of the Etiwan Phosphate Company, Charleston, S. C., with instructions

to ship to Mike Fullerton, Lancaster Siding, S. A. L., near Denmark. Bill of lading with the words, "Prompt shipment required," was issued March 15, 1907, by the Atlantic Coast Line to Mike Fullerton, Lancaster, S. C., S. A. L., near Denmark," and sent to Gillam, who turned it over to Fullerton. The Etiwan Phosphate Company charged the fertilizers to Gillam on their books. The shipment was not a joint shipment, as each one of the four persons named had a definite portion of the fertilizers, Fullerton's portion being about four tons, and the shipment was ordered to Lancaster Siding in the name of Fullerton for the convenience of the parties, and Fullerton was furnished by Gillam with a list so as to distribute the fertilizers among them. The fertilizers not having arrived by April 12, 1907, and having been purchased for farm use, and the planting season being on, plaintiff and the other parties arranged with Gillam to order other fertilizers, which was done, and the parties received the goods about the 15th or 16th of April. About this time it was discovered by the railroad agents that the car of fertilizers in question had been shipped to Lancaster, S. C., and soon thereafter the car was sent to Denmark for delivery to the Seaboard Air Line for transportation to Lancaster Siding, where Gillam, with plaintiff's approval, notified the railroad company that other fertilizers had been ordered and furnished to the parties, and that the shipment would not be received. The railroad company then returned the goods to the Etiwan Phosphate Company and made a settlement in reference thereto with that company. Gillam and the Etiwan Phosphate Company made a settlement, whereby Gillam was released from liability from the first shipment and was charged with the second or substituted shipment. The bill of lading for the first shipment was delivered back to Gillam by the plaintiff. With reference to the damages he had sustained, plaintiff testified that the delay in shipment delayed him two or three weeks in his farm work, but there was no evidence that such delay was injurious to plaintiff.

Upon the facts it was proper to direct a verdict for defendant. Under the statute the penalty can only be recovered "by any consignee who may be injured in any way by such delay or by the owner or holder of the bill of lading." The plaintiff was not shown to be either the owner or the holder of the bill of lading or injured consignee at the time of the commencement of the action. It was incumbent upon the consignee to prove that he was injured by the delay. *Muckenfuss Mfg. Co. v. Charleston & W. C. Ry. Co.* (S. C.) 63 S. E. 747. While not absolutely conclusive, the cases of *Best v. Railway*, 72 S. C. 479, 52 S. E. 223, *Macon v. Railway*, 81 S. C. 167, 62 S. E. 6, and *Matheson v. Railway*, 79 S. C. 158, 60 S. E. 437,

tend to show that plaintiff had no cause of action against the defendant for the penalty.

The judgment of the circuit court is affirmed.

(32 S. C. 402)

ROGERS v. MORRELL et al.

(Supreme Court of South Carolina. April 9, 1909.)

1. WILLS (§ 531*) — CONSTRUCTION — "BETWEEN"—"AMONG."

Where testator bequeathed to H. (his son) and to "W., L., and G." (children of a predeceased daughter) all his notes, mortgages, and moneys, "to be equally divided between them," and also his other personal property "to be sold to the highest bidder, and the money equally divided between the legatees above named," the word "between" was intended to mean "among," and the parties took per capita, and not per stirpes (citing *Words and Phrases*, vol. 1, p. 768).

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 531.*]

2. WORDS AND PHRASES—"BETWEEN."

While, in a strictly technical sense, the word "between" implies a division between two persons or classes, yet frequently by the uneducated and colloquially it is used in the sense of "among," especially where it follows the word "divide."

3. WILLS (§ 531*) — CONSTRUCTION — PER STIRPES OR PER CAPITA.

If a devise be made to an individual designated by name and to other individuals designated as a class, all the individuals take equally, and per capita, and not per stirpes.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 531.*]

4. WILLS (§ 488*)—CONSTRUCTION—EVIDENCE.

Where a will is not ambiguous in terms, testimony as to the surrounding circumstances will not be resorted to to ascertain its meaning.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1025; Dec. Dig. § 488.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. C. Klugh, Judge.

Petition by W. L. Rogers, as executor, against H. W. Morrell and others. From the judgment, defendant Morrell appeals. Affirmed.

Simpson & Bomar, for appellant. Stanleyne Wilson, for the Gilberts.

JONES, J. The appeal in this case involves the construction of a clause of the will of W. F. Morrell, deceased, which is as follows: " * * * I further bequeath unto Hy W. Morrell and W. F., L. M. and Hazel S. Gilbert all my notes, mortgages and monies to be equally divided between them, also my cot or personal property, horse, cows or utensils of any kind to be sold to the highest bidder and the money equally divided between the legatees above named." It appears that Henry W. Morrell is a son of the testator, and that W. F. Gilbert, L. M. Gilbert, and Hazel S. Gilbert are children of a predeceased daughter.

The question at issue between the parties was whether the division of the property un-

der the terms of the will should be per stirpes or per capita. The probate court held that the division should be per stirpes because this construction would give full effect to the word "between," because the name of Henry W. Morrell is followed by the word "and," and because the Gilbert children are grouped together thus: "W. F., L. M. and Hazel S. Gilbert." The circuit court reversed the probate court, holding that the word "between" was clearly intended to mean "among," and that the division should be per capita.

We agree with the circuit court. While it is true that in a strictly technical sense the word "between" implies a division between two persons or classes, yet frequently by the uneducated and colloquially it is used in the sense of "among." Especially is this true when it follows the word "divide" as in this instance. 1 Words & Phrases, 768. The notes, mortgages, and moneys were "to be equally divided between them," and the other personality sold and "equally divided between the legatees above named." "Them" and "legatees above named" clearly refer to all the individuals designated as the persons among whom the equal division was to be made. The word "and" after the name "Henry W. Morrell" cannot have the effect of defeating this plain meaning of the will. This case does not fall within the principle stated in *Cole v. Creyon*, 1 Hill, Eq. 311, 26 Am. Dec. 208, as in that case the bequest was to an ascertained individual and to a class of unascertained individuals, whereas in this case the individuals are ascertained and named. The rule is well settled in this state that, if a devise be made to an individual designated by name and to other individuals designated as a class, all the individuals take equally and per capita, and not per stirpes. *Conner v. Johnson*, 2 Hill, Eq. 44; *Dupont v. Hutchinson*, 10 Rich. Eq. 1; *Feemster v. Good*, 12 S. C. 576. The will not being ambiguous in terms, it is unnecessary to resort to testimony as to the surrounding circumstances in order to ascertain its meaning. *Reynolds v. Reynolds*, 65 S. C. 390, 43 S. E. 878.

The judgment of the circuit court is affirmed.

(82 S. C. 368)

STATE v. LOPEZ.

(Supreme Court of South Carolina. April 9, 1909.)

CRIMINAL LAW (§ 1036*)—APPEAL—REVIEW—PRESENTATION OF ERROR AT TRIAL.

The sufficiency of the evidence to support a conviction cannot, in general, be reviewed on appeal unless first appropriately presented to the trial court for its action and an appeal taken from the court's ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2641; Dec. Dig. § 1036.*]

Appeal from General Sessions Circuit Court of Richland County.

J. F. Lopez was convicted of obtaining property under false pretenses, and he appeals. Affirmed.

John J. Earle, for appellant. Christie Benet, Sol., for the State.

JONES, J. The defendant was convicted at the February term, 1908, general sessions for Richland county, under an indictment for obtaining property under false pretenses and was sentenced to pay a fine of \$300 and to serve six months on the county chain gang.

The exceptions all allege that there was no evidence to support the conviction. There was no request to charge, no motion to direct a verdict, and no motion for a new trial on this ground. The circuit court was in no way called upon to make a ruling and made no ruling upon the subject. There was nothing to prevent counsel raising the question in the circuit court. Hence there is nothing to review. Usually such a question should be presented first to the trial court in some appropriate way, and appeal should be taken from the ruling thereon. In *Gunter v. Fallo*, 78 S. C. 458, 59 S. E. 70, it was impracticable to raise the question on circuit before judgment, as the testimony had been taken by consent and reported to the court, and judgment was rendered after the adjournment of court. Under these exceptional circumstances the court considered whether there was any testimony to support the judgment. We may say, however, *ex gratia*, that, considering the record, we cannot say that there was absolutely no testimony to support the verdict.

The judgment of the circuit court is affirmed.

(82 S. C. 236)

DESCHAMPS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. CONTINUANCE (§ 26*)—ABSENCE OF WITNESS—DILIGENCE.

The refusal of a continuance to procure testimony of a witness living in another state is not an abuse of discretion, where the case has been pending for six months and no effort has been made to take his deposition.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 87, 88; Dec. Dig. § 26.*]

2. CARRIERS (§ 114*)—CARRIAGE OF GOODS—LOSS OF GOODS—TERMINATION OF LIABILITY.

Where goods transported by a common carrier arrive at their destination, the liability continues to be that of a common carrier until the consignee has a reasonable time to remove them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. § 114.*]

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge.

Action by L. W. Deschamps against the Atlantic Coast Line Railroad Company.

From a judgment for plaintiff, defendant appeals. Affirmed.

P. A. Willcox and Mark Reynolds, for appellant. L. D. Jennings, for respondent.

WOODS, J. A few days before February 24, 1907, the plaintiff checked from Charleston, S. C., to Sumter, S. C., on defendant's railroad a case containing one Gold Medal Computing Scale, used by him as a sample in his business as a traveling salesman. It does not appear when the scale reached Sumter, but it was in the defendant's baggage-room at Sumter, on February 24, 1907, when a fire occurred destroying defendant's depot, including the baggage-room. Plaintiff, in his complaint against the defendant, alleged the scale and case to have been destroyed, and sought to recover their full value, \$122.50. The evidence tended to show injury only, and the jury found a verdict for \$50. The defendant appeals.

The first four exceptions charge abuse of discretion in the refusal of the circuit judge to grant a motion for continuance, made on the ground that William J. Walker, an officer of the Toledo Computing Scales Company, would testify, if present, that the scale belonged to that company, and not to the plaintiff, and that, after due diligence, the defendant had not had time to secure the presence of Walker as a witness, or to have his testimony taken. The action was commenced on June 1, 1907, and was not called for trial until November, 1907. The ownership of the scale was one of the issues made by the pleadings. It was certainly not an abuse of discretion for the circuit court to hold that six months was sufficient time to ascertain what would be the testimony of the officers of the scales company, and have it taken in Toledo, Ohio, their place of residence.

The instructions complained of in the fifth and sixth exceptions were nothing more than a statement of the rule, well established in this state, that when goods transported by a common carrier arrive at their destination, the liability continues to be that of a common carrier until the consignee has a reasonable time to remove them. *Brunson v. R. R. Co.*, 76 S. C. 9, 56 S. E. 538, 9 L. R. A. (N. S.) 577.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 284)

SHUTE v. SHUTE et al.

(Supreme Court of South Carolina. April 9, 1909.)

1. EVIDENCE (§ 431*) — PAROL EVIDENCE — VARYING WRITTEN INSTRUMENTS.

Parol evidence to prove or disprove delivery of a deed is admissible as against the objection that it varies the written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1978; Dec. Dig. § 431.*]

2. DEEDS (§ 56*)—DELIVERY.

The act and fact of delivery of a deed is independent of the language thereof and consists of an act and purpose.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 117; Dec. Dig. § 56.*]

3. DEEDS (§ 208*)—DELIVERY—EVIDENCE.

Evidence held to show that a deed of land was never delivered by the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 625; Dec. Dig. § 208.*]

4. LIMITATION OF ACTIONS (§ 60*)—SUIT TO CANCEL—ACCRUAL OF CAUSE.

An action to set aside a deed of land for want of delivery is not barred by limitations where there was no adverse holding by the grantee.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 336; Dec. Dig. § 60.*]

5. CANCELLATION OF INSTRUMENTS (§ 34*)—SUIT TO SET ASIDE DEED—LACHES.

The doctrine of laches being applied to prevent the commission of wrong, a grantor who delays for 15 years before instituting a suit to cancel a deed of land, on the ground that he never delivered it, is not barred by laches.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 49; Dec. Dig. § 34.*]

Appeal from Common Pleas Circuit Court of Lancaster County; Geo. W. Gage, Judge.

Action by Howell H. Shute against William H. Shute and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This was an action to cancel a deed of land on the ground that it had never been delivered. The primary issue was whether plaintiff, who signed a deed purporting to convey land to defendants, his sons, intended to deliver the deed so as to have the same take effect. The following is the opinion of the court below:

"The primary issue involved here is this: Did the plaintiff intend the deed in controversy to be delivered upon its signing, so as to convey the fee out of him and into the defendants?

"At the outset the defendants object to, as incompetent, any parol testimony to prove the negative of that issue. The rule of evidence which rejects parol testimony which tends to vary a written instrument is as old as the law. The matter of difficulty lies always in the application of the rule. The testimony here does not tend to vary the words of the instrument. The act and fact of delivery is independent of the language of the instrument. Delivery consists of an act of the hand joined with a purpose of the mind. It comes after the scrivener has done his work, and after the signing of the paper. Whether or not a deed was delivered is an issue frequently made in the courts, and has been since deeds were written. If parol evidence, to establish or to refute delivery, is incompetent, then the issue of delivery would never arise, for delivery rests, not in words written, but in things done and said. I think the testimony is competent. If the testimony

of the witnesses be then received, it then clearly proves that the plaintiff never intended the deed to take effect and be delivered, so as to transfer the fee from himself to his sons, the defendants. The old man so swears, and so does one of the defendants, and so did the defendant Joseph at another trial, and so does one of the law's witnesses, John P. Hunter. The only testimony to the contrary is that of the defendant Joseph and the circumstances of the case, and the defendant Joseph does not recite the circumstances of the making of the deed. He does not deny that they were as detailed by Hunter and by the old man. His testimony is directed chiefly to proving acts of dominion and ownership exercised by him and by his brothers, the other two defendants. In the suit by Howell H. Shute v. Manchester Insurance Company, tried in 1898, Joseph has even testified that his father, Howell, always kept the deed; never delivered it to him; he never had it in his hands, and that he lived on the land by permission of his father. That testimony, competent and relevant in this action, is inconsistent with the claim Joseph makes. It is consistent with the contention of the plaintiff, Howell H. Shute, and that of his other son, William. The son and defendant John has not testified. He sold his interest to Joseph in November, 1906. I am therefore of the opinion that when the deed was signed it was not delivered to the sons, and that it was not the intention of the old man to put the fee and dominion out of himself and into his sons.

"I have not overlooked the circumstances relied upon by Joseph, which tend to show the contrary. They are the recording of the deed, the improvements by Joseph, the return of the property in the names of the sons, the payment of taxes by the sons, the execution of a mortgage by the sons. Most of these acts are technical, and their import and the consequences of them are not apprehended by plain men. The fundamental issue is: Did the old man mean to deprive himself of his property and give it to his boys? I think the circumstances do not overcome the force of his own oath and that of the witness to the deed that he did not. Nor can I sustain the defenses set up by Joseph. They are the statute of limitations, a claim for improvements, estoppel by conduct, and laches of the plaintiff. There is no room to apply the statute of limitations. There was no adverse holding by Joseph. There is a wide difference between the witnesses about the value of the improvements. No disinterested witness testified. Joseph put the improvements at \$1,200. The plaintiff put them at \$102. It is safe to assume the truth lies between these two estimates. If they be fixed at \$600, no harm can come to Joseph. He occupied the premises for 15 years, cultivated a two-

horse farm thereon, and paid no rent. He has lost nothing. The testimony does not warrant the application of the doctrine of estoppel to the plaintiff. Joseph was not misled by the plaintiff, for Joseph knew that the old man had not intended to convey away the land, and if the old man has waited too long to seek his remedy in a court, he, and not the defendant Joseph, has suffered thereby. The doctrine of laches is applied to prevent the commission of wrong. I am therefore of the opinion that the plaintiff is entitled to the relief he asks.

"It is therefore ordered and directed that the deed in issue be mutilated, and that the clerk of this court write upon the book where it was recorded the declaration that the deed was mutilated, and that its record shall be of no force whatever."

J. Harry Foster, for appellants. R. B. Allison, for respondent.

WOODS, J. After careful consideration of the record, this court is of the opinion that the reasoning of the circuit court well supports the conclusions stated in the decree.

The judgment of this court is that the judgment of the circuit court be affirmed.

(32 S. C. 224)

PLATTEAU v. VIRGINIA CAROLINA CHEMICAL CO.

(Supreme Court of South Carolina. April 9, 1909.)

MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLECT.

Evidence, in an action by a servant for injuries, held to show that defendant failed to provide a safe place for plaintiff to work in, and to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958; Dec. Dig. § 278.*]

Appeal from Common Pleas Circuit Court of Charleston County.

Action by William Platteau against the Virginia Carolina Chemical Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mordecai & Gadsden and Rutledge & Haggood, for appellant. Logan & Grace, for respondent.

WOODS, J. On 27th February, 1907, the plaintiff, as a servant of the defendant, was employed, along with other laborers, in carrying on trucks, from the warehouse of the defendant to a car which the defendant was loading, a lot of cotton seed meal in bags. While engaged in this work, a part of the pile of sacked meal fell on plaintiff, inflicting physical injuries for which he recovered a judgment in this action. The issue on the trial was whether the injury resulted from negligence of the defendant in failing to pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vide a reasonably safe place for plaintiff to work, or from the negligence of plaintiff's fellow servants. The defendant, contending that no other inference could be drawn from the evidence than that the injury resulted from the negligence of plaintiff's fellow servants, moved for a nonsuit at the end of the evidence on behalf of the plaintiff, and, after the verdict, moved on the same ground for a new trial. The appeal depends on the alleged error of the circuit judge in refusing these motions.

We think the record shows beyond doubt that there was evidence of the failure of defendant to provide a safe place to work, resulting in the injury to the plaintiff. The plaintiff and several other witnesses on his behalf testified that, in order to make a pile of sacks of cotton seed meal safe, it is necessary to "tie" the sacks—that is, lay them crosswise on each other—and that the pile in this instance was not properly tied. It is true that the same witnesses testified that they supposed the meal had been piled by some of their fellow laborers; but, on the other hand, W. H. Barnwell, superintendent of defendant's business, testified as follows: "A. This tying of bags is usually done at the end of the pile to form a buttress to pile against, but, if the bags are tied all through the pile, it certainly has never been done at the Standard, and I don't think at any of the other works. They are tied at the end and simply piled against that. Q. You heard this witness describe how they were tied all through, is that ever done? A. No, sir; not as far as I know. Q. How many piles of these bags do you suppose you have seen? A. They are never tied through the pile. Q. Did you see this pile before it fell? A. Of course, I have seen it." And A. S. Prince, defendant's foreman, testified this meal was piled in the way indicated by Mr. Barnwell. This evidence on behalf of defendant tends to prove that this method of piling and tying—the plan of making the pile safe—described by Mr. Barnwell, was that adopted by the defendant itself, and that the laborers who did the work of piling merely carried out the defendant's plan. If this method was used here, as Prince testified it was, and was negligent, evidently the negligence would be that of the master who planned, not of the fellow servants of the plaintiff, who mechanically carried out the plan of piling; and there would be a basis for the inference that the plaintiff was injured because of the negligence of the defendant in failing to provide a safe place to work. There was evidence on behalf of the defendant that this method was used here, and was safe; and evidence on behalf of plaintiffs that the bags were not tied or not properly tied so as to make the pile secure. The issue thus made, as to whether plaintiff's injury resulted from a breach of defendant's duty to provide a

reasonably safe place to work, was necessarily submitted to the jury.

It follows from the same reasoning that there was evidence to sustain the verdict, and it was therefore not error of law for the circuit court to refuse to set it aside and order a new trial.

The judgment of the circuit court is affirmed.

(82 S. C. 299)

HALLUM v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. MASTER AND SERVANT (§ 182*)—CONSTITUTIONAL PROVISION LIMITING DOCTRINE OF FELLOW SERVANTS—OPERATION OF RAILROADS—SECTIONMEN.

Const. art. 9, § 15, providing that "every employé of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employés allowed by law to persons not employés, when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of the party injured, * * *" applies to a section hand in the employment of a railroad corporation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 372; Dec. Dig. § 182.*]

2. MASTER AND SERVANT (§ 279*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—INJURY TO FELLOW SERVANT.

Evidence, in an action by a section hand to recover for injuries, held to show that the injury resulted from the negligence of a person having a right to control or direct plaintiff's services, and to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 978-980; Dec. Dig. § 279.*]

Appeal from Common Pleas Circuit Court of Pickens County; D. E. Hydrick, Judge.

Action by Plumer Hallum against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. P. Carey, for appellant. Morgan & Mauldin, for respondent.

JONES, J. On the 17th day of April, 1906, near Norris, in Pickens county, plaintiff was in the employment of defendant as a member of a squad of section hands, under control of J. H. Pittman as section boss, and was engaged in moving heavy iron rails from one side of the track to the other, and when throwing down one of the rails, one end bounced back and struck plaintiff on the leg, breaking it. This action was to recover damages for such injury, and resulted in a judgment for plaintiff for \$450.

The complaint alleged that George Brown and Tom Austin had been appointed "callers," and were acting as such, and that plaintiff and other persons working with him were governed and directed in the handling of the rails by said callers, especially as to when to throw or let go said rails, and their authority to so direct was recognized or ac-

quiesced in by the said Pittman, the plaintiff, and defendant, and those working with him, and the plaintiff at this particular time was required to obey Tom Austin. The complaint further alleged that plaintiff and several others had hold of one end of the iron rail, with Tom Austin as caller at that end, and that several others had hold at the other end, with George Brown as caller there, that George Brown gave the order to throw down the rail while Tom Austin gave order to hold steady, and that, when the end controlled by Brown was thrown, that caused the plaintiff and those at the end controlled by Austin to drop the rail, and the other end being thrown caused the Austin end to fly back and strike plaintiff, and in short that it was negligence of the defendant to subject plaintiff to the hazard and danger usually resulting from the confusion of orders by those authorized to direct the services of plaintiff. The defendant, besides a general denial, pleaded that the injury was the result of plaintiff's negligence, and was the result of the ordinary risks of his employment. Both on the motion for nonsuit and for a new trial defendant contended (1) that there was no evidence tending to show negligence of defendant; (2) that the injury received by plaintiff was the result of the acts of fellow servants in the same employment or labor; (3) that the acts of those removing the rails were not done under the immediate orders of a superior officer or agent having the right to direct the services of plaintiff and those working with him. These questions are renewed here by the exceptions.

The court instructed the jury that article 9, § 15, of the Constitution nullified the doctrine of assumption of risks in certain particulars named in the section, and that, if plaintiff was injured by the negligence of a person having the right to control and direct his services, he could not be held to have assumed such risk, and that, if they were satisfied that Pittman had general charge of the work and appointed these callers, or if the employes of the company themselves agreed that these men should be callers, and it was their duty to obey the order of the callers, and plaintiff was injured by reason of the negligence of the callers, plaintiff was entitled to recover. Under exceptions to this charge it is contended that it is error in holding that article 9, § 15, of the Constitution applied to a gang of hands removing railway irons, and in no way connected with the operation of trains.

We will first notice this last question. We are of the opinion that a section hand in the employment of a railroad corporation is within the meaning of the words "every employé of any railroad corporation," provided for in article 9, § 15, of the Constitution. The section reads as follows: "Every employé of any railroad corporation shall have the same rights and remedies for any

injury suffered by him from the acts or omissions of said corporation or its employes as are allowed by law to other persons not employes, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from any injury to employes, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement expressed or implied, made by any employé to waive the benefit of this section shall be null and void, and this section shall not be construed to deprive any employé of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The General Assembly may extend the remedies herein provided for to any other class of employes." It is not within the question submitted to us to consider whether the section in any particular violates the fourteenth amendment of the federal Constitution; nor whether the term "railroad corporation" is limited to commercial railroads, or those engaged in the transportation of freight and passengers; nor whether a street railway is included; nor whether railways operated by an industrial association, joint-stock company or corporation for its own private use are not included. These topics are interestingly noticed in 8 Am. & Eng. Ann. Cas. 1086, and 10 Am. & Eng. Ann. Cas. 1118, note to 15 L. R. A. (N. S.) 479. In this case the plaintiff was an employé of a strictly commercial railroad, and the question is whether the Constitution modifies the common-law doctrine of fellow servants in respect to a sectionman of such a railroad. The Supreme Court of Mississippi, in the case of Bradford Construction Co. v. Heflin, 88 Miss. 314, 42 South. 174, 12 L. R. A. (N. S.) 1040, 8 Am. & Eng. Ann. Cas. 1036, construing a similar provision in the Mississippi Constitution, held that it meant only such employes as were imperilled by the hazardous nature of the business of operating railroad trains. Like rulings were made in Iowa and Minnesota, under employer's liability statutes in terms as general. Deppe v. Chicago, 36 Iowa, 52; Johnson v. St. Paul, etc., R. R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419. These decisions are mani-

festly in conflict with the natural meaning of the language of the Constitution and statute, and the construction was confessedly adopted to avoid a supposed conflict with the equality clause of the federal Constitution. Without further reference to decisions from other jurisdictions we content ourselves with citing the case of *Callaghan v. St. Louis, etc., R. R. Co.*, 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746, affirmed by the United States Supreme Court *St. Louis Merchants' Bridge Terminal R. Co. v. Callahan*, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157, under the authority of *Tullis v. Lake Erie, etc., R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 138, 44 L. Ed. 192. The Missouri statute provided that every railroad corporation operating a railroad shall be liable for all damages sustained by any agent or servant thereof, while engaged in the work of operating such road, by reason of the negligence of any other servant or agent thereof. It was held that the right of recovery was not limited to injuries inflicted by negligence of a fellow servant while actually moving trains, and that the term "operating a railroad" includes all work directly necessary for the running of trains over a track, including section hands engaged in repairing the track over which the trains must run. This is a very reasonable view, as it cannot be doubted that the efficient operation of a railroad and the safety of the traveling public depend very largely and directly upon the ceaseless vigilance of the sectionmen. Their work entails many perils peculiar to it as an essential factor in the movement of trains. It would be a strange result if an enactment, designed to protect railroad employes, should be held to exclude this important class charged with the duty of making the track secure, and that, too, in the absence of any intimation of such intent in the language of the enactment. On this point the case of *Rutherford v. Southern Railway*, 56 S. C. 448, 35 S. E. 136, and the case of *Bodle v. Southern Railway Co.*, 61 S. C. 468, 39 S. E. 715, are conclusive, and we are satisfied with the ruling in these cases. Both cases held that sectionmen, as employes of a railroad company, were within the provision of article 9, § 15, of the Constitution. In *Bodle's Case* the section master was injured while engaged with his men in carrying rails up an embankment for the purpose of loading them upon his dump car for removal to another place, the injury resulting from negligence of the railroad company to furnish sufficient force of hands to lift the rails safely. In *Rutherford's Case* a section hand was injured while engaged with other employes in loading flat cars, slowly moving along the track, with iron or steel rails, the injury resulting from the failure of *Lune Walker*, who was caller for the gang, to countermand the order to throw the rails on the car in time for plaintiff to escape from the falling

rail. The court held that it was immaterial whether Walker had been appointed caller by Summer, as section master having general supervision of the work, or was selected by the other hands, who voluntarily subjected themselves to his order, and that in either case Walker would be a person having a right to control or direct the services of the plaintiff in the particular work in which he was engaged when injured. The instructions given were in accordance with the law as declared in the *Rutherford Case*.

It remains to consider whether there was any evidence tending to support the verdict. As shown in the *Rutherford Case*, an employe of a railroad company has the same rights and remedies as a person not an employe in three instances: "(1) Where the injury results from the negligence of a superior officer or agent; (2) where it results from the negligence of a person having a right to control or direct the services of the party injured; (3) when it results from the negligence of a fellow servant engaged in another department of labor, or on another train of cars, or one engaged in a different piece of work." "In all other cases not falling under either of the classes above indicated the law upon the subject of the defense of fellow servant remains the same as it was before." It is conceded that the case does not fall within the first and third classes. Does the case fall within the second class? On this point *George Brown* testified that he was one of a squad of section hands moving the rails, and was appointed caller at one end of the rail by *Captain Pittman*, the section master, and that it was the duty of the men to obey what he said; that *Tom Austin* was appointed caller at the other end; that about 15 hands had a hold of the rail, and the rail was getting heavy; that *Austin* said "Steady," and he (*Brown*) said "Drop down"; that the boys threw it too quickly, and the rail flew back and struck plaintiff. The plaintiff testified that both *Austin* and *Brown* had been giving the orders; that *Brown* called "Throw away," and *Austin* said "Steady," and he paid attention to his call. All the witnesses agreed that *Austin* was caller at one end of the rail and *Brown* at the other, but most of the witnesses testified that it was *Brown's* duty to call "Deal" or "Pick up" when the rail was to be lifted, and that it was *Austin's* duty to call "Throw away" when the rail was to be dropped. *Pittman*, the section master, testified that he appointed no one caller, that it was the custom of the section hands to choose a caller and that they had chosen *Austin*, and he was the man they should have obeyed, and that he (*Pittman*) was not present at the time of the accident.

The testimony tends to show that the injury was the result of the confusion arising from the opposite calls of two men having the right to direct the services of plaintiff

in the matter of moving rails. The case was properly submitted to the jury, and for the same reason there was no error of law in refusing a new trial.

The judgment of the circuit court is affirmed.

(82 S. C. 326)

Ex parte REMBERT.

(Supreme Court of South Carolina. April 9, 1909.)

1. **HABEAS CORPUS (§ 99*)—CUSTODY OF CHILD.**
In awarding the custody of children, the court should exercise a wise discretion, looking to the real welfare of the children as the principal consideration.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99;* Parent and Child, Cent. Dig. §§ 16-24.]

2. **HABEAS CORPUS (§ 99*)—CUSTODY OF CHILD—RIGHT OF FATHER.**

Though the right of the father to custody of his minor children will, in a proper case, be recognized even as against the mother, such right is subject to the discretion of the court, exercised for the best interests of the children and may be affected by the father's previous voluntary agreement as to such custody.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 99;* Parent and Child, Cent. Dig. §§ 4-32.]

3. **HABEAS CORPUS (§ 99*) — CUSTODY OF CHILD.**

A letter by a father, assenting in most positive terms to the mother's custody and control of their children and separate maintenance for them, cannot be ignored by the father in his subsequent petition for his custody of the children.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 99.*]

Original petition by Edward E. Rembert for writ of habeas corpus for the purpose of obtaining custody of his three children. Proceedings dismissed.

Lee & Moise, for petitioner.

JONES, J. The petitioner makes application in the original jurisdiction of this court for writ of habeas corpus to award him, as father, the custody of three infant children, alleged to be unlawfully detained from him by their mother. The petitioner, Edward E. Rembert, is a resident of Sumter county, and the children, Arthur Rembert, Andre Rembert, and Edward Rembert, aged, respectively, thirteen, nine, and six years, are in the custody of their mother, Christine E. Rembert, wife of petitioner, now living in the city of Charleston, S. C. It is alleged that on May 26, 1908, Mrs. Rembert deserted the home of petitioner and unlawfully carried away these children, and is detaining them illegally and against his wishes, and that he is entitled to their custody as their father.

Mrs. Rembert in her verified return alleges that she left the home of her husband, the petitioner, on account of his base conduct and violence towards her, and his drunkenness; that she had previously on several oc-

casions left his home on this account, and would return upon his solicitation, only to have the same conduct repeated; that she and the children are residing in the city of Charleston, S. C., with her father and mother; that she has the children at school; that they are happy, and have the best surroundings and her constant protection. She further alleges that petitioner has relinquished to her his parental right to the children, as shown by his letter, exhibited as follows:

"Rembert, S. C., April 23, 1907.

"Dear C.: I wired you children would be down to-morrow. I do not now require that you shall stay with them. Just do as you please with them. I turn them over to you completely. Our ideas are too totally different to raise the same children; so it is best for one to have complete control. This I would have required from you, had I kept them; so I extend same to you. On the first of each month I will send you check for \$100. This must cover everything. Now please understand this most positively. Arthur can calculate everything for G. and E., pocket money, clothes, etc., and I will make a deposit four times a year for them—with him for G. and the Prest. of St. Mary's for E. I hope this will end a disagreeable correspondence. I, of course, won't expect a reply. Your check will be forwarded May 1st. Hoping the children will arrive safely, and wishing you every success and happiness, I am in haste Yours affect., Edward.

"P. S. Understand the children are yours, just as if I were dead, and your actions are your own. I know we are just as separated as if you had your divorce and new husband. There is no one to question your actions now. E."

Petitioner denies that he has relinquished the custody of his children, and with reference to this letter admits that he wrote the same, but alleges that it was written as an experiment, and in the hope that by casting such responsibility on respondent he might thereby induce her to arrive at a proper conception of her duty to the petitioner and his family, and reform her conduct after a practical experience in establishing an independent household elsewhere.

It seems that Mrs. Rembert and the children have been at the home of petitioner at intervals since the date of that letter, but that she went away, taking the children with her, without objection on the part of petitioner. Mrs. Rembert in her return further alleges that the probate court of Charleston county has appointed her guardian of said children; but it appears that an effort is now being made on behalf of petitioner to revoke such appointment for want of jurisdiction. It also appears that Mrs. Rembert, as guardian of the children, has instituted suit against Arthur G. Rembert, as trustee of said children, involving an accounting for rents and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

profits of a valuable tract of land in Sumter county, now in the possession of petitioner under said trustee. It further appears that on August 31, 1908, Mrs. Rembert commenced an action against petitioner for alimony and separation, and that Judge Watts, upon a rule to show cause, on October 21, 1908, made his order allowing \$80 per month to Mrs. Rembert as alimony pendente lite and council fees, from which order an appeal has been taken to this court.

The charge made that petitioner is morally unfit to have the custody of his children cannot be sustained upon the testimony submitted in this case. The testimony of many reputable citizens of Sumter county completely refutes any such suggestion. Nor can it be doubted that the children are the object of his love, and that he is able and willing to provide for their comfort and proper training. On the other hand, it has not been shown that the mother is unfit for the custody and training of her children, and, while she is scant of means, the children are devoted to her, are happy with her, are being trained in the public schools of the city of Charleston, and, so far as appears, are in wholesome and comfortable surroundings in the home of their grandparents. In awarding the custody of children, the court should exercise a wise discretion, looking to the real welfare of the children as the principal consideration. *Brown v. Robertson*, 76 S. C. 153, 56 S. E. 786, 9 L. R. A. (N. S.) 1173.

But, in view of all the circumstances, the court is not prepared to say that the best welfare of the children will be promoted by taking them from the loving care of their mother. The paramount right of the father has been often recognized and enforced by this court, and will in proper cases be recognized, even as against the mother; but the father's right is not absolute. Not only is it subject to the discretion of the court, exercised for the best welfare of the child, but may be affected by his own previous voluntary definite agreement as to the custody of the child. *Ex parte Reynolds*, 73 S. C. 296, 53 S. E. 490, 114 Am. St. Rep. 86. In this case the letter in evidence shows in most positive terms the assent of the petitioner that respondent shall have custody of the children and separate maintenance for them. It does not appear that this arrangement has been annulled by the parties, and it cannot be ignored or capriciously disregarded by petitioner.

Having reached the conclusion that the welfare of the children does not require that they be taken from their mother, in whose custody petitioner has voluntarily placed them under circumstances looking to their separate maintenance under her control, the court will, at least for the present, leave the children in their mother's custody. We refrain from expressing any conclusion as to

the charges respecting the conduct of petitioner towards respondent, as that matter will be more appropriately involved in the pending suit for alimony, and we wish our judgment herein not to be regarded as preventing the circuit court in that suit from making any proper judgment touching the custody and maintenance of the said children as may be found to be within the scope of the action and the general power of the court. We dismiss the proceedings herein without prejudice to another application on a different state of facts, either in the circuit court in the alimony suit, or in this court after the termination of said suit.

The writ of habeas corpus is refused, and the proceedings dismissed.

(32 S. C. 284)

ANCRUM v. CAMDEN WATER, LIGHT & ICE CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. MUNICIPAL CORPORATIONS (§ 750*)—LIABILITIES UNDER CONTRACTS TO PERFORM DUTIES OF MUNICIPALITIES.

When a public duty is required of a municipality, one who contracts with it to perform the duty for it incurs the same liabilities as the law imposes on the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1579; Dec. Dig. § 750.*]

2. WATERS AND WATER COURSES (§ 206*)—MUNICIPAL WATERWORKS—CONTRACT WITH WATER COMPANY—INDEMNITY AGAINST FOR LOSSES.

As the law does not require municipal corporations to maintain waterworks, but merely authorizes them by 22 St. at Large, p. 83, and 23 St. at Large, p. 49, to build and operate them as municipal property, when the statute of 1902 (23 St. at Large, p. 1039) empowered them to grant others exclusive franchises to do so, without limiting the power, except as to the vote necessary to approve the same, and requiring that the grant should provide a maximum water rate, it left them free as to other terms and conditions, and they might provide for indemnity against fire losses if they saw fit.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

3. WATERS AND WATER COURSES (§ 206*)—MUNICIPAL WATERWORKS—CONTRACT WITH WATER COMPANY—INDEMNITY AGAINST FIRE LOSSES.

If it be an unfair discrimination against other taxpayers for a city to pay from its general revenue indemnity for fire losses, a water company could not avail itself thereof to avoid a liability assumed in such a case.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

4. WATERS AND WATER COURSES (§ 200*)—MUNICIPAL WATERWORKS—CONTRACT WITH WATER COMPANY—LIABILITIES FOR BREACH.

A city and any of its inhabitants, on one side, and a water company, on the other, are entitled to such damages resulting to them from a breach of the contract between the city and the company as are fairly within the contempla-

tion of the parties, either expressly provided by the contract or fairly implied therefrom.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 200.*]

5. WATERS AND WATER COURSES (§ 200*)—MUNICIPAL WATERWORKS—CONTRACT WITH WATER COMPANY — AGENCY OF CITY FOR CITIZEN.

A city, in contracting with a water company, does not make the contract as the agent of the individual citizen, on the ground that the city, as his agent, makes it for him, as its principal, though such a contract is made invalid by law unless confirmed by a two-thirds vote.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 200.*]

6. MUNICIPAL CORPORATIONS (§ 1*)—DEFINITION.

A municipal corporation is a legal institution formed by charter from sovereign power, erecting a populous community of prescribed area into a body politic and corporate, with corporate name and continuous succession, and for the purpose and with the authority of subordinate self-government and improvement and local administration of affairs of state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4620-4627; vol. 8, p. 7726.]

7. MUNICIPAL CORPORATIONS (§ 66*)—INHERENT RIGHTS OF INHABITANTS.

A city's inhabitants have no inherent right to direct its affairs; all these rights being conferred on them by the lawmaking power of the state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 159; Dec. Dig. § 66.*]

8. MUNICIPAL CORPORATIONS (§ 1*)—CITY AS AGENT FOR INHABITANTS.

A city is not in any legal sense the agent of its inhabitants, either singularly or collectively, but is a legal institution in the nature of a governmental agency, deriving its powers from the state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1; Dec. Dig. § 1.*]

9. WATERS AND WATER COURSES (§ 206*)—MUNICIPAL WATERWORKS—CONTRACT WITH WATER COMPANY — LIABILITY FOR FIRE LOSSES.

A municipal water company is not liable for fire losses of an individual citizen of a city, on the ground that in contracting with the city it contracted with him through the city as his agent, though such relationship is not necessary to confer on him the legal right to benefits provided in its contract with such a company.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

10. CONTRACTS (§ 330*)—PARTIES—AGREEMENT FOR BENEFIT OF THIRD PERSON.

Where one person makes a promise for the benefit of a third, the latter may sue thereon.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1592; Dec. Dig. § 330.*]

11. WATERS AND WATER COURSES (§ 206*)—MUNICIPAL WATERWORKS—LIABILITY FOR FIRE LOSS.

It is presumed that parties contract for their own benefit, and not for that of others, not parties, and so a contract by a city is presumed to be for the benefit of the municipality as a whole, and not for the benefit of its inhabitants as individuals; and in order for an

inhabitant to have the benefit of a contract with a water company, so as to render it liable to him for fire losses sued for, it is not sufficient to show that it contracted with the city to have an adequate supply of water to extinguish fires, but he must show that it was intended that he should be the direct beneficiary of this provision, to the extent that it would indemnify him for losses due to its negligence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

12. CONTRACTS (§ 321*)—STIPULATIONS AS TO CONSEQUENCES OF BREACH—EFFECT.

A stipulation by parties themselves as to what shall be the consequences of a breach, if reasonable, is controlling, and excludes other consequences.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1508; Dec. Dig. § 321.*]

13. WATERS AND WATER COURSES (§ 206*)—MUNICIPAL WATERWORKS—CONTRACT WITH WATER COMPANY — LIABILITY FOR FIRE LOSSES.

A contract of a water company did not directly undertake to respond to individuals for fire losses, though it stipulated to keep a sufficient water supply for the protection of public and private property, and its compensation as provided therein was entirely inadequate to meet the payment of such losses. Besides this, it provided for a forfeiture of its franchise for failure to perform its duties, except in a case of temporary failure due to casualty, and for failure to keep the hydrants in repair a forfeiture of \$10 per month for each hydrant was provided. Held, that its obligations were limited by the contract, and did not contemplate payment for such losses in case of its negligence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

Appeal from Common Pleas Circuit Court of Kershaw County; Ernest Gary, Judge.

Action by Anna Calhoun Ancrum against the Camden Water, Light & Ice Company. From a judgment for plaintiff, defendant appeals. Reversed.

Kirkland & Smith, for appellant. W. B. De Loach, for respondent.

WOODS, J. The defendant, Camden Water, Light & Ice Company, appeals from an order of the circuit court overruling a demurrer to the complaint. The question to be decided is whether the complaint states facts sufficient to constitute a cause of action. These are the material allegations: The defendant owns and operates waterworks in the city of Camden, under a contract of date 21st May, 1903, entered into by the city council and the defendant with proper legal sanctions, which conferred upon the defendant the exclusive franchise for 17 years to furnish to the city of Camden water for the extinguishment of fires and other municipal purposes, and to the inhabitants of the city water for private purposes. On 27th June, 1907, a four-story building of the plaintiff was destroyed by a fire, which would have been extinguished without great damage by the fire department of the city, but for the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fact that, on account of the negligence of the defendant the water mains and hydrants through which the defendant had contracted to supply water for the extinguishment of fires furnished no appreciable water pressure. The plaintiff had insurance for \$3,000, but her net loss from the fire was \$12,000, and for this sum she demands judgment against the water company.

The important inquiry whether the defendant is liable to a private citizen under such a state of facts depends, as we shall endeavor to show, on the terms of the contract, which is attached to the complaint as a part thereof. Hence it is necessary to set out in full such portions as bear on the issue. The general undertaking of the defendants, as set out in section 1, is "to lay, maintain, and operate a system of water pipes in, over, across, and along the streets, alleys, and public places of and within said city of Camden, for the distribution of water for municipal, domestic, business, and personal uses, and likewise, for the same period, to build, lay, place, operate, and maintain all necessary hydrants, service pipes, stop and valve boxes, and other appliances usually employed in the operation of a municipal waterworks system." The details of the defendant's obligations are contained in these sections:

"(3) That it will use the Johnson Springs, so called, near said city, as its source of supply, and that it will furnish from said source, and from other such sources as may be hereafter agreed upon, to the party of the first part and its successors, and to the inhabitants of the said city of Camden, an abundant and sufficient supply of pure, wholesome and potable water for domestic, business, personal, and municipal purposes, and for the extinguishing of fires, for and during the full time of this contract.

"(4) That it will cause to be constructed as a part of said water system a Jewell gravity filter of five hundred thousand (500,000) gallons daily capacity, and will cause all water introduced into the pipes and distributing system of and within said city to be carefully filtered through said filtering apparatus, and further, and in connection with said filter, will construct a pumping reservoir, with brick walls and metal roof, and of sufficient size to provide a constant supply of water to the pumps, together with a pumping station to be supplied with duplicate engines so arranged that either or both engines may be employed at the same time as occasion may require, and said engines and pumps to be of sufficient capacity to furnish an ample supply of water for the purpose hereinbefore indicated at all times during the term of this franchise. And said plant shall be constructed according to the plans and specifications hereto attached and made a part of this contract. * * *

"(7) * * * That all pipe, hydrants, and

connections shall be of standard weight; that there shall be furnished by said party of the second part to the party of the first part a certificate of manufacturers of said pipe and appliances, showing that the same have been tested at a hydrostatic pressure of 250 pounds to the square inch; that, in addition to the twenty-five (25) fire hydrants now set and connected with the pipe system in said city of Camden, the party of the second part shall set ten (10) other fire hydrants of modern type, with double delivery, so arranged as to connect with hose couplings of two and one-half (2½) inches in diameter. * * *

"(9) That the fire hydrants above referred to shall be kept at all times in good repair and ready for immediate service, and so that, when an alarm is given and fire pressure is called for, said hydrants shall furnish efficient streams for extinguishing fires in all portions of said city."

These provisions are found in the contract to secure to the city of Camden, as a party to the contract, compliance by the water company with its obligations:

"(10) That the hydrants shall be in charge of the chief of the fire department, and shall be subject to inspection by him, and in case of any hydrant being found out of repair he shall, in writing, notify the mayor of said city and the superintendent of the waterworks plant; and if the same is not carefully repaired in one week after giving such notice in writing, the city shall have the right to deduct from the hydrant rent, all hereinafter agreed to be paid, the sum of ten (10) dollars per month until said hydrant is put in working order. * * *

"(20) The party of the first part, and all users of water under this franchise, shall have the right to inspect the source of supply and all machinery and other appliances employed by the party of the second part in connection with the filtration, storage, pumping, and distribution of water at all times during ordinary business hours; such inspection to be made in good faith, and not for the purpose of harassing or annoying the party of the second part, or in any wise interfering with the performance by it of its public duties under this franchise. * * *

"(25) And it is further expressly stipulated and agreed that, in the event that the party of the second part, its successors or assigns, shall willfully fail, neglect, or refuse to well and truly carry out and perform all and singular the duties, agreements, and covenants hereby imposed, then and in such event this franchise and contract and all rights and privileges granted thereby by said first party to the second party shall cease and determine, and be thereafter held and deemed to be null and void, anything herein to the contrary notwithstanding: Provided, however, that temporary failure to furnish water and service under this cou-

tract, due to breakage or other casualty, shall not be deemed to be a failure or refusal on the part of the second party hereunder."

In *Black v. Columbia*, 19 S. C. 424, 45 Am. Rep. 785, a municipal corporation owning its own waterworks was held not to be liable to an inhabitant of the city, whose property was destroyed by fire, when it would have been saved, but for the neglect of the city to provide suitable engines or fire apparatus, or to provide and keep in repair public cisterns. Since that case was decided municipal corporations have in this state by statute been made liable for injuries to persons or property received "through a defect in any street causeway, bridge or public way, or by reason of defect or mismanagement of anything under the control of the corporation within the municipal limits." Civ. Code 1902, § 2023. We are not now concerned with the liability of a city for a fire loss of one of its inhabitants, which would not have occurred, but for the negligence of the city to provide an adequate supply of water to extinguish the fire. This liability would have to be passed upon as a preliminary question in the case, if the law imposed upon a city the duty of providing public waterworks; for it seems apparent, where a public duty is required of a municipality, one who contracts with a city to perform for it the duty imposed on it by law incurs the same liabilities that the law imposes on the city itself. But the statute law of the state does not require municipal corporations to maintain waterworks. On the contrary, the statutes on the subject negative the idea of command or requirement, in that they in express terms merely authorize towns and cities to build and operate waterworks as municipal property. 22 St. at Large, p. 83; 23 St. at Large, p. 49. Hence, when the statute of 1902 (23 St. at Large, p. 1039) "empowered cities and towns to grant to private persons or corporations the exclusive franchise of furnishing light and water to said cities and towns and inhabitants thereof," without imposing any limitations on the power, except that the franchises, to be valid, should be approved by a vote of two-thirds of the board of aldermen and a majority of the popular vote, and that the grant or the franchise should provide a maximum water rate, it left the municipality free as to the other terms and conditions of the franchise. Thus there was no obstacle to the city council providing, in the contract and franchise with the water company, any safeguards for the welfare of the city or its inhabitants, who were to use the water, or whose property was to be protected from fire loss; for, even if it be considered an illegal or unfair discrimination against other taxpayers for the city to pay from the general municipal revenue for such indemnity for all whose property was subject to fire loss, such discrimination could not avail the water company. Equally free were the city and water company to agree on such

sanctions and penalties as they saw fit for the enforcement of the obligations assumed by the water company. Further, the city as a municipality and any of its inhabitants, beneficiaries of the contract, on the one side, and the water company, on the other side, were entitled to such damages resulting to them from a breach of the contract as were fairly within the contemplation of the parties, either expressly provided by the language of the instrument or to be fairly implied from it.

These propositions are nothing more than the application of familiar principles of law to the contract under consideration. But, inasmuch as some of the cases deny the right of the individual citizen to recover in a case like this, on the ground that there is not such privity of contract between a citizen and a water company as to enable him to bring an action on his own behalf, some further attention should be given to that point. We think it is true that the city does not make the contract as the agent of the individual citizen, and that no right of action could accrue to the citizen on the ground that the city as his agent makes the contract for him as its principal. That relation does not exist. The relation of agency implies a principal, controlling the action of an agent within the scope of the agency. The municipality is not subject to the control of an individual citizen, or of a majority of its citizens, or even of the whole body of its citizens, speaking unanimously, except in so far as such control is conferred by statute. A municipal corporation is defined to be: "A legal institution, formed by charter from sovereign power, erecting a populous community of prescribed area into a body politic and corporate, with corporate name and continuous succession, and for the purpose and with the authority of subordinate self-government and improvement and local administration of affairs of state." 28 Cyc. 117. The inhabitants of a city have no inherent right to direct its affairs. All their rights are conferred on them by the lawmaking power of the state. The General Assembly has made any contract for a municipal water supply invalid unless confirmed by a vote of two-thirds of the qualified electors of the city; but that does not make a city the agent of a single elector, or of the aggregate two-thirds of the electors. In short, the municipality is not in any legal sense the agent of its inhabitants, either singly or collectively, but is a legal institution in the nature of a governmental agency deriving its powers from the state. For these reasons, we are entirely unable to agree with those courts which hold the water company liable in a case like this on the ground that in contracting with the city it contracted with the individual through the city as his agent.

But the relationship of agency is not necessary to confer on the individual citizen the legal right to benefits provided for him by the

city in its contract with a water company. The English rule is that a third person cannot sue upon a promise made for his benefit, where he is a stranger both to the promise and to the consideration. *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 176, note; 9 Cyc. 374. This rule has been adopted in a number of the states, with a modification that such third person may sue, if he has some legal or equitable interest in the contract. If the English doctrine, or that doctrine modified as above indicated, should be applied, even then an inhabitant of the city, made the beneficiary, as one of a class, of a contract by the city with a water company, would fall within it; for such inhabitant by his taxes contributes to the consideration of the contract, and as an inhabitant he has a vital interest in its performance. But the rule in this state and some of the other states is broad, and without the limitations of the English rule, either in the original or modified form. It is thus stated in *Brown v. O'Bryan*, 1 Rich. Law, 270, 44 Am. Dec. 254: "Where one person makes a promise for the benefit of a third person, that person may maintain an action on such promise." *Duncan v. Moon*, Dud. 332. Having reached the conclusion that the city of Camden could contract with the defendants that it would be liable to its inhabitants, as individuals, for fire losses due to the defendant's neglect to keep an adequate water supply, and that the plaintiff could sue on such a contract, the pivotal question recurs whether the city of Camden did make a contract imposing that liability on the water company.

In the first place, it is to be observed that the presumption is that parties contract for their own benefit, and not for that of others not parties to the contract. So a contract entered into by a city is presumed to be for the city's own benefit as a municipality; that is, for the benefit for the municipal public as a whole, and not for the benefit of its inhabitants as individuals. Hence, in order for the plaintiff to have the benefit of the contract, it is not sufficient for her to show that the defendant contracted with the city to have an adequate supply of water to extinguish fires; but she must show, further, that it was intended that she should be the direct beneficiary of this provision to the extent that the defendant should indemnify her for fire losses due to its negligence. There will hardly be difference of opinion that there are many public municipal purposes to be obtained by contract of this sort, leaving out of view the citizen as an individual. The general municipal purpose of a water supply is to promote the prosperity of a city. This it does by lessening the risk of destruction of property by fire, by lowering the rate of insurance, increasing the general sense of security, and, therefore, the general happiness, diminishing the risk of numbers of persons being thrown out of employment, and gener-

ally in giving steadiness and confidence to the life and enterprise of a city. These are the inducements to a city for entering into the contract, and it is for these municipal purposes that it pays for the maintenance of waterworks for fire protection. For the attainment of these municipal ends the city had a right to pay out public funds. It may well be doubted whether it has the right to apply the public funds to a larger compensation, which a water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all property would be an unjust discrimination in favor of those whose property is exposed to fire loss, and against those whose property is not subject to that peril.

There is at least a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue. True, the water company would be liable only for losses due to its negligence; but negligence would be chargeable to the company for its inspector of machinery to overlook a defect which he ought to have observed in time to remedy it; for a pumper to fail in his duty; for an employé carelessly to break a main, so that the water would be wasted; for the company not to have adequate machinery; in brief, for it to fail, in the opinion of a jury, to be diligent in any of the almost innumerable details incident to the conduct of such a business. In addition to this, it is considered, as is held in some jurisdictions, that the action for loss in cases like this is an action of tort. Then for their fire losses the insurance companies would be subrogated to the rights of the owners of the property, and entitled to recover from the water company. *Mobile Insurance Co. v. Columbia, etc.*, R. R. Co., 41 S. C. 403, 19 S. E. 858, 44 Am. St. Rep. 731, note; *Ætna Insurance Co. v. C. & W. C. Ry. Co.*, 76 S. C. 101, 56 S. E. 788; *American Bonding Co. v. Nat., etc., Bank*, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 504, note. That a water company, assuming such liabilities, would have to demand very large compensation to have any profit, or even to save itself from bankruptcy, is most obvious. When it is asserted that a city has undertaken to pay for such indemnity to its individual inhabitants, and that the water company has assumed it, the contract relied on ought to show clearly that such payment by the city and indemnity by the water company were intended. The contract now under consideration contains no direct undertaking to respond to the individual inhabitant for fire loss. The stipulation that it shall keep a sufficient water supply for the protection of public and private property is naturally to be referred to the purpose of the city to promote the general municipal welfare we have pointed out, rather than to indemnify individual property owners from fire loss. The compensation to be

paid is \$50 each for 70 hydrants, a sum on its face utterly inadequate to meet the expense for furnishing the water and to afford compensation for the enormous risk the plaintiff insists was assumed. These considerations seem to show plainly that the parties did not contemplate by their contract the assumption of liabilities by the water company for the plaintiff's fire losses arising from its neglect to furnish an adequate water pressure.

There is another strong reason for this conclusion. When parties themselves stipulate in the contract what shall be the consequences of a breach of the agreement, such stipulation, if reasonable, is controlling, and excludes other consequences. 8 Am. & Eng. Enc. 686; *Allen v. Brazier*, 2 Bailey, 293; *Covington v. Ex. of Lide*, 1 Bay, 158; *Worrell v. McClintagh*, 5 Strob. 115; *Williams v. Vance*, 9 S. C. 344, 30 Am. Rep. 26; *Terry v. So. Ry. Co.*, 81 S. C. 279, 62 S. E. 249. In this case the parties agreed by the contract that the consequences to the water company for a neglect to perform any of the duties undertaken by it should be a forfeiture of its franchise, except "that temporary failure to furnish water and service under this contract, due to breakage or other casualty shall not be deemed to be failure or refusal on the part of the second party hereunder." For the temporary failure to keep the hydrants in repair a forfeiture of \$10 a month for each hydrant was promised. Thus the contract fixed and limited the consequences of the defendant's breach, and the court cannot add to the contract by imposing other and additional consequences.

Authorities holding the plaintiff entitled to recover in a case such as is stated in the complaint lay much stress on the fact that the defendant is a public service corporation. While this is true, it is obvious the water company's status as a public service corporation rests on the contract, and liability for damage cannot be imposed on it beyond that contemplated by the contract. *Hughes v. Telegraph Co.*, 72 S. C. 516, 52 S. E. 107; *Poteet v. Telegraph Co.*, 74 S. C. 491, 55 S. E. 113. Even a common carrier of goods is not liable beyond that. When a carrier accepts goods for transportation, it contracts to be liable for the value of the goods. But it is not liable for anything else, unless such additional liabilities are within the purview of the contract of carriage. *McKerall v. Railroad Co.*, 76 S. C. 342, 56 S. E. 965; *Strange v. Railroad Co.*, 77 S. C. 182, 57 S. E. 724, and cases cited. And the carrier may limit the amount for which it may be liable by special contract to that effect. *Johnstone v. Railroad Co.*, 39 S. C. 56, 17 S. E. 512; *Frasier v. Railroad Co.*, 73 S. C. 140, 52 S. E. 964. We conclude that the obligations

and liabilities of the parties are limited by the contract, and that the defendant did not contract to pay the losses of all the citizens of the city of Camden by fires which would have been extinguished if it had not neglected to comply with the contract.

The cases in other jurisdictions are irreconcilable; but the conclusion we have reached is in accord with the great weight of authority. A number of courts of last resort, including the Supreme Court of the United States, hold contrary to our conclusion that in a case of this kind the water company is liable. We cite only one case from each state. *Trust Co. v. Fisher*, 200 U. S. 59, 26 Sup. Ct. 186, 50 L. Ed. 367; *Gorrell v. Greensboro Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207; *Coy v. Ind. Depot*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Lex. Hyd. Co. v. Oots*, 119 Ky. 598, 84 S. W. 774, 86 S. W. 684.

But the great majority of the courts hold in such cases there is no liability. *Bush v. Art Co.*, 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161; *Fowler v. Athens City W. W. Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *Fitch v. Seymour*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Mott v. Cherryvale W. Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *House v. Houston W. Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 582; *Allen & Curry v. Shreveport W. W. Co.*, 113 La. 1091, 37 South. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525, overruling *Planters' Oil Mill v. Monroe W. Co.*, 52 La. Ann. 1243, 27 South. 684; *Boston Safe Deposit & T. Co. v. Salem Water Co. (C. C.)* 94 Fed. 238; *Wilkinson v. Light, etc., Co.*, 78 Miss. 389, 28 So. 877; *Howson v. Trenton W. Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Eaton v. Fairbury W. Co.*, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; *Ferris v. Carson W. W. Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Montgomery v. Montgomery W. W. Co.*, 79 Ala. 233; *Nickerson v. Bridgeport Hyd. Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Wainwright v. Queen's County W. Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *Blunk v. Denison, etc., Co.*, 71 Ohio St. 250, 73 N. E. 210; *Beck v. Kittanning W. Co. (Pa.)* 11 Atl. 300; *Foster v. Look-out Mt. W. W. Co.*, 71 Tenn. 42; *Britton v. Green Bay W. W.*, 81 Wis. 43, 51 N. W. 84, 29 Am. St. Rep. 856; *Ukiah v. Ukiah W. Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107.

The judgment of this court is that the judgment of the circuit court be reversed.

(82 S. C. 235)

COOKE v. PARIS MOUNTAIN WATER CO.
et al.

(Supreme Court of South Carolina. April 9, 1909.)

WATERS AND WATER COURSES (§ 206*)—MUNICIPAL WATERWORKS — CONTRACT WITH WATER COMPANY — LIABILITY FOR FIRE LOSSES.

A water company's contract with a municipality, containing a general stipulation to furnish an adequate supply of water to extinguish fires, does not render it liable to a private owner of property for fire losses due to its negligent failure to provide pressure sufficient to extinguish a fire.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

Appeal from Common Pleas Circuit Court of Greenville County; J. O. Klugh, Judge.

Action by C. E. Cooke against the Paris Mountain Water Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Cothran, Dean & Cothran, for appellants.
J. J. McSwain, for respondent.

WOODS, J. This is an appeal from an order overruling a demurrer to the complaint. The contract of the defendant with the city of Greenville is not in the record, while in the very similar case of *Ancrum v. Camden Water, Light & Ice Co.*, 64 S. E. 151, the contract of the water company was set out as a part of the complaint. The complaint in this case, however, rests on the proposition that a contract of a water company with a municipality, containing a general stipulation that it would furnish an adequate supply of water for the extinguishment of fires, carries with such stipulation liability to a private owner of property for fire losses which would have been prevented if the defendant had not negligently failed to provide water pressure sufficient to extinguish the fire. The case of *Ancrum v. Camden Water, Light & Ice Co.* holds that the contract does not cover such liability, and that the plaintiff cannot recover.

The judgment of the circuit court is reversed.

(82 S. C. 380)

BERLEY v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. MASTER AND SERVANT (§ 285*)—INJURIES—ACTIONS — JURY QUESTIONS — CAUSE OF ACCIDENT.

In a lineman's action for injuries by the breaking of a telegraph pole while he was on it, whether the pole broke on account of a defect therein, and not from the negligence of fellow servants, *held* for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1016; Dec. Dig. § 285.*]

2. MASTER AND SERVANT (§ 284*)—ACTIONS—PLEADING—VARIANCE.

Allegations of negligence in furnishing a defective pole were sufficiently sustained by evidence that the pole on which a lineman was working broke while the wires were being stretched in the usual way because the pole was rotten near the ground.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 872; Dec. Dig. § 264.*]

3. MASTER AND SERVANT (§ 288*)—INJURIES—JURY QUESTION—ASSUMPTION OF RISK.

The question of assumption of risk is for the jury unless the testimony is susceptible of no other reasonable inference than that plaintiff assumed the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1068; Dec. Dig. § 288.*]

4. MASTER AND SERVANT (§ 289*)—ACTIONS—JURY QUESTION — CONTRIBUTORY NEGLIGENCE.

The question of contributory negligence is for the jury, unless the testimony is susceptible of no other reasonable inference than that the servant was negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1089; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 289*) — ACTIONS — JURY QUESTION — CONTRIBUTORY NEGLIGENCE.

In a lineman's action for injuries from falling from a telegraph pole while wires were being strung thereon, whether plaintiff negligently climbed the pole while the wires were being strung, in violation of the company's rules, *held* for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1127; Dec. Dig. § 289.*]

6. MASTER AND SERVANT (§ 288*)—INJURIES—JURY QUESTION—ASSUMPTION OF RISK.

In a lineman's action for injuries by falling from a telegraph pole which broke while he was working thereon, whether plaintiff went into a place of obvious danger with knowledge of the defect in the pole, so as to assume the risk of working thereon, *held* for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1072; Dec. Dig. § 288.*]

7. MASTER AND SERVANT (§ 294*) — TRIAL — INSTRUCTIONS — NEGLIGENCE OF FELLOW SERVANT.

In a lineman's action for injuries by the breaking of a telegraph pole while he was on it, a requested instruction that, if the pole he was climbing fell because of a strain put upon it by other employes pulling a wire attached to the pole, plaintiff was the fellow servant of such employes, and could not recover, was properly refused as denying a recovery if the jury found that the pole broke because of defects therein while the other employes were using due care in stretching the wire, or if the injury resulted from the combined negligence of the master and the other employes, the evidence raising those issues.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1162; Dec. Dig. § 294.*]

8. MASTER AND SERVANT (§ 227*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

If a pole which a lineman was climbing fell because of the strain put upon it by other employes in stretching a wire attached to it, and the lineman was negligent in remaining on the pole while the wire was being stretched, he could not recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 668; Dec. Dig. § 227.*]

9. MASTER AND SERVANT (§ 177*)—INJURIES—NEGLIGENCE OF FELLOW SERVANT—MASTER'S LIABILITY.

If a lineman was injured by the breaking of a telegraph pole while he was working thereon, caused by the negligence of fellow servants stretching a wire attached to the pole, he could not recover for such injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 352; Dec. Dig. § 177.*]

10. MASTER AND SERVANT (§ 155*) — DUTY TO WARN — HIDDEN DANGERS — MASTER'S KNOWLEDGE.

A master is only bound to point out hidden dangers at the place of work or machinery if he knows of such dangers, or could have known thereof by exercising ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

11. MASTER AND SERVANT (§ 101*)—MASTER'S LIABILITY—LIABILITY AS INSURER.

A master is not liable as an insurer, but only for negligence in the performance of a duty he owes to the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 172; Dec. Dig. § 101.*]

12. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.

In a lineman's action for injuries by the fall of a telegraph pole on which he was working, alleged to have been caused by the master's failure to furnish a pole sufficient to bear the weight of one working on it, the court's charge as a whole impressed upon the jury that no recovery could be had unless the master was negligent in failing to provide a reasonably safe place of work, and, in charging upon the master's duty generally, stated that it was his duty to point out hidden dangers to a servant without adding the qualification that such danger must have been known to the master, or such as he could have known by exercising ordinary care. There was no request to modify the charge by adding the qualification stated. *Held*, in view of the whole charge, that the jury could not have understood that it was the absolute duty of the master to warn servants of hidden dangers, whether or not he knew of them, there being really no issue requiring greater particularities of statement, as the negligence alleged was not the master's failure to warn of hidden dangers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 704; Dec. Dig. § 295.*]

Appeal from Common Pleas Circuit Court, Richland County; Ernest Gary, Judge.

Action by Samuel Berley against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Nelson & Nelson, for appellant. Frank G. Tompkins, for respondent.

JONES, J. The plaintiff recovered judgment against defendant for \$1,000 in this action for damages for personal injuries resulting from the falling of a defective pole, which cast him to the ground, while employed as a lineman on one of defendant's telegraph lines near Martinsville, Va. The act of negligence alleged in the complaint is that the defendant failed to provide plaintiff a safe place to work; "the said pole on which he was required to work being decayed and incapable of sustaining the weight of a man

working thereon." Defendant, in addition to a general denial, pleaded assumption of risk and contributory negligence. Plaintiff was engaged with a gang of employes of defendant, under the direction of M. V. Lemmond, foreman, in stringing an additional wire on defendant's telegraph line between Leaksville Station, Va., and Stewart, Va., and at the time of the accident had gone over a distance of about 28 miles of said line. On the day of the accident, and for several days previous thereto, it was plaintiff's duty to climb poles, nail on brackets, and fasten the wire thereto after it had been pulled tight by two men on the ground at the next pole with a block and tackle. On this occasion plaintiff climbed the pole carrying up with him the bracket and wire, nailed on the bracket, laid the wire thereon loosely, and descended to the ground, while the other employes were waiting for water, and, when they were ready to pull the wire tight by means of the block and tackle, he went back up the pole for the purpose of fastening the wire. When he was near the top of the pole while the wire was being stretched, the pole broke off at or near the ground, and he was precipitated therefrom into the railroad cut, falling on the cross-ties, sustaining the injuries complained of. At the close of plaintiff's testimony a motion for nonsuit was made on the grounds (1) that the evidence conclusively showed that the injury was not the proximate result of any negligence of defendant, but of the acts of fellow servants or the acts of plaintiff and fellow servants combined; (2) that the injury was within the risks of employment assumed by plaintiff. After verdict a motion for new trial was made on the grounds (1) that the injuries were due to the acts and negligence of fellow servants; (2) that the injuries were not the result of any act of negligence alleged in the complaint. The motions were overruled, and the first and second exceptions assign error.

We find no error. The testimony is practically undisputed that the pole was worm-eaten and rotten at or near the ground, and that it broke and fell while plaintiff was on it at work, when subject to the stretching of the wire in the usual and ordinary manner. There was no testimony that the fellow servants stretched the wire in a negligent manner and that such negligence broke the pole under the ordinary strain involved in the mere stretching of the wire. A natural inference from the testimony is that but for the defect in the pole the usual stretching of the wire would not have broken it. Hence it cannot be said as a matter of law that plaintiff was injured by the acts or negligence of fellow servants, and that the defective pole was not a proximate cause of the injury.

The specific act of negligence alleged—a

defective pole incapable of sustaining the weight of a man working thereon—was sufficient to cover the case made by the testimony, which was a defective pole which broke while plaintiff was working thereon in the line of his employment while the wire was being stretched in the usual way. It is argued that the pole was shown to be sufficient to sustain the weight of plaintiff while going up and down it and placing the bracket thereon, and that it was not plaintiff's duty to remain on the pole during the process of stretching the wire, but there was testimony that it was the duty of plaintiff to be on the pole to guide the wire while being stretched, and to fasten it when sufficiently taut. Whenever the testimony is such as to raise a question or issue of assumption of risk or contributory negligence, such issue should be submitted to the jury, and it is the province of the court to decide such matters only when the testimony is susceptible of no other reasonable inference than that plaintiff assumed the risk or negligently contributed to his injury. We think the testimony does not conclusively show either of these defenses. It appears that a rule of defendant required that "poles must not be climbed without being tested, and, if they are weak, assistance must be summoned to hold them while being worked upon." For this purpose the defendant supplied pike poles and guy ropes. For defendant it was testified that this rule was read to and was known by plaintiff, but he testified he was not aware of the rule. He had been working at this particular part of the work but a few days. It further appeared that the usual test to ascertain whether the pole was safe was to shake it, and, if the pole was deemed unsafe, the climber should call to his assistance any members of the gang, who, with the pike poles and guy ropes, should support the post for the climber. If the pole was found much decayed near the ground, it was the duty of the employes to cut down the pole, cut off the decayed end, and reset the pole before the climber ascended it. This had been done in only three instances on the line of 28 miles, and plaintiff testified that he had not seen a pole so reset. The plaintiff, however, testified that, before climbing the pole, he looked at it to see if it was rotten, and pushed it, and could find no fault. This testimony was sufficient at least to raise an issue whether plaintiff had knowingly or negligently breached any rule of the company designed and promulgated for his safety, or had negligently climbed the pole under the circumstances, or had gone into a place of obvious danger, or, with knowledge of the defective condition of the pole, had voluntarily assumed the risk of working upon it.

The third exception assigns error in refusing to charge defendant's twelfth request, as follows: "If you find from the testimony that at the time of the accident and alleged

injuries the plaintiff, Samuel Berley, was one of a gang engaged in repairing the line, and the pole he was climbing fell on account of the strain put upon it by reason of the other employes in the same gang with plaintiff pulling a wire attached to said pole while plaintiff was upon said pole, I charge you that the plaintiff and other employes in said gang were fellow servants, and plaintiff cannot recover." The request was properly refused because it was faulty in denying plaintiff a right to recover should the jury take the view that the pole was so defective that it broke while the fellow servants were stretching the wire with due care, or should the jury take the view that the injury was the result of the combined negligence of the master and fellow servants. The law was correctly given to the jury in charging defendant's tenth request, as follows: "If you find from the testimony that at the time of the accident and alleged injuries the plaintiff, Samuel Berley, was one of a gang engaged in repairing the line of defendant and in stringing an additional wire along said line, and that the pole he was climbing fell by reason of the strain put upon it by the other members of said gang stretching a wire attached to said pole, and that plaintiff was negligent in remaining upon said pole while said wire was being stretched, or the other members of said gang were negligent in stretching said wire while plaintiff was upon said pole, in either event the plaintiff cannot recover, if such negligence contributed to his injury as a proximate cause thereof."

The fourth exception alleges error in instructing the jury that it is the duty of the master to point out to the servant hidden dangers in the place or machinery, without adding as a qualification, if such hidden dangers are known to the master, or could have been known by the exercise of ordinary care. A full and accurate statement of the law governing the duty of the master to warn the servant of the hidden dangers would involve the qualification mentioned, as the master is not liable as an insurer but for negligence in the performance of a duty to a servant. But, in view of the whole charge, we cannot think the jury was misled into believing that it was the absolute duty of the master to warn the servant of hidden dangers, even though the master did not know or could not with reasonable diligence have known of such danger. The charge as a whole impressed it upon the jury that no recovery could be had unless the defendant was negligent in failing to provide a reasonably safe place. The specific charge complained of was only intended to be a general statement of the master's duty, and there was no request for a modification in the particular mentioned, and really no issue requiring greater particularity of statement, as the complaint is not based upon negligence of the master in failing to warn of hidden dangers.

The fifth and sixth exception alleges error in modifying defendant's first request to charge, which was as follows: "The general rule resulting from considerations of justice and policy is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, not only so far as they were known to him, but also so far as they could have been known to him by the exercise of ordinary care upon his part; and, if you believe from the evidence that whatever injuries the plaintiff sustained were the result of such a risk or peril, the plaintiff cannot recover, and your verdict must be for the defendant." Responding to the request, the court said: "That is a true proposition of law. In other words, that the servant assumes all the risks that are necessarily incident to the employment, that is, he assumes the danger ordinarily incident to climbing a pole; but I take it that would be one of the dangers incident to climbing a sound pole. * * * So with a pole the master is called upon to furnish, if he furnishes a pole upon which he desires his wires to be strung, and he furnishes a pole not strong enough to support not only the weight of the servant while engaged in the employment, but whatever was necessary to enable him to properly perform his duty, and it breaks under those circumstances without negligence on the part of the servant, the master would be liable." The contention is, the first modification precluded the jury from considering whether or not the falling of decayed poles was one of the risks assumed by plaintiff under his employment in so far as said risks were known or could have been known by the exercise of ordinary care on his part. This objection cannot be sustained. The court especially covered this point by instructing the jury in accordance with defendant's second, sixth, and seventh requests. It is further contended that the second modification was erroneous, as the complaint only alleged that the pole on which the plaintiff was required to work was decayed and incapable of supporting the weight of a man working thereon, and there was no testimony tending to show that it was necessary for plaintiff to remain upon the pole while the wires were being stretched. This objection is not well taken. We have already stated that there was testimony tending to show that it was usual and proper for plaintiff to be upon the pole while the wire was being stretched for the purpose of guiding and fastening the wire.

The remaining exception presents no material matter not considered and disposed of already.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(82 S. C. 256)

GRIFFIN v. GRIFFIN et al.

(Supreme Court of South Carolina. April 9, 1909.)

1. MORTGAGES (§ 226*)—RIGHTS OF PURCHASER FROM MORTGAGEE.

Where a mortgagee who made an invalid foreclosure sale took a deed from the purchaser, paying him what he had paid at the sale, and thereafter, while in possession, deeded to a purchaser, who took the land under the bona fide belief that the mortgagee had a good title, such purchaser is entitled to subrogation to the mortgage, or an equitable assignment of the mortgage to the amount of the money paid by him and interest thereon.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 611, 614; Dec. Dig. § 226.*]

2. MORTGAGES (§ 226*)—INVALID SALE UNDER MORTGAGE — EFFECT AS EXTINGUISHING LIEN.

A sale under a mortgage to a third person being invalid and not depriving the mortgagor of the land, the price paid the mortgagee did not extinguish the mortgage debt, but left the lien as to the mortgagor undisturbed, and the mortgage may be foreclosed for the entire debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 614; Dec. Dig. § 226.*]

3. MORTGAGES (§ 226*)—RIGHTS OF PURCHASER FROM MORTGAGEE.

Where a mortgagee in possession of land under an invalid foreclosure sale covering five-elevenths only of a tract of land sold eight-elevenths thereof by a conveyance, his conveyance being good as to three-elevenths which he acquired after execution of the mortgage, the purchaser's right of subrogation to the rights of the mortgagee is limited to five-eighths of the sum which he paid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 614; Dec. Dig. § 226.*]

4. MORTGAGES (§ 226*)—MORTGAGEE IN POSSESSION — ACCOUNTING FOR RENTS AND PROFITS.

A mortgagee of an undivided five-elevenths of a tract of land foreclosed by invalid sale, and thereafter, while in possession, conveyed the five-elevenths and an additional three-elevenths which he had purchased to one who believed he was getting good title. *Held*, in an action by the mortgagee's grantee against the mortgagor for subrogation to the mortgage and foreclosure, that plaintiff was not chargeable with rents and profits of the premises for the entire time since the invalid foreclosure sale, but only for the time he himself was in possession.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 611, 614; Dec. Dig. § 226.*]

5. TENANCY IN COMMON (§ 28*)—LIABILITY TENANT IN EXCLUSIVE POSSESSION.

One tenant in common in exclusive possession is not liable for the rental value of the land, but only for the profits made or rents actually received.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 76; Dec. Dig. § 28.*]

6. TENANCY IN COMMON (§ 28*)—ACCOUNTING FOR RENTS AND PROFITS—EVIDENCE.

In the absence of better evidence of the actual profits or rents of land received by a tenant in common required to account therefor, its rental value will be received as evidence thereof.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 82; Dec. Dig. § 28.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Common Pleas Circuit Court of Clarendon County; R. W. Memminger, Judge. Action by Samuel W. Griffin against Joseph D. Griffin and others for subrogation and other relief. From a judgment for plaintiff, defendants appeal. Modified.

Johnson S. Wilson and Charlton Durant, for appellants. Joseph F. Rhame and W. C. Davis, for respondent.

WOODS, J. Two opinions have already been rendered in this cause on demurrers to the complaint. 70 S. C. 220, 49 S. E. 561; 75 S. C. 249, 55 S. E. 317, 117 Am. St. Rep. 899. The judgment of the circuit court overruling the demurrer to the amended complaint having been affirmed by this court, the cause was heard by Judge Memminger on the evidence taken by a referee. The defendant Joseph D. Griffin appeals from the judgment of the circuit court on the questions of subrogation and the accounting by the plaintiff for rents as a mortgagee and cotenant in possession.

These are the material facts bearing on the subject of subrogation: Joseph D. Griffin executed to Moses Levi on January 19, 1883, a mortgage to secure the sum of \$2,585. The property described in the mortgage was six-elevenths of a tract of land containing 183 acres. Under the power contained in the mortgage Moses Levi on February 4, 1884, undertook to sell the property at public auction and to execute to Ferdinand Levi, the highest bidder at the sale, a deed of conveyance for the consideration of \$650 as expressed in the deed. On February 14, 1884, Ferdinand Levi conveyed his interest to Moses Levi for the same consideration. Thereafter, on July 16, 1891, Moses Levi conveyed to the plaintiff, Samuel W. Griffin, his right, title and interest in the land, consisting of "eight interests," as the deed states. The consideration expressed in this deed was \$1,000. The plaintiff made the purchase, and took the deed under the bona fide belief that he was receiving a good title. The plaintiff alleges that, under these facts, he is entitled to be subrogated to the rights of the mortgagee, Moses Levi, to the extent of the \$1,000, the purchase money mentioned in the deed from Moses Levi to him, and asks for a foreclosure in his favor of the mortgage to that amount, with interest. The circuit judge decreed on the authority of *Givins v. Carroll*, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889, that the measure of the right of subrogation was not the purchase money paid for the mortgaged land by the plaintiff to Moses Levi, but the bid of Ferdinand Levi of \$650 at the auction sale made by Moses Levi, and mentioned as the consideration of the invalid deed which Moses Levi undertook to make to Ferdinand Levi. Subrogation being a pure equity depending on the facts of each case, it is impossible to lay down any rule that will meet the justice of all the varying con-

ditions presented in cases similar to each other. This case differs from *Givins v. Carroll* in one important particular. In that case Weathersbee was the mortgagee, Lard was the mortgagor, Birt was the purchaser at the invalid sale made by the mortgagee, and Carroll was the purchaser from the master, under proceedings instituted for the partition of the lands of the estate of Birt. The court held that, as Birt had paid only \$700 to the mortgagee at the invalid sale, he and those claiming under him alone could be subrogated to the rights of the mortgagee only to the extent of the \$700 received by the mortgagee from him. This sum of \$700 being all that the mortgagee received, that was held to be the extent to which he was required to surrender his mortgage for the benefit of the purchaser. This case would be identical with *Carroll v. Givins* if Ferdinand Levi, who bought the land at the invalid sale, had conveyed to the plaintiff. But, on the contrary, Moses Levi, the mortgagee himself, conveyed to the plaintiff, and, when he made the conveyance, he had satisfied any equity that Ferdinand Levi had by taking a deed of the land from him for precisely the same consideration that he had received from Ferdinand Levi. Thus Ferdinand received back any money he may have paid to the mortgagee, and could have no equity against him. Moses Levi, after he took the deed from Ferdinand Levi, paying the same consideration he had received, was a mortgagee, holding his original mortgage, owing no equity to any one, except an equity to the mortgagor that, when there should be a valid foreclosure sale, the mortgagor should have credit for at least \$650 bid at the invalid sale, whether the land should bring that sum or not. The foundation of this equity of the mortgagor is that he was not responsible for the invalidity of the attempted sale under the mortgage; and it would not exist if the mortgagor himself had had the original sale set aside.

The inquiry, then, was: What was the equity of the plaintiff, who bought and took a deed from a mortgagee in possession under the bona fide belief that the mortgagee was the owner, and that he was receiving a good title? The answer cannot be other than that he is entitled to have from the mortgagee subrogation or an equitable assignment of the mortgage to the amount of the money paid by him and the interest thereon. This was the subrogation asked for by the plaintiff in his complaint. His right to it was settled by the former decree in this language: "It is not necessary to the plaintiff's right of subrogation to allege and prove that either Ferdinand Levi or Moses Levi honestly believed the sale to be valid and the title made under it good, for, the deeds being actually ineffectual to carry the title, the mortgage was not discharged by it, and when the plaintiff actually paid his money and took the deed from

the mortgagee, not as a speculative volunteer, but in good faith, believing his title to be good, he was entitled to have from the mortgagee the benefit of the mortgage to the extent of the purchase money paid by him. On this point the case of *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677, is conclusive. The correlative equity of the mortgagor and those holding under him is to have credit on the mortgage debt for at least \$650, the amount of the original bid, as the proceeds of the sale of the land, even if at the resale now demanded the land should bring less than that sum, for the reason that the mortgagor was in no way responsible for the failure to pass a good title by the deeds made under the former auction sale." It is true in the course of the discussion in *Givins v. Carroll* the court does say that the price paid at the invalid sale under the mortgage was an extinguishment of so much of the mortgage debt as was secured by the mortgage. But this proposition was not necessary to the decision of the case, and, after careful consideration, we think it unsound. The sale under the mortgage being invalid and not depriving the mortgagor of the land, it left the lien of the mortgage as to the mortgagor undisturbed. The mortgagor pays nothing and loses nothing. Hence there is no obstacle which the mortgagor can interpose to a valid foreclosure for the entire mortgage debt. Under the pleadings and facts of this case, when Moses Levi, who was in fact only a mortgagee, and not a holder of any title whatever, undertook as owner of the land to convey it to the plaintiff, then the plaintiff was entitled to be subrogated to the rights of Moses Levi as mortgagee to the extent of the purchase money paid by him to Moses Levi.

The next question is: What was the purchase money paid by the plaintiff? The consideration expressed in the deed is \$1,000 for eight-elevenths of the land. The mortgage from Joseph D. Griffin called for six-elevenths of the land, but it turned out that he owned only five-elevenths. After the execution of the mortgage, Moses Levi acquired by purchase three-elevenths from other persons interested; and his deed to the plaintiff for these three shares was a good conveyance. Therefore the real sum to be regarded as received by Moses Levi as the consideration for the attempted conveyance of the mortgaged property, which was five-elevenths of the land, was five-eighths of \$1,000. It follows that under his right of subrogation to the rights of Moses Levi, the mortgagee, the plaintiff was entitled to set up the mortgage against the defendants for the sum of \$625, the purchase money. The defendants allege in their answer, however, that Moses Levi was in possession of the land from 1884 to 1891, and that the plaintiff has been in possession since that time, and that the amount of \$625 due to the plaintiff under his right of sub-

rogation must be credited with the rents for the entire period of the possession of Moses Levi and the plaintiff. In the circuit decree the plaintiff is charged with the rents received by Moses Levi, but nothing is charged against him for the time that he has himself occupied the land. As we understand, appellants' counsel in their argument do not contend that the plaintiff is chargeable with rents received by Moses Levi, but only with the rents and profits accruing while the plaintiff himself was in possession. The rents collected by Moses Levi were received by him before plaintiff had taken a deed from him, and Moses Levi, and not the plaintiff, was chargeable with these rents as credits on his mortgage. After allowing these credits, there was far more due on the mortgage than the sum of \$625, the portion of the mortgage to which the plaintiff was entitled by subrogation. The plaintiff admits that he was in exclusive possession of 64 acres of the land from January, 1891, to February 4, 1907, when the land was divided between himself and the defendant Joseph D. Griffin. The remainder, 119 acres, had been set off to Emily Griffin as her dower, and was held by her until her death in 1895. From that time until the partition this 119 acres was in possession of William H. Griffin, R. M. Griffin, and Lawrence Griffin, none of whom had any interest in the land. It seems clear, therefore, that the plaintiff, Samuel W. Griffin, must account for defendant Joseph D. Griffin's share of the rents and profits of this 64 acres from the date of his possession in 1891 till the death of Emily Griffin in 1895. That is the limit of his accountability because after that date the 64 acres was less than his share of the land, and it was not chargeable to him that the defendant Joseph D. Griffin did not take possession of the remaining 119 acres or his full share thereof. Samuel W. Griffin, being a tenant in common, is not liable for rental value, but only for the profits made or rents actually received. But, in the absence of better evidence of actual profits or rents received, the rental value will be received as such evidence. The plaintiff testified the rental value was not over \$100, while the defendant testified it was \$250. Up to the time the plaintiff went into possession Moses Levi had been receiving \$68 rent for eight-elevenths of the property which would be at the rate of \$93.50 for the whole. Allowing for some increase in the value of the usufruct after the year 1891, it seems fair to take the average of these three figures, which would be \$147.83, as the rental value of the whole land or \$67.20 for five-elevenths. The record does not disclose any fairer method of arriving at the accountability of the plaintiff for the use of the defendant's portion of the land. There is no exception to the allowance of taxes paid by the plaintiff as an offset to the charges for the use of the land.

Under the principle and the conclusions announced, the account will stand thus:

Due by subrogation to the plaintiff January 17, 1891, five-eighths of \$1,000	\$ 625
Interest to January 1, 1892, at 7 per cent.	41 80
	<hr/>
Less five-elevenths of rents for that year	\$ 666 80
	<hr/>
Interest to January 1, 1893.....	\$ 599 60
	41 97
	<hr/>
Less five-elevenths rents for that year	\$ 641 57
	<hr/>
Interest to January 1, 1894.....	\$ 574 37
	40 20
	<hr/>
Less five-elevenths rents for that year	\$ 614 57
	<hr/>
Interest to January 1, 1895.....	\$ 547 37
	38 31
	<hr/>
Less five-elevenths rents for that year	\$ 585 68
	<hr/>
Balance due January 1, 1895....	\$ 518 48
Interest at 7 per cent. to October 1, 1907.....	462 69
	<hr/>
Total	\$ 981 17
Taxes and interest thereon as stated in circuit decree.....	132 82
	<hr/>
Amount due.....	\$1,113 99

The amount due, therefore, on October 1, 1907, is \$1,113.99, instead of \$2,028.15, and the judgment of this court is that the judgment of the circuit court be modified accordingly.

(82 S. C. 352)

BOARD OF TP. COM'RS FOR SULLIVAN'S ISLAND v. BUCKLY.

(Supreme Court of South Carolina. April 9, 1909.)

1. EVIDENCE (§ 25*)—JUDICIAL NOTICE.

The Supreme Court takes notice of the fact that the town of Moultrieville on Sullivan's Island was incorporated December 17, 1817 (8 St. at Large, p. 290), and that on February 17, 1906 (25 St. at Large, p. 280), the charter of the town and all acts amendatory thereof were repealed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 32; Dec. Dig. § 25.*]

2. MUNICIPAL CORPORATIONS (§ 49*)—REPEAL OF MUNICIPAL CHARTERS—LEGISLATIVE AUTHORITY.

The General Assembly may repeal the charter of a municipal corporation so far as the repeal affects merely the public governmental aspect of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 134; Dec. Dig. § 49.*]

3. STATUTES (§ 90*)—REPEAL OF MUNICIPAL CHARTERS—SPECIAL LEGISLATION.

Const. art. 3, § 34, forbidding special legislation to change the name of places or to amend or extend the charter of a town, does not prohibit the repeal of charters, and, as a general law cannot be enacted governing the repeal of

town charters, the repeal of a particular charter must necessarily be special, so that subdivision 12 of the section requiring the enactment of general legislation has no application to the repeal of charters.

[Ed. Note.—For others cases, see Statutes, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

4. MUNICIPAL CORPORATIONS (§ 49*)—LEGISLATIVE CONTROL.

Where the charter of a town has been revoked by the Legislature, the territory and the inhabitants thereof must be subject to such government as the state under constitutional limitation may impose.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 49.*]

5. STATUTES (§ 90*)—LEGISLATIVE CONTROL—STATUTES.

Act Feb. 17, 1906 (25 St. at Large, p. 280), establishing a town government for the town of Sullivan's Island, is not invalid as special legislation under Const. art. 3, § 34, art. 7, § 11, authorizing the General Assembly to provide such a system of township government as it shall think proper, etc., and forbidding special legislation to amend or extend the charter of a town, since, in view of the fact that the land on the island is practically the property of the state, and the island is largely used as a summer resort only, the act, though special legislation, is valid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

6. CONSTITUTIONAL LAW (§ 48*)—VALIDITY OF STATUTES—PRESUMPTIONS.

Every presumption must be indulged in favor of the validity of legislation, though the question is judicial, and not legislative.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

7. TOWNS (§ 16*)—LEGISLATIVE CONTROL—LOCAL SELF-GOVERNMENT.

The principle of local self-government does not inhere in townships, and they have such local rights of government as the Legislature confers on them, and Act Feb. 17, 1906 (25 St. at Large, p. 280), establishing a township government, and providing that the Governor shall appoint a commission of five persons, three of whom shall be lot holders and two of whom shall be registered electors, which commission shall have charge of township affairs, is not invalid as violating the principle of local self-government.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 16.*]

Appeal from Common Pleas Circuit Court of Charleston County; D. E. Hydrick, Judge.

Action by the Board of Township Commissioners for Sullivan's Island against B. Buckly. From a judgment for plaintiff, defendant appeals. Affirmed.

Lee Royal, for appellant. Burke, Rivers & Erckman, for respondent.

JONES, J. This is an action to enforce a license, and the appeal comes from an order of Judge Hydrick overruling a demurrer to the complaint; the ground of demurrer being that plaintiff had no legal capacity to sue. In this connection the complaint alleged: "That under and by virtue of an act of the General Assembly of the state of South Carolina, entitled 'An act to establish a township government for the township of Sulli-

van's Island, in Charleston county, state of South Carolina,' as approved 17th day of February, 1906, the plaintiff was created a body politic and corporate with such rights and powers as are fairly and sufficiently set forth in said above entitled act, which act gives the said board of township commissioners the control and management of the affairs of the township of Sullivan's Island, S. C." Under this demurrer defendant seeks to raise the question that Act Feb. 17, 1906 (25 St. at Large, p. 280), is unconstitutional (1) because it provides for a board of five members, and requires only two of them to be registered electors of Sullivan's Island; (2) because it is special legislation to repeal the charter of the town of Moultrieville and place the government of the territory of Sullivan's Island, which embraces the territory of Moultrieville, under the board of township commissioners created by the act; (3) because it is special legislation in violation of article 3, § 34, subd. 1, Const., in that it changed the name of the town of Moultrieville, also in violation of article 3, § 34, subd. 3, in reference to changing, amending, or extending the charter of an incorporated town, also in violation of article 8, § 1, requiring general laws for the organization and classification of municipal corporations. We have not been called upon to consider whether such questions can be raised under demurrer for want of capacity to sue; on the contrary, respondent also desires the judgment of the court on the questions raised.

The court takes notice of the fact that the town of Moultrieville on Sullivan's Island was incorporated December 17, 1817 (8 St. at Large, p. 290), and that on February 17, 1906, the charter of said town and all acts amendatory thereto and all acts relating to the government thereof were repealed (25 St. at Large, p. 280). Sullivan's Island, except such portions as may have been ceded to the United States, is considered the property of the state, and has been devoted by the state for the purpose of a health resort. Previous to 1857 the occupants of lots on Sullivan's Island were mere tenants at will of the state, and in 1857 (12 St. at Large, p. 603) it was declared that the tenure of the owners of lots under the license to build should be tenants from year to year. *Whetmore v. Rhett*, 12 Rich. Law, 565. Under the original charter of 1817 the corporators were "all persons, citizens of the United States, now owning dwelling house on the said island, or who may hereafter own dwelling houses thereon, or occupying under lease during the season that people resort thither for health or safety a dwelling house," and "all free male white inhabitants of said island owning or renting dwelling houses thereon" were entitled to vote for intendant and five wardens. In 1873 (15 St. at Large, p. 446) the charter was amended, the corporators being "all persons citizens of the United States who now reside

or may hereafter reside, or who may own buildings erected on any lot in the town of Moultrieville, Sullivan's Island," and those entitled to vote were "all male residents of the said town and all male owners of lots upon which buildings have been erected, citizens of the United States who have attained full age." It thus appears in the history of Moultrieville the state has sought to give lot owners a right to participate in the government of the town whether residents or not. After the adoption of the Constitution of 1895 and the legislation pursuant thereto regulating qualifications of electors, the government of the town of Moultrieville has been in the control of the resident qualified electors. In this situation the General Assembly deemed it advisable to establish a township government for Sullivan's Island as a part of the county of Charleston, and adopted the act in question. Section 1 of the act provides "that as soon as practicable and within thirty days after the approval of this act, the Governor shall appoint a commission to be composed of five persons, three of whom shall be lot holders and two of whom shall be registered electors on Sullivan's Island, which commission shall be known as the board of township commissioners for Sullivan's Island, and shall have charge of the township affairs of said township with the powers and duties hereinafter set forth." Commissioners appointed under this act have been in charge ever since. The right of the General Assembly to repeal the charter of a municipal corporation of the state cannot be questioned unless there is some constitutional inhibition. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; 1 Dillon, Mun. Corp. (3d Ed.) par. 66; *Cooley, Con. Lim.* (5th Ed.) pp. 230, 231, 232. There is no restriction in the Constitution upon such repeals, certainly not so far as the repeal affects merely the public governmental aspect of the municipality, as in this case. The first and third subdivisions of article 3 of section 34, forbidding special legislation to change the name of places and to amend or extend the charter of a town, has no reference to repeals of charters, as is manifest by the terms of this section; nor could a general law be well enacted governing the repeal of town charters, since the repeal of a particular charter must necessarily be special, hence subdivision 12 of said section has no application as to repeals of charters.

The charter of Moultrieville having been revoked, the territory and inhabitants therein must necessarily be subject to such government as the state, under constitutional limitation, may impose. Is the act of February 17, 1906, void as special legislation? We think not. Section 11 of article 7 of the Constitution expressly declares that the "General Assembly may provide such system of township government as it shall think proper to any and all the counties, and may make spe-

cial provision for municipal government and for the protection of chartered rights and powers of municipalities." Construing this provision in *Grocery Co. v. Burnet*, 61 S. C. 214, 39 S. E. 385, 58 L. R. A. 687, the court says: "This section was evidently framed in view of the provisions of article 3, § 34, and was intended to give the Legislature a wider latitude in the making of special provisions for county and township government." Then when we consider that the land on Sullivan's Island is practically the property of the state, and its use as a health resort during the summer and the custom of most lot owners, many of whom reside in the city and county of Charleston, not to occupy their premises during the winter, and yet having a very large interest in the government of the island, we cannot affirm that Sullivan's Island as a township of Charleston county is not in a class by itself and the subject of special legislation. The Legislature has declared that the act is advisable, and every presumption must be indulged in favor of the legislation, even if the question is judicial, and not legislative, a matter which the court has not finally settled. *Bulst v. City Council*, 77 S. C. 273, 57 S. E. 862.

With respect to the contention that the act is void because it requires the Governor to appoint a commission to be composed of five persons, three of whom shall be lot holders and two of whom shall be registered electors on Sullivan's Island, it is contended that the statute violates the principle of local self-government, and deprives the electors of Sullivan's Island from choosing their own officers; but the principle of local self-government does not inhere in townships. They have such local rights of government as the Legislature sees fit to confer upon them. We find nothing in the Constitution prohibiting the Legislature from ordaining for Sullivan's Island the particular system of government provided in the act.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(83 S. C. 356)

BARDIN et al. v. COMMERCIAL INS. & TRUST CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. ADVERSE POSSESSION (§ 43*)—TACKING SUCCESSIVE POSSESSIONS.

The possession of an ancestor and heir may be tacked to show 20 years' possession so as to presume a grant, or 10 years' adverse possession so as to make out title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 220; Dec. Dig. § 43.*]

2. ADVERSE POSSESSION (§ 23*)—USE OF LAND FOR SUPPLYING FUEL AND TIMBER.

Under Code Civ. Proc. 1902, § 103, providing as to adverse possession that land shall be deemed to have been possessed and occupied

where it has been used for the supply of fuel, or of furnishing timber for purposes of husbandry, or ordinary use of the occupant, possession of land was adverse and continuous where, though not cultivated or inclosed, it was continuously used for the supply of fuel and timber, the ordinary uses for which it was fitted.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 112, 113; Dec. Dig. § 23.*]

3. ADVERSE POSSESSION (§ 113*)—GRANT BY STATE—EVIDENCE—PAYMENT OF TAXES.

Payment of taxes on land by a claimant is competent evidence to show whether the state has parted with its title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 674; Dec. Dig. § 113.*]

Appeal from Common Pleas Circuit Court of Florence County; Charles G. Dantzler, Judge.

Action by M. W. Bardin and others against the Commercial Insurance & Trust Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Willcox & Willcox, for appellant. J. P. McNeill and S. W. G. Shipp, for respondents.

JONES, J. This action was to recover a tract of land in Florence county containing 231 acres. The answer, besides a general denial, pleads the statute of limitations, adverse possession, and presumption of a grant. At the close of plaintiffs' testimony defendant moved for a nonsuit on the grounds that there was no evidence of a grant or presumption of a grant from the state, and no testimony tending to show that plaintiffs and defendant claimed from a common source. This motion being overruled, defendant submitted no testimony, and the jury rendered a verdict for the plaintiffs; and from the judgment thereon defendant appeals, renewing the question presented on the motion for nonsuit.

We think there was no error. There was testimony that S. S. A. Brooks in 1882 conveyed a 441-acre tract of land, which included the tract in question, to I. V. Bardin; that the tract in dispute was mostly woodland or bay land, the principal value of which was the timber; that it was known as the "Bardin land," and was used by Bardin for the purpose of getting wood, straw, and timber therefrom when needed; and that Bardin paid the taxes thereon until his death in 1897. His widow and children, the plaintiffs, continued in possession, using the land in the same way, or permitting their tenants to use the land for wood, straw, and timber, and the widow continued to pay the taxes thereon. This action was commenced on September 21, 1905, 23 years after the Bardins acquired color of title and possession. The possession of ancestor and heir may be tacked to show 20 years' possession so as to presume a grant, or 10 years' adverse possession so as to make out title by adverse

possession, because there is no break in the continuity of possession. *Duren v. Kee*, 26 S. C. 219, 2 S. E. 4; *Epperson v. Stansill*, 64 S. C. 488, 42 S. E. 426; *Kilgore v. Kirkland*, 60 S. C. 85, 48 S. E. 44. The possession of the Bardins was adverse and continuous for more than 20 years; and, while the land in question was not cultivated or inclosed, it was used for the supply of fuel and timber, the ordinary uses for which such land was fitted. Code Civ. Proc. 1902, § 103. The payment of taxes on the land for a number of years by the Bardins was also some evidence to be submitted to the jury on the ground whether the state had parted with title. *Busby v. Railroad Co.*, 45 S. C. 313, 23 S. E. 50; *Kolb v. Jones*, 62 S. C. 195, 40 S. E. 168.

The judgment of the circuit court is affirmed.

(150 N. C. 377)

JONES et al. v. PROVIDENT SAVINGS LIFE ASSUR. SOCIETY.

(Supreme Court of North Carolina. April 1, 1909.)

APPEAL AND ERROR (§ 1207*)—PROCEEDINGS AFTER REMAND—ENTRY OF JUDGMENT.

Plaintiffs sued a life insurance society to avoid an increase of premiums on a policy or for a rescission. Plaintiffs agreed to a continuance on condition that they should not be required to pay further premiums pending the suit. Judgment for plaintiffs was reversed, with directions to enter judgment for the society. *Held* that, on remand, the trial court properly allowed the society's motion for judgment, such agreement not entitling plaintiffs to a determination fixing a rule by which future assessments and dividend credits should be made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4696; Dec. Dig. § 1207.*]

Appeal from Superior Court, Wake County; Lyon, Judge.

Action by W. O. Jones and others against the Provident Savings Life Assurance Society. From a judgment for defendant, plaintiffs appeal. Affirmed.

See, also, 147 N. C. 540, 61 S. E. 388.

The plaintiffs, filing their complaint, alleged, in substance, that they were holders and beneficiaries of an insurance policy in defendant company, and that, by the terms of the policy, the premium payable thereon should never exceed the amount printed on the policy for the attained age of 65 years; that the holder, W. O. Jones, having attained and passed the said age, the defendant company had wrongfully assessed against him, and had compelled payment of premiums largely in excess of the amount demandable under the contract and policy to his damage.

The plaintiffs further allege that W. O. Jones was induced to enter into said contract by the false and fraudulent assurances on the part of defendant's general agent, that the premiums on the policy would never exceed

the amount printed thereon for an attained age of 65; the specific relief demanded being set forth as follows:

"(1) That the said premiums be declared excessive, and that an account be taken of all sums paid on premiums since said plaintiff W. O. Jones attained the age of 65 in excess of the rate prescribed for that age on the back of the policy, and that the defendant be adjudged to pay the same to the plaintiffs, and that it be declared that all future premiums shall conform to the representations and agreements as aforesaid.

"(2) That, if this reasonable prayer be not granted, the entire amount of the premiums, with interest thereon, be paid the plaintiffs by the defendant, and said policy be rescinded."

Denial was made of these allegations, and, on issues submitted, the jury rendered the following verdict:

"(1) At the times alleged in the complaint was J. Sterling Jones the general agent of the defendant company? Answer. No.

"(2) Did the said J. Sterling Jones, as the general agent of the defendant company, induce the plaintiff, W. O. Jones, by false and fraudulent representations, to apply for insurance in the terms of the application, and to take out a policy of insurance from the defendant company, as alleged in the complaint, upon an understanding and agreement, made at and before the delivery of the policy, that the premium upon the said policy should never exceed the rate prescribed in a table on the back of the said policy for the age of 65? Answer. No.

"(3) Was the plaintiff W. O. Jones, by reason of said alleged false and fraudulent representations and agreements, induced to accept the said policy, and pay the premiums thereon, and was he thereby misled and prevented from examining and questioning the terms of the policy as so represented and agreed at and before the delivery of the policy and until he had attained the age of 67 years, and until the said premiums began to exceed the rate prescribed for the age of 65? Answer. No.

"(4) Was the said J. Sterling Jones authorized and empowered by the defendant company as its agent under his contract with the defendant to issue policies of insurance or to change or alter the contents thereof? Answer. No.

"(5) If the said J. Sterling Jones, under his contract with the defendant, was not authorized and empowered to issue policies of insurance or to change or alter the contents thereof at and before the delivery of the policy by the defendant to the plaintiff W. O. Jones, did the plaintiff Jones at or before the acceptance of the policy have notice from the defendant or its agent that the powers of the said J. Sterling Jones were so limited that he was not authorized to is-

sue policies of insurance or to change or to alter the contents thereof? Answer. No.

"(6) Did the said W. O. Jones, after the delivery and acceptance of the policy by him, continue to pay the alleged excessive premiums thereafter under protest of himself or his agent, and by reason of assurances and promises of the defendant company through J. Sterling Jones, or other agents of the defendant, as alleged by the plaintiff, that the said excessive payments as alleged would be properly adjusted so as to conform to the alleged representations and agreements as set forth in the complaint, and did the plaintiff fail to sue the defendant by reason of such assurances and promises, and at the request of defendant's agent or agents? Answer. Yes.

"(7) Did the plaintiff W. O. Jones, after having an opportunity to learn the character, terms, and conditions of the policy, without disavowing its terms and giving notice of protest to the defendant or its agents, by his acts, conduct, dealings and negotiations with the defendant, either himself or through and by his agent ratify, or acquiesce in the terms of the said policy? Answer. Yes.

"(8) How many premiums did plaintiffs pay under protest? Answer. Two.

"(9) Did plaintiff W. O. Jones ascertain that the policy of insurance was not in accordance with the alleged representations of J. Sterling Jones more than three years before the institution of this action? Answer. Yes.

"(10) Did the plaintiff W. O. Jones ascertain that the policy of insurance was not in accordance with the alleged representations of J. Sterling Jones more than 10 years before the institution of this action? Answer. No.

"(11) Did plaintiffs before the commencement of this action demand of defendant a reasonable and equitable adjustment of the matters in difference, or, upon refusal, a return of the premiums, and was such demand refused? Answer. No.

"(12) Did the plaintiff's cause of action arise more than three years before the beginning of the suit? Answer. No.

"(13) Did the plaintiff's cause of action arise more than 10 years before the beginning of the action? Answer. No.

"(14) Has defendant constantly carried on business and maintained an agency in this state, in compliance with the laws of this state since the date of the policy issued to plaintiff August 1, 1887? Answer. Yes.

"(15) Did defendant file with the Secretary of State copies of its charter and by-laws as required by chapter 62, p. 197, Pub. Laws 1899, and thereupon become domesticated in this state? Answer. Yes.

"(16) What amount, together with interest, has been paid on said policy in excess of the rate prescribed for the age of 65 in

the lower or second table on the back of said policy? Answer. \$1,754.09 (by consent).

"(17) What has been the cost to the defendant of carrying the liability imposed upon it by this policy issued to the plaintiff since the same was issued August 1, 1887, to the present time? Answer. This issue not to be answered by the jury."

And the court below, being of opinion that, according to the admitted stipulations of the policy, the premiums could never exceed the maximum rate for the attained age of 65 years, and that all premiums paid in excess of that amount were illegal, gave judgment in favor of plaintiff for the sum of \$1,754.09, the amount of such excessive premiums as established by the verdict. On appeal this judgment was reversed, and for reasons assigned in the opinion written by the Chief Justice, as reported in 147 N. C. 540, 61 S. E. 388, it was ordered that, on the verdict and the admitted stipulations of the policy, judgment should be entered for defendant. This opinion having been certified down, and the defendant having moved for judgment in accordance therewith, the plaintiff resisted the motion, and filed a petition in the cause, alleging that under and by virtue of an agreement in the cause entered into between the parties, of date April 20, 1907, and whereby the defendant had obtained a continuance of the same, the plaintiffs were entitled to have the rule or rules established and declared in this action by which future assessments and dividend credits should be made. It was further urged that this relief was within the scope and purpose of the original action. The petition was disallowed, in so far as the same contemplated further litigation in this cause between the parties, and final judgment given for defendant on the verdict as rendered.

It was further provided in said judgment that no forfeiture of the policy should be declared by reason of the nonpayment of any premiums on and after April 20, 1907, and the right of the plaintiffs to challenge the validity and correctness of all premiums or assessments or dividends since said date was secured and preserved. From the refusal of the court to allow further litigation between the parties in the cause now constituted, the plaintiffs excepted and appealed.

Shepherd & Shepherd and J. W. Hinsdale, for appellants. J. H. Pou, for appellee.

HOKE, J. The construction and interpretation of this contract of insurance, and the effect of the stipulations therein, and also of the verdict rendered by the jury, were all involved and presented on the former appeal in the cause, and, after full and careful consideration, the court, being of opinion with defendant, directed that judgment be entered in its favor. This opinion having been certified down, it became the duty of the

judge below to comply with the order made, and there is no error to plaintiffs' prejudice in the judgment as entered. *Dobson v. Simonton*, 100 N. C. 56, 6 S. E. 369; *Calvert v. Peebles*, 82 N. C. 334. And we are of opinion that there is nothing in the scope of the original complaint nor in the agreement made in the cause to require or justify the court in opening up the controversy as desired by the plaintiff.

The action was instituted and tried on the theory that the amount of the premiums to be assessed against the holder were fixed and expressed at the attained age of 65 years, and could in no event ever exceed that sum. It was further contended that, if this were not true, the plaintiff had been induced to enter into the contract under false and fraudulent assurances that this was its purport, and judgment was demanded in the one case for all premiums wrongfully collected in excess of the stipulated amount, or, if this was not the correct interpretation of the contract on its face, and fraud was established by the verdict, that the contract relation be severed, and all premiums collected should be returned. Defendant controverted both positions taken by plaintiffs, and claimed, further, that, if recovery was had by plaintiff, the cost and value of the insurance which the company had carried on the life of W. O. Jones should be allowed and deducted from any recovery plaintiff should make. Issues were framed determinative of the substantial issues arising on the pleadings as understood by both parties, as no objection to the issues from either appear in the record, and the jury have rendered a verdict against the plaintiffs on their allegations of fraud, and the court has held against their legal position as to the force and meaning of the stipulations of the contract, and the agreement relied upon by plaintiffs was never intended to have the effect contended for by the plaintiffs. This agreement was entered into between the parties in April, 1907, on condition that defendant should be granted a continuance. Its principal intent and purport was to relieve the plaintiffs of the payment of further premiums pending the litigation, and to prevent the forfeiture of the policy by reason of nonpayment. This effect has been allowed it in the judgment as entered by the court, and the intimations in the agreement, looking to a further accounting between the parties, were evidently made in view of further adjustment to be required in case the plaintiffs should succeed. This was the view of the agreement entertained by the judge below, the same who presided at the trial of the cause, as indicated by the judgment concerning it entered and signed by him at October term, 1907, as follows: "Consent Order. North Carolina, Wake County. Superior Court, October Term, 1907. *Jones et al. v. Provident Life Assurance Society of New*

York. In this case it is agreed that if judgment be given finally for plaintiffs, defendant shall be entitled to credits on said judgment for all unpaid premiums, with interest from date when such premiums should have been paid. This order is made in furtherance of an agreement of counsel that premiums falling due after February 1st, 1907, should not be paid until the final termination of the suit, and then at the rates which the Court should hold the legal rate of premiums. Nov. 6, 1907. B. F. Long, Judge Presiding." And in our opinion it cannot be maintained that a collateral agreement of this character should have the force and effect to change the scope of the action and open up questions which involve an inquiry into the scheme and plan of defendant's organization, and an investigation as to the regulation and management of the internal affairs of the company. Such a result is not within the scope of the action as originally constituted was never contemplated by the parties, and is not a just or correct interpretation of the agreement relied upon.

There is no error, and the judgment below will be affirmed.

Affirmed.

(150 N. C. 820)

STATE v. QUICK.

(Supreme Court of North Carolina. April 1, 1909.)

1. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS—CONDITION OF DECLARANT.

Deceased was shot about 6 o'clock p. m., and died at midnight. His wife testified that he said he was going to die several times before the doctor came, but she was not certain as to whether these statements were made before or after he told how he was shot. *Held*, that his statements as to the shooting were properly admitted as dying declarations.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

2. WITNESSES (§ 274*)—CROSS-EXAMINATION.

A witness who has testified as to the character of accused may be asked on cross-examination, for the purpose of testing the witness' conception of good character, and not to prove bad character by affirmative evidence of specific acts, whether a person who carries a concealed weapon and drinks whisky in a barroom on Sunday is considered a man of good character.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 965, 966; Dec. Dig. § 274.*]

3. CRIMINAL LAW (§ 1170½*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

The allowance of a question, on cross-examination of a witness for the accused, which is objectionable in form is harmless, where the accused admits the facts embodied in the question.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1170½.*]

4. HOMICIDE (§ 150*)—EVIDENCE—BURDEN OF PROOF—DEFENSE.

Where an intentional killing with a deadly weapon is shown or admitted, the law presumes malice, and the crime is murder, unless the facts justify the killing or mitigate it to manslaughter, and the burden is on the accused to estab-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lish such facts to the jury's satisfaction, unless they arise out of the evidence against him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 275; Dec. Dig. § 150.*]

5. HOMICIDE (§ 340*)—APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

Where an intentional killing with a deadly weapon is admitted, a charge which erroneously submits to the jury a view of the case not supported by the evidence, whereby they are permitted to convict of manslaughter, instead of murder, if they reject the plea of self-defense, is error prejudicial to the state, and not to the accused, and does not require a reversal of a conviction of the lesser degree of homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 717; Dec. Dig. § 340.*]

6. HOMICIDE (63*)—MANSLAUGHTER—MUTUAL COMBAT.

If two men fight upon a sudden quarrel, and one kills the other, the chances being equal, the crime is manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 86; Dec. Dig. § 63.*]

7. HOMICIDE (§ 119*)—MANSLAUGHTER—MUTUAL COMBAT.

If one who enters a fight in self-defense, and without malice uses unnecessary force resulting in death, the crime is manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 172; Dec. Dig. § 119.*]

8. HOMICIDE (§ 276*)—TRIAL—QUESTIONS FOR JURY.

Whether one used unnecessary force in killing another in self-defense is a question for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.*]

9. CRIMINAL LAW (§ 1172*)—APPEAL AND ERROR—HARMLESS ERROR.

The reading of extracts from opinions of the Supreme Court as a part of the charge in a criminal case is unwise, but is not ground for reversal, where it appears that the extracts are of a very general character, and could not possibly have misled the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

Appeal from Superior Court, Richmond County; Long, Judge.

Cary Quick was convicted of manslaughter, and he appeals. Affirmed.

Morrison & Whitlock, A. S. Dockery, John P. Cameron, and W. M. Kelly, for appellant. Attorney General Bickett, for the State.

BROWN, J. The defendant was tried for murder in the second degree and convicted of manslaughter. It appears from the evidence set out in the record that this defendant, with Lone Knight, Ebb Quick, and Lauder Quick, had an altercation with Jule Combs, at the latter's saloon in Richmond county, over the price of a pint of gin. There were several pistol shots fired, and Combs was wounded and in consequence thereof died.

1. The defendant excepts to the ruling of the court below admitting the dying declarations of the deceased. There can be no question that the declarations are pertinent and material, as they tend to prove that all the defendants were participants in an unjustifiable assault upon the deceased at the time he was

shot. The wife of the deceased testified concerning her husband's condition: "He was weak, and continued to grow weaker. He could not help himself at all. He remained in bed after being brought home until he died. He said that he was going to die—about the first word he said after he came home. He said this several times. There was nothing said by him about his getting well during this time." On cross-examination witness stated that her husband "said he was going to die soon after he got there; said he could not live. About two hours after he got there, the doctor came. He said he was going to die before the doctor came. After the doctor came, he did not say anything about dying, because the doctor gave him something to put him to sleep; cannot be certain whether he told how he was shot before or after he told he was going to die." The deceased was shot about 6 or 7 o'clock p. m., on Sunday November 11, 1906, and died at 12 o'clock that night. Under our precedents we think it was proper to admit the declarations of the deceased as dying declarations. *State v. Pearce*, 46 N. C. 251; *State v. Whitt*, 113 N. C. 716, 18 S. E. 715.

2. Witness Adams for defendant testified that his general character is good. On cross-examination by the solicitor the court permitted the following question: "Witness is asked if he thinks that a man who would visit a barroom on Sunday afternoon, carrying concealed on his person a pistol, and remain at the barroom drinking whiskey, etc., would entitle such a person to be considered a man of good character." We see no objection to the question. The evident purpose was to test the witness' conception of what constituted good character and not to prove a bad character by affirmative evidence of specific acts. Assuming that it was objectionable in form, it was harmless, as the defendant had already testified as a witness in his own behalf, and admitted the very facts embodied in the inquiry.

3. The defendant excepts to the instructions of the court placing the burden of proof upon the defendant to justify the killing of the deceased, contending that the burden of the issue never shifts from the state to satisfy the jury, beyond a reasonable doubt, upon the entire evidence in the case, of the defendant's guilt. For this position the learned counsel cite *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562, and *Board Education v. Makeley*, 139 N. C. 31, 51 S. E. 784, and insist that the rule upheld in those cases is applicable here. We do not think those precedents have any application in an indictment for homicide. The position of counsel is one of the propositions laid down by Judge Wilde in his dissenting opinion in the well-known case of *Commonwealth v. York*, 9 Metc. 93, 43 Am. Dec. 373, and was taken by counsel before this court, in *State v. Willis*,

63 N. C. 26. But the proposition was repudiated in that case, and the doctrine reiterated that in all indictments for homicide, where the intentional killing is established, or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in second degree), unless he can satisfy the jury of the truth of facts which justify his act or mitigate it to manslaughter. The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. This rule has been uniformly adhered to by this court in indictments for homicide, and it was reiterated in the recent case of *State v. Worley*, 141 N. C. 764, 53 S. E. 128, where the cases are cited. The defendant, Cary Quick, was examined in his own behalf, and not only admits the intentional killing, averring that he did it in self-defense, but states that he fired at the deceased four times. His honor's ruling was in accord with the unvarying precedents in this state, which have ever followed the common law. 1 East, P. C. 279. The exception cannot be sustained.

4. The defendant contends that the court erred in instructing the jury "that, if the jury found there was a mutual affray between deceased and Cary, into which they both willingly entered, and during the progress of the fight Cary shot and killed deceased in the transport of passion aroused by the fight, but without malice, it would be no more than manslaughter; but, if Cary had satisfied the jury that he was without fault in entering the fight, and that he fired the fatal shot in self-defense agreeably to the principles governing this defense set out hereafter to acquit him." We see nothing in this instruction of which the defendant can reasonably complain. The charge of the court is very full, and presented clearly and fairly to the jury the defendant's plea of self-defense and the evidence in support of it. Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him. His plea of self-defense had been fully and fairly presented to the jury, and rejected by them as untrue. What then was the duty of the jury, if there was no evidence of manslaughter? Clearly under the law they should have convicted the defendant of murder in the second degree. How then can the defendant, his plea of self-defense having been wholly discarded by the jury, and the burden being upon him to reduce the offense to something less than murder in the second degree, reasonably complain of a charge, however erroneous in that respect, which permitted the jury to convict of a lesser degree of homicide? The appellant in all cases, civil as well as criminal, is not only required to show

error, but that he was injured by it. The deduction seems to us to be founded in the very logic of the law that evidence which is amply sufficient to support a conviction of murder must, of necessity, be sufficient to sustain a conviction of manslaughter. But independent of that, there are phases of the evidence which warranted a verdict for manslaughter, and not for murder, and therefore his honor's charge is unobjectionable.

There is evidence tending to prove that the quarrel was a "drunken brawl," started suddenly by an altercation over some gin; that the deceased whipped out his pistol and shot at defendant about the same time if not a little sooner than defendant shot at him; that the parties fought willingly, suddenly, and upon equal terms. This brings the case within those precedents which hold that if two men fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes manslaughter. *State v. Massey*, 65 N. C. 480; *State v. Hildreth*, 31 N. C. 429, 51 Am. Dec. 364; *State v. Brittain*, 89 N. C. 481; *State v. Ellick*, 60 N. C. 456, 86 Am. Dec. 442. Killing, the result of passion produced by fight, is manslaughter. *State v. Miller*, 112 N. C. 878, 17 S. E. 167; *State v. Crane*, 95 N. C. 619. It is further held that if a person upon whom an assault is made with violence resent it immediately by killing the aggressor, and act therein in heat of blood, and not exclusively in his own defense, it is manslaughter. *State v. Tuckett*, 8 N. C. 210; *State v. Roberts*, 8 N. C. 350, 9 Am. Dec. 643; *State v. Smith*, 77 N. C. 488; *State v. Barnwell*, 80 N. C. 466. There are phases of the evidence and reasonable inferences which may be drawn from it which support this theory. Again there is evidence tending to prove that while the defendant may have entered the affray unwillingly, and have fired at first in self-defense, yet he continued to fire, as is contended, unnecessarily. The defendant himself admits that he was the only person who shot deceased, and that he fired four times at him. There are circumstances in evidence which surround the occurrence from which it may be fairly inferred that the defendant's repeated firing was unnecessary, and possibly further wounded the deceased after the latter had ceased to fire and was disabled. It is well settled that if the defendant entered the fight in self-defense, and without malice used unnecessary force, which resulted in death, it is manslaughter, and that the question of excessive force is one peculiarly for the jury.

5. The defendant excepts because the judge read to the jury lengthy extracts from opinions delivered by this court in certain cases. We doubt the wisdom of such practice, as the language and reasoning of an opinion is generally based upon the facts of that particular case, and the facts may differ, but we are unable to see that any appreciable harm was done to the defendant by the extracts read as a part of his honor's charge in this case.

as they were of a very general character. The plea of self-defense, and the evidence in support of it, was put before the jury by the court with such clearness that the jury could not possibly have been misled by any of the extracts read to them. The jury having repudiated the defendant's plea of self-defense, he is fortunate, upon the evidence adduced, that he escaped with a conviction for manslaughter only.

Upon a review of the entire record we find no error.

WALKER, J. (concurring in result). My assent to the conclusion reached by the court in this case is based upon the opinion, which I entertain, that there is some evidence of manslaughter. I cannot concur in the view taken by the court in its opinion that a defendant in a criminal action can, under any circumstances, be convicted of, and punished for, an offense, where there is no evidence to support the verdict, even though the offense of which he is convicted may be embraced by the general charge in the indictment, and may therefore be considered by the jury where there is evidence that will sustain a conviction. It is said that if the jury rejects the defendant's plea of self-defense, they should convict him of murder in the second degree, if there is no evidence of manslaughter. Conceding this to be true, provided the jury have repudiated the plea of self-defense, as unsupported by evidence, why is it not equally true that, as we know the jury have acquitted the defendant of murder, either in the first or the second degree, they should have acquitted him entirely, if there had been no evidence of manslaughter. The conclusion that they should thus have acquitted him is indeed sustained by the better reason, for they have actually and certainly acquitted him of murder in any degree, and their refusal to acquit altogether may have been caused by the erroneous instruction of the court as to manslaughter. Can it be that, if there is no evidence of the offense, for which the defendant has been convicted, the verdict can be justified because he could have been convicted of a higher offense, and the jury has merely failed to acquit him? In a prosecution for a homicide, where the jury acquit of murder, there are only two other verdicts they can render, namely, guilty of manslaughter, or not guilty. If there is no evidence of manslaughter, is it not more accurate to say that they should acquit, or is there a rule of law that they may convict of manslaughter, even though there is no evidence of that offense, having been committed, merely because they could have convicted of the higher felony? I do not think so, and for this reason I am unable to concur in all that is said in the opinion of the court. I think that a conviction must be founded, not alone upon the charge preferred

in the indictment, but upon some evidence sufficient in law to establish it.

CONNOR, J., concurs.

(150 N. C. 385)

HARDY et al. v. WARD.

(Supreme Court of North Carolina. April 1, 1909.)

1. VENDOR AND PURCHASER (§ 18*)—OPTIONS—NATURE.

An option to sell land is a mere proposition by the owner to sell, which, until accepted, is unilateral.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

2. CONTRACTS (§ 169*)—CONSTRUCTION—EXTRINSIC CIRCUMSTANCES.

In construing a contract, if the language of the contract does not clearly express the intention of the parties, the character of the subject-matter and the circumstances surrounding the transaction must be considered in determining their intention.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

3. CONTRACTS (§ 155*) — CONSTRUCTION — AGAINST PARTY DRAIVING CONTRACT.

Where the language of a contract, given without consideration, was on a printed form, and its meaning was doubtful, it should be construed most strongly against the party who furnished the printed form and drew the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. § 155.*]

4. LOGS AND LOGGING (§ 3*)—CONSTRUCTION OF CONTRACTS — CONDITIONS — TENDER OF DEEDS.

Where the owner of standing timber gave an option, without consideration, to sell the timber within 30 days, the owner to at once prepare and execute deeds therefor when the purchaser signified his intention to exercise the option, the owner was bound to prepare and tender the deeds after notice by the purchaser that he accepted the option.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 9, 10; Dec. Dig. § 3.*]

5. SPECIFIC PERFORMANCE (§ 121*)—ACTIONS — EVIDENCE—SUFFICIENCY.

In an action to enforce specific performance of a contract to sell standing timber, by which the owner was to immediately prepare and tender the deeds upon the acceptance of the option, evidence held to show that the parties subsequently modified the contract so as to require the purchaser to prepare the deeds.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 394; Dec. Dig. § 121.*]

6. PRINCIPAL AND AGENT (§ 23*)—AUTHORITY — EVIDENCE.

In an action for specific performance of an option contract to sell standing timber, evidence held to show that the person who undertook to prepare the deeds was acting for the purchaser, and not for the owner, in doing so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

7. CONTRACTS (§ 248*)—MODIFICATION—QUESTION FOR JURY.

Whether a contract was modified by letters was for the court to determine, the letters containing all the evidence of the alleged modification.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1140; Dec. Dig. § 248.*]

8. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SUBMISSION OF ISSUES.

Error in submitting to the jury the question whether a contract was modified by certain letters was not prejudicial, where the jury correctly decided the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4215, 4216; Dec. Dig. § 1062*]

9. CONTRACTS (§ 299*)—PERFORMANCE—TIME—STRICT PERFORMANCE.

If the parties to a contract agree upon the time of performance, in the absence of waiver or those providential interventions which excuse strict performance, the courts will not relieve the parties from performance as agreed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1398; Dec. Dig. § 299*]

10. VENDOR AND PURCHASER (§ 78*)—CONSTRUCTION OF CONTRACT—TIME OF PAYMENT—TIME AS ESSENCE.

The equitable doctrine that time is not of the essence of executory contracts for the sale of land does not apply where, from the nature of the property or the surrounding circumstances, it would be inequitable to interfere with the contract as made, and would defeat the intention of the parties, as where the subject-matter of the contract is fluctuating in value and the vendee does not take possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 125; Dec. Dig. § 78*]

11. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—TIME OF PERFORMANCE.

Where one engaged in purchasing options on standing timber took, without consideration, an option to purchase timber within 30 days, by the terms of which he was to pay part of the price upon delivery of the deeds and the rest in installments, the deeds to be executed when the option was accepted, time was of the essence of the agreement, and the purchaser was bound to tender the cash payment and notes upon delivery of the deed, and, even in absence of any specific provision as to payment, the price would have to be tendered within the 30 days.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 9, 10; Dec. Dig. § 3*]

12. SPECIFIC PERFORMANCE (§ 13*)—CONTRACTS ENFORCEABLE—PERFORMANCE IMPOSSIBLE—PARTING WITH TITLE.

A contract for the purchase of standing timber could not be specifically enforced by the purchaser, where the owner had parted with title before suit was brought.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 31; Dec. Dig. § 13*]

13. SPECIFIC PERFORMANCE (§ 128*)—TIME AS ESSENCE OF CONTRACT—RECOVERY OF DAMAGES.

Where time was of the essence of an option contract to purchase standing timber, the purchaser must show strict performance with the terms of the contract as to time of payment, in order to recover damages for failure to convey, in an action for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 414; Dec. Dig. § 128*]

14. SPECIFIC PERFORMANCE (§ 57*)—OPTION CONTRACTS—AMBIGUITY—INTENT—CONSIDERATION.

An option contract to sell standing timber will not be specifically enforced unless it is unambiguous, understood by the parties, and based upon a valuable consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 178; Dec. Dig. § 57*]

Appeal from Superior Court, Duplin County; Ward, Judge.

Action by Caldwell Hardy, trustee, and others, against Maury Ward, to compel specific performance of a timber contract. From a judgment for defendant, plaintiffs appeal. Affirmed.

On December 22, 1905, defendant executed and delivered to plaintiff, trustee for the Carolina Timber Company, a paper writing whereby, in consideration of \$1, he sold the company "the right or option of purchasing from said party of the first part at any time within thirty days from the date of this agreement in fee simple and with general warranty, at the price hereinafter named, all the pine timber, ten inches in diameter.

* * * If the said company, its assigns or successors, shall avail themselves of this option and purchase said timber hereunder, then when they shall have so signified their intention of doing, the said party of the first part shall, at once, make, execute and acknowledge a good and sufficient deed with warranty to the said company, its assigns or successors upon compliance, by them, with the terms of sale as above prescribed," etc. The price to be paid for the timber was \$7,500, of which \$2,500 was to be paid "cash upon delivery of deed," the balance in five annual instalments of \$1,000 each, carrying interest from date. The contract contained provisions in regard to the time within which the timber was to be cut, not material to the decision of this appeal. The contract was signed by defendant, duly proven, and registered.

On January 9, 1906, the plaintiff's representative addressed to defendant the following letter: "This is to notify you that my company will exercise your option and I will be glad if you will assist Mr. Beasley in making up the deed. I talked to him over the phone today and told him to push your matter through at once. I am writing to Mr. Beasley, telling him to call on you to help him on your deed." Mr. Beasley was plaintiff's attorney.

On January 8, 1906, he wrote defendant: "I have been employed by the Carolina Timber Co. to trace your title and will thank you for any information as to books and pages where your deeds are recorded. You can look over your papers and it will save me lots of time." Defendant sent Mr. Beasley, "as per request," a list of deeds, dates, pages, and books of registration, etc., covering the lands included in the option. At the conclusion of the list he writes in regard to two tracts that he "can couple them without survey," saying: "Write me if you wish this done to facilitate writing deed. The only complications in title are on the Ira Robinson tract and J. C. Mills tract. This is not to conflict with closing option. I am to give security to indemnify the company in case of any legal restraint. Draw satisfactory papers for me to sign for that purpose." This

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

letter is without date. On January 12, 1906, Mr. Beasley wrote defendant asking information in regard to title to several tracts, and defendant answered the letter January 15th, saying: "I expect to straighten up the titles as opportunity affords, but wished to do so at suitable times. Draw such paper as is satisfactory to your company, and do not make it unreasonable, we wish them to have what they buy. * * * Hope you will be able to get papers ready soon." Mr. Beasley wrote defendant January 18th, and again on January 20th. In the last letter he said: "The Carolina Timber Co. requests me to write you that they will take your timber according to option as soon as you can furnish them a fee simple title to the same." On January 28, 1906, Mr. Beasley wrote defendant: "The Carolina Timber Co. is ready to pay you according to agreement and we are still standing by what we promised to do and we know you will do likewise. The money and notes are ready for you."

Defendant sold the timber to another purchaser January 23, 1906, for \$10,000. The plaintiff tendered money January 30th, and notes bearing date January 26th. Plaintiff sues for specific performance, and, if that cannot be had, for damages. Plaintiff excepted to the admission of the letters from Beasley to defendant.

His honor submitted the following issues to the jury:

"(1) Did the defendant enter into an agreement with the plaintiff of date December 22, 1905, as alleged in complaint?

"(2) Did the plaintiff signify their intention of availing themselves of the purchase under their option, and accept the terms thereof, during the 30 days mentioned therein?

"(2½) Did plaintiff make an offer to accept the option of December, 1905, as modified by the letter of Meyers dated January 9, 1906, and introduced in evidence, and, if so, did the defendant accept the modification made by said letter?

"(3) Were the plaintiffs willing and able to perform their part of the said contract after accepting terms of same prior to the 23d of January, 1906?

"(4) Has the defendant wrongfully broken the said contract and refused to execute deed thereunder as alleged in the complaint?

"(5) What damages, if any, are plaintiffs entitled to recover of the defendant?

"(6) Did the plaintiff tender purchase price before the expiration of 30 days?

"(7) Did the defendant tender deed before the expiration of 30 days?"

By consent, the sixth and seventh issues were answered "No." Plaintiff requested his honor to instruct the jury that, if they believed the evidence, they would answer the second issue "Yes." This was refused, and plaintiff excepted. The same request was made as to the third and fourth issues, which was refused, and plaintiff excepted. Plain-

tiff excepted to the submission of the issue numbered 2½. The court, by consent, answered the first issue "Yes," and instructed the jury that the burden of proof was on the plaintiff to establish the affirmation of the second issue, and that, if they had satisfied them that they accepted the terms of the contract within 30 days, to answer the issue "Yes." The jury answered the issue "No." On the issue numbered 2½ his honor instructed the jury that, if they were satisfied that plaintiff agreed that Beasley was to write the deed and plaintiff (defendant) consented to it, they would answer the issue "Yes," otherwise they would answer it "No." "If you find from the greater weight of the evidence that such acceptance as was made by the plaintiff was contained in the letter of Meyers dated January 9, 1906, and that defendant accepted the modifications contained in said letter and acted upon by them, you should answer the issue 'Yes.'" Plaintiff excepted. His honor instructed the jury that, if they answered the third issue "No," they should answer the fourth issue "No," and the fifth issue "Nothing." To this instruction plaintiff excepted. The jury answered the third and fourth issues "No," and the fifth issue "Nothing."

His honor rendered judgment for the defendant upon the verdicts, to which plaintiff excepted and appealed.

J. O. Carr, for appellants. Simmons, Ward & Allen, for appellee.

CONNOR, J. (after stating the facts as above). Eliminating immaterial matter, the verdict of the jury, read in the light of the pleadings and the evidence, discloses this case: Defendant on December 22, 1905, gave to plaintiff the right, or option, of purchasing at any time within 30 days "from the date of the agreement" the timber described in the contract, with the provision that, if the plaintiff should avail itself of the option "and purchase the timber" thereunder and should so signify its intention, the defendant should "at once make, execute and acknowledge" a deed for the timber and deliver the same to the plaintiff "upon compliance by it with the terms of sale"; that is, paying \$2,500 cash, and executing its notes for \$5,000, payable in five annual installments. On January 9, 1906, plaintiff signified its acceptance of the option by writing the letter of that date set out in the record. Subsequent to the receipt of that letter the correspondence between Mr. Beasley, plaintiff's attorney, and the defendant took place, concluding with the letter of January 20, 1906, and the sale of the timber by defendant January 23, 1906, to a third party. It is conceded that no deed was at any time tendered by defendant, and no money was tendered by plaintiff until January 30, 1906. Plaintiff's exceptions to the refusal of his honor to give the instructions asked and to the instructions given present the

questions, the solution of which are decisive of the appeal. Was the plaintiff required, by the terms of the option, to tender the money and notes within 30 days? Did the letter of January 9th modify the terms of the option and put upon plaintiff the duty of preparing the deeds for defendant to execute, and thereby relieve him of the obligation imposed by the contract to "at once make, execute and acknowledge" the deeds when plaintiff should signify its acceptance of the option?

The learned counsel for plaintiff insists that, by a proper construction of the paper writing, the "right or option" given plaintiff was to signify its purpose to buy within 30 days; that is, to enter into a contract of purchase for the land, as distinguished from a completed purchase, within the time named; that when, at any time within the 30 days, plaintiff signified its acceptance of the option, the relation of vendor and vendee was created, no time being fixed within which the money was to be paid and the deed executed; that, in this condition of the transaction, both parties were allowed a reasonable time to complete the trade. It is true that an option is a mere proposition on the part of the owner of the land to sell, and, until accepted by the person to whom it is made, is unilateral. We had occasion to consider the several definitions of the term, and the legal rights and liabilities growing out of it, in *Allston v. Connell*, 140 N. C. 485, 53 S. E. 292, and *Trogden v. Williams*, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867. We found a very satisfactory discussion of the duties imposed upon the person to whom the option is given in the opinion of Woods, J., in *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 8 L. R. A. 94. In that case the option was in the following words: "I am willing to sell my land * * * for the price of six dollars and twenty-five cents per acre cash; and the parties for whom Mr. H. are negotiating for said land shall have the privilege of buying said property at said price and on said terms, for sixty days, from the seventh day of June, 1883." After a very exhaustive discussion, with a wealth of authority, in regard to the general principles of law applicable to options, he says in regard to the one under consideration: "The period of 60 days from the 7th of June, 1883, mentioned in the option, within which plaintiff had the privilege of buying said land at the price of \$6.25 per acre cash, expired on the 6th of August, 1883. During the whole of that period, and during the whole of the said 6th of August, the plaintiffs had the privilege of converting the offer of John Burr into a valid and binding contract by an unconditional acceptance of and compliance with the terms thereof. They could not do so by any other acceptance, nor could they comply with said terms in any other manner than by actual payment or tender of the whole price

of the land before the 60 days expired. * * * It was their privilege to accept unconditionally and comply with the same by paying or tendering the cash within the 60 days, and thus secure to themselves the right to compel John Burr to perform his contract." In *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249, the option contained no reference to payment in cash, or otherwise. It was a simple proposition to sell within a fixed period, concluding: "If not accepted as provided, this agreement is null and void." The acceptance was by telegram. "Will take property. Meet me at Toronto first train." The court, distinguishing the case from *Weaver v. Burr*, supra, held that tender of the cash was not a condition precedent to the conversion of the option into a contract. Brannon, J., referring to *Weaver's Case*, said that the majority of the court "construed the cash payment in the option in that case as an act required by it to be done within the limit, the option having prescribed cash payment as part of the term; further providing that the parties should have the privilege of buying the property at said price and on said terms, for sixty days, thus including, as their judges thought, cash payment within the sixty days. But here cash is not mentioned. The only thing required to be done within the limit assigned by the option is acceptance." The learned justice quotes, with approval, the language of Prof. Pomeroy: "Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, where a mere acceptance is contemplated, or payment must be made, where payment was the act of acceptance contemplated at or before a specified date, then, of course, the act of assent or payment must be done within the prescribed time, and time is from the very form of the contract essential. If, therefore, a vendor agrees to convey, if payment be made, at or before a given date, or if an option is given which is to be accepted by payment within a given time, then the time of payment is certainly essential; in fact, payment is a condition precedent to the vesting of any right in the vendee." Contracts, § 387.

With these general principles and two well-considered opinions to aid us, we inquire what, in the light of the facts in this case, duty was imposed upon the plaintiff to entitle it to demand specific performance of the option, or to bring it into contractual relations with the defendant? If the language used does not clearly express the intention of the parties, we must have regard to the character of property with which they were dealing, the conditions by which they were surrounded, and other circumstances throwing light upon the transaction. It must be noted that the subject-matter of the transaction was standing timber, and not the land itself. We may also note, as appears from the nu-

merous appeals in this court and the recent history of the increasing demand with rapidly increasing value of standing timber, that it would be unreasonable to suppose that the defendant intended to "tie up" his valuable timber without any consideration paid by plaintiff for an almost indefinite time, and, by the simple notice of an acceptance, to come under a contractual obligation in which time was not "of the essence." It is in evidence that plaintiff had several "buyers" of timber in the section, and that the contracts were drawn by it, usually a printed form, which persons agreeing to sell timber were called upon to sign. The plaintiff assumed no obligation and paid nothing for the option, the recited consideration being \$1. If the language used in the option is of doubtful meaning, it should be construed most strongly against the plaintiff. The option given is "the right of purchasing" within 30 days. In *Weaver's Case* the option gave "the privilege of buying." We can perceive no substantial distinction between cases in this respect. If other language does not modify that which we have quoted, we should hold that the plaintiff acquired, by the option, the right to purchase the timber by tendering the cash and notes within 30 days. This would, we think, effectuate the intention of the parties, closing the transaction within the time fixed. The further provision, however, clearly shows that the money was to be paid and the notes tendered "upon delivery of the deed," and the defendant was to "make, execute and acknowledge" the deed "at once"—when the plaintiff signified that it would avail itself of "the option and purchase said timber." This language imposed upon the defendant the duty of making—that is, preparing, executing, and tendering—the deed before the plaintiff was required to tender the money.

It is clear that, as the contract was drawn and executed, the defendant was under obligation to prepare and tender the deed after notice that plaintiff desired to "exercise the option." Did the letter of January 9, 1906, modify or change the obligation of the parties in this respect? The answer to this question is dependent upon the construction placed upon the letter of January 9th and the subsequent correspondence between plaintiff's attorney, Mr. Beasley, and defendant. In the letter of January 9th, plaintiff says: "I will be glad if you will assist Mr. Beasley in making up the deed. * * * I told him to push your matter through at once. I am writing to Mr. Beasley telling him to call on you to help him on your deed." This language is a clear expression of a purpose on the part of plaintiff that its attorney will write the deed. Mr. Beasley put this construction upon the terms of his employment by plaintiff. On January 8th, a day prior to the letter of plaintiff to defendant, he writes defendant: "I have been employed by the

Carolina Timber Co. to trace your title"—asking him to send information, in regard to his deeds, etc. Defendant complies with the request, sending memorandum of dates, books, pages, etc., of registered deeds. He calls attention to complications in title of two tracts, but says: "This is not to conflict with closing option. I am to give security to indemnify the company in case of any legal restraint. Draw satisfactory papers for me to sign for that purpose." On January 15th defendant writes in regard to details, concluding: "Hope you will be able to get papers ready soon. If you wish further, kindly advise me." The letter dated January 20th appears to have been "postmarked" at Kenansville, "January 24, 6 A. M. 1906," and at Rose Hill, its destination, "January 24 9 A. M. 1906." Plaintiff says that he received it January 24th. He says: "I told him on the 20th that I wanted to close the matter. * * * Plaintiff had not notified me before then that it would approve and accept title contract."

Mr. Arringdale, a witness for plaintiff, says that he was with defendant one week before the expiration of the option, and he acknowledged that he had sold the timber to plaintiff. That he told defendant that Beasley would help him, and that we were ready to close up the transaction—to get his papers ready—said he would do so right away.

Mr. Meyers, who wrote the letter of January 9th, testified that he got the money and notes "three or four days after the option was out. * * * Beasley was our attorney. There was strong competition in this community for purchase of timber. This was not usual form, but was one of Camp Manufacturing Company's options."

Plaintiff insists that Mr. Beasley was defendant's attorney to draw the deed, and that, therefore, the letters are not competent evidence against it. We do not concur in this view. Plaintiff's witness Meyers, who wrote the letter of January 9th, expressly says, "Mr. Beasley was our attorney." The entire evidence is consistent with this statement. Plaintiff insists that his honor should not have submitted issue numbered 2½ to the jury, but should have construed the letters and held, as a conclusion of law, that they did not modify the contract. We incline to plaintiff's view in this respect; but if the jury have decided the question, construed the letters correctly, there is no prejudicial error in the course pursued by his honor. It is elementary that, if a question of law be submitted to the jury and they decide it correctly, the error is cured by the verdict. If the letter of January 9th so modified the original contract or option as to relieve the defendant of the duty of preparing the deed and imposed upon the plaintiff that duty, it is conceded that no deed was prepared or tendered. The parties evidently understood that, notwithstanding the terms of the original option con-

tract, Mr. Beasley was to prepare the deeds and the contract of indemnity. We do not find any evidence tending to show a failure on the part of defendant to furnish to him the information necessary to do this. His letter giving information, while not dated, was evidently written upon receipt of, and in reply to, the letter from Mr. Beasley of January 8th. Mr. Beasley acknowledged receipt of this letter on January 12th, saying that he had "traced up most of your titles." He makes inquiry about title to several tracts. Defendant answers on the 15th of January, giving details, and concluding, "I believe this covers your questions." He explains that all of the titles are clear except two tracts, and he had before written Mr. Beasley that the complications in regard to them were not to delay closing the transaction; that he was to give indemnity to plaintiff. We think that the letters show that plaintiff's attorney was to prepare the deeds, and that on January 22, 1906, defendant was not in default in closing the transaction. The jury found that the acceptance of the option by plaintiff was subject to the modification in this respect; we concur in this conclusion. That time was of the essence of the contract was recognized by both parties, and we think correctly so. If the parties agree upon a day of performance, in the absence of waiver, or those providential interventions recognized as sufficient to relieve them from strict performance, the courts are not permitted to do so. The equitable doctrine that, in executory contracts for the sale of land, time is not of the essence, is subject to well-defined exceptions. Among the circumstances which will take a contract out of the operation of the doctrine, are "the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right." Bispham, Eq. 391. Among the contracts mentioned by Mr. Bispham which, by reason "of the subject-matter," are exceptions to the doctrine, are contracts for sale of "trades or manufactories and mines." He further says: "As to 'surrounding circumstances' which may render time of the essence of the contract, they must, of course, depend upon the facts of each particular case; such as whether the value of the property has greatly diminished; whether the vendee has bought to sell again; and so forth. Indeed, in this country, the fact that land bears a much more commercial character than it does in England, is subject to more fluctuations and has more of a speculative value, has led to not a few expressions of judicial opinion that time ought, as a general rule, to be considered as of the essence of a contract. But, perhaps, the safest statement of the law is that the general rule is the same in the United States as in England, but that exceptions growing out of the circumstances of the individual

transaction are more numerous and looked upon with more favor." Bispham, 394.

It will be found, we think, upon examination of our Reports, that the equitable doctrine has usually been applied to cases when, upon the execution of a bond for title by the vendor and a bond for the purchase money by the vendee, the latter has been let into possession of the land, and both parties, by their conduct, have acquiesced in the status quo, notwithstanding the lapse of time. This was the case in *Falls v. Carpenter*, 21 N. C. 237, 28 Am. Dec. 592, followed in *Scarlett v. Hunter*, 56 N. C. 84, Pearson, J., saying: "When there is a contract for the sale of land, the vendee is considered, in equity, as the owner, and the vendor retains the title as security for the purchase money. He may rest satisfied with this security as long as he chooses, and, when he wants the money, he has the same right to compel payment, by a bill for a specific performance, as the vendee has to call for title." In such cases "it is taken for granted that the parties are content to allow matters to remain in statu quo until a movement is made by one side or the other." The reason upon which these, and similar cases, are decided, fails when the subject-matter of the contract is standing timber, mines, or property of which the vendee is not let into possession and the value of which is fluctuating. While we do not question the wisdom or justice of the doctrine which has received the sanction and approval of the chancellors for centuries, we do not think that it should be extended so as to include contracts which, on account of the subject-matter, surrounding circumstances, etc., its application would defeat the intention of the parties and subject property to unreasonable burdens not in contemplation of the owners when entering into the contract or giving an option. While the courts will not unduly restrict the freedom of contract, or constitute themselves guardians for the owners of such property by refusing to enforce the execution of contracts fairly made, free from obscurity, the terms of which are understood by the parties, we cannot fail to see from the records of this court that by printed contracts skillfully drawn, sometimes of difficult construction, valuable property rights are disposed of and burdens of uncertain extent and more uncertain duration are imposed upon lands. When the enforcement of these contracts is sought by appeal to the equitable powers of the court, a due regard to the rights of parties and the conservation of one of the most valuable natural resources of the state imposes upon us the duty of requiring that the contract shall be free from ambiguity, understood by the parties, and based upon a valuable consideration. In this case it is manifest that specific performance cannot be had, because the defendant has parted with his title before

the suit was instituted. Recognizing this difficulty, plaintiff asks for damages. In this aspect of the case, there being no equitable element, it must allege and prove strict performance of the contract on its part according to its terms as modified. This it cannot do. We have given the record and the carefully prepared argument of counsel a careful consideration, and are of the opinion that there is no reversible error. Let this be certified.

No error.

(150 N. C. 431)

SYKES v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. April 7, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 54*)—MESSAGES—DELIVERY—NEGLIGENCE—CLAIMS—PRESENTATION.

A provision of a telegraph company's contract for the transmission of a message that any claim for failure to properly transmit the same must be presented within 60 days after the filing of the message for transmission or be barred is valid.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 42; Dec. Dig. § 54.*]

2. TELEGRAPHS AND TELEPHONES (§ 54*)—MESSAGES—NEGLIGENT TRANSMISSION—CLAIMS—FILING—TIME.

Where a person, alleged to have been injured by a failure to deliver a death message within a reasonable time, failed to present any claim for damages within 60 days after knowledge of the nondelivery of the message, as required by the terms of a contract under which the message was transmitted, his right to recover was barred, notwithstanding the telegraph company was guilty of inexcusable negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 42; Dec. Dig. § 54.*]

Appeal from Superior Court, Durham County; Long, Judge.

Action by N. R. Sykes against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Benj. Lovenstein and Manning & Foushee, for appellant. F. L. Fuller and Tillett & Guthrie, for appellee.

WALKER, J. This action was brought to recover damages for mental anguish alleged to have been caused by the negligent failure of the defendant to deliver a death message. Plaintiff's wife was critically ill, and his brother, J. W. Sykes, in his own name, but as agent for the plaintiff, N. R. Sykes, delivered a telegram to the defendant at Durham, N. C., to be sent to Caze Cates at Haw river, N. C., for the purpose of informing the plaintiff's two sisters of his wife's condition, though their names were not mentioned in the message, nor was the defendant's operator notified that it was sent for that purpose. The message, which was sent on December 6,

1907, was not delivered, but on December 7, 1907, the plaintiff learned of its nondelivery. This action was commenced March 13, 1908. The contract with the company required that the plaintiff should present his claim within 60 days after the filing of the message for transmission, or be barred of a recovery. It was admitted that no claim had been presented, although the plaintiff knew of the defendant's default more than 60 days before this action was commenced. At the close of the evidence the court, on motion of the defendant, nonsuited the plaintiff under the statute, and he appealed. The validity of the stipulation as to presenting the plaintiff's claim within 60 days, after knowledge of the nondelivery of the message has been received by him, is too well settled now to be questioned. "The object of the requirement is to give the company cognizance of facts creating the liability, in order that it may use these for investigating the cause of the loss or injury. It is impossible for these companies to keep up with all mistakes of their employes, and the injuries arising therefrom; and, while they may be clearly liable for claims presented—and for which they would readily, without suit, indemnify the injured party—yet, if they have no facts on which to base an investigation in order to determine whether they are liable, they would very probably be heavily taxed with an expensive litigation. So, if the plaintiff has good grounds to recover damages, he should impart these facts to the company, in order to avoid litigation." Jones on Telegraph & Telephone Companies, p. 380, § 395. The object, therefore, in requiring notice of the claim is to enable the company to ascertain whether it is liable for the damage. This stipulation, exempting the company from liability where the claim for damages is not presented in 60 days, is not a condition restricting its liability for negligence; nor is it in the nature of a provision limiting the time within which an action may be commenced, and therefore having the force and effect of the statute of limitations. We have so held in *Sherrill v. Telegraph Company*, 109 N. C. 527, 14 S. E. 94. In that case the court, by the present Chief Justice, after deciding in favor of the validity of the stipulation, says: "If, therefore, the action was begun within 60 days after knowledge by the plaintiff of the failure to deliver the message, it would be such compliance with the stipulation as could be required in a case where a message was not delivered at all. If not brought within such time, the plaintiff is barred by his own negligence in not presenting his claim within the specified time." It is admitted in the case, and was also admitted here at the bar, that the action was brought more than 60 days after the plaintiff had acquired knowledge of the nondelivery of the message, and, under the authority of that decision, this action cannot be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

maintained. The court properly ordered a nonsuit to be entered. It is so expressly decided in *Lewis v. Telegraph Company*, 117 N. C. 436, 23 S. E. 319. The defendant was guilty of inexcusable negligence in this case, but the plaintiff's failure to comply with a plain and valid stipulation, requiring notice of his claim to be given, has forfeited his right to recover against the defendant even for its gross violation of duty.

No error.

(150 N. C. 372)

CLARK et al. v. SACO-PETTEE MACH. CO.
et al.

(Supreme Court of North Carolina. April 1, 1909.)

1. APPEAL AND ERROR (§ 956*)—DISCRETION OF TRIAL COURT — PERMITTING FURTHER PLEADINGS.

The refusal of the trial judge to reopen a case and permit answers to be filed long after the time for pleading has expired will not be reviewed in the absence of evidence of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3810; Dec. Dig. § 956.*]

2. JUDGMENT (§ 10*)—CONFIRMATION—POWERS OF JUDGE IN VACATION.

A judge of the superior court may, by consent of parties, hear motions for confirmation of a sale under decree of court and enter judgments out of term and in another county than the one wherein the cause is pending.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 10.*]

3. JUDGMENT (§ 329*)—CORRECTION.

Where the court, having full jurisdiction of the subject-matter of the action and of the parties, ratified and affirmed, without exception by them, a decree and order of sale theretofore made in writing and spread on the minutes of the court, whether such decree when originally made was void or voidable for lack of jurisdiction to make it at the time and place where it was made was immaterial; the effect being the same as if it had been rewritten and re-entered.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 329.*]

Appeal from Superior Court, Lee County; Long, Judge.

Action by David Clark and others against the Saco-Pettee Machine Company and others. From the decree, defendants appeal. Affirmed.

See, also, 63 S. E. 153.

This is a proceeding brought under section 1199 of the Revisal of 1905 for the dissolution and settlement of the Eugenia Manufacturing Company, a corporation heretofore doing business in that portion of Moore county, N. C., now within the county of Lee. The creditors of the corporation are named as defendants in the proceeding. The action was originally instituted in the superior court of Moore county and afterwards removed to the county of Lee. A. W. Graham was duly appointed receiver of the said corporation. On the 8th day of April, 1908, an order of sale and decree of foreclosure of a deed

of trust securing the bonded indebtedness of the corporation was made by Jones, Judge, at chambers in Richmond county. This decree was filed in the superior court of Moore county on April 8, 1908. The property was not sold as appears by report of the receiver to the April term, 1908, of said court, and another decree was entered, which refers to the first-named decree as follows: "And said decree is hereby in all other matters affirmed." The only modification made was in appointing another day of sale. It appearing that April term was a criminal term, and the property not having been sold, another decree was entered at May term, 1908, of the superior court of Moore county, as follows: "This cause coming on to be heard at the May term, 1908, of the superior court of Moore county, before his honor, E. B. Jones, judge presiding, and it appearing to the court that all creditors and stockholders of the Eugenia Manufacturing Company have been made parties to this action, and that no answer nor demurrer has been filed to the complaint therein, and that an order of sale has heretofore been made of the real and personal property of the said Eugenia Manufacturing Company, which was affirmed at the April term, 1908, of this court, and it appearing to the court that said April term, 1908, of this court was for the trial of criminal cases only, with the right to take judgment in civil actions when a jury trial was not required: Now therefore, upon motion of Walter Clark, Jr., and W. A. Devin, attorneys for the plaintiff and the receiver, it is ordered that the order of sale heretofore made in this case be, and the same are. In all things confirmed, and it is further ordered that this cause be removed to the county of Lee, and it is further ordered that in the event said receiver shall be of the opinion that it is to the interest of the creditors of the said Eugenia Manufacturing Company that the said sale be postponed to the first Monday in August, he is hereby authorized to postpone said sale. E. B. Jones, Judge Presiding."

On the 3d day of August, 1908, the receiver sold said property of the Eugenia Manufacturing Company at public auction, and on the 3d day of August, 1908, in the office of the superior court of Lee county, filed his report of sale. Answers were attempted to be filed on August 17, 1908, by certain creditors, which were ordered to be stricken from the record as having been filed without leave after time for pleading had expired. This feature of the case was considered by the superior court, in an opinion 63 S. E. 153. At August term, 1908, of the superior court of Lee county, the motion to confirm the sale was made and resisted by certain creditors by their attorneys, whereupon his honor, Judge Long, presiding, made an order by consent as follows: "This cause coming on

to be heard before his Honor, B. F. Long, judge presiding, upon motion and consent of the parties, it is ordered that all motions in the cause be continued to be heard by the court at Monroe, N. C., in the Eighth judicial district on Thursday, the 3d day of September, 1908." It appears from the findings of Judge Long recited in his subsequent decree that on account of high water prevailing in the district, by consent of the parties, the cause was again continued to be heard on Wednesday, the 9th of September, 1908, of the superior court of Richmond county in pursuance of the above-recited order made at August term of the superior court of Lee county. The cause was heard at Rockingham, Richmond county, on the date agreed by consent, all parties being present, at which time Judge Long made an elaborate decree reciting all prior orders and decrees in the cause, and confirming the sale of the property, and directing title to be made, and distributing the proceeds of sale, and applying the same in accordance with the original decree of sale made by Judge Jones. To this decree the defendants, creditors, excepted and appealed.

A. A. F. Seawell and K. R. Hoyle, for appellants. Womack & Pace and Aycock & Winston, for appellees.

BROWN, J. (after stating the facts as above). We think the exception to the ruling of his honor at August term, 1908, refusing to open the case and permit answers to be filed traversing certain allegations of the complaint and praying for affirmative relief, cannot be sustained. It was within the sound discretion of the judge below to open the case at that late day and set aside the sale and allow the answers to be filed, but his discretion was exercised against the defendants and is not reviewable by us, certainly not when there is no evidence that such discretionary power has been abused. The parties, having slept on their legal rights, forfeited them, and as they failed to convince the judge below that he should exercise his discretion in their behalf, this court cannot now help them. The matter we think was practically disposed of by us at last term (63 S. E. 153), when we held that the answers, having been filed in the papers in the case without authority of the court and long after time for pleading had expired, were properly ordered to be stricken from the official records.

It is contended by the defendants, in excepting to the decree of confirmation, that his honor had no jurisdiction to render such decree after the term had expired and outside of the county of Lee. We would have no hesitation in holding with the defendants but for the finding by the judge that all parties consented that the matter should be

heard and determined while the judge was in the district at Union county, and, the parties being unable to reach Union court, by consent the matter was heard at Richmond court, and the decree of confirmation was then rendered. It is well settled that by consent of parties a judge of the superior court may hear such motions and enter judgments out of term and in another county than the one wherein the cause is pending. *Bank v. Perego*, 147 N. C. 296, 61 S. E. 68; *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170; *Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793.

It is further contended that the court should have ordered another sale as the original decree was rendered by Jones, Judge, in Richmond county at Chambers, and that such decree was void ab initio. It is possible that the decree of April 8th, rendered outside of the county of Moore, where the cause was then pending, was of such a sweeping character as to constitute something more than a mere direction to a receiver to sell property, and that under *Bank v. Perego*, supra, the judge had no jurisdiction to render it at chambers in Richmond county except upon a consent hearing; but this decree was ratified and adopted by the court in term time in April and again in May in Moore county before the cause was removed to Lee county. At the May term the defendants had been brought in and had been made parties and were before the courts and took no exception to the decree then rendered. This decree undertakes to ratify and affirm the decree of April 8, 1908, and also the decree of April term, not only as to the order of sale contained in the decree, but declares that said decrees "are in all things confirmed." Having full and complete jurisdiction at May term over all the parties as well as the subject-matter of the action, Judge Jones adopted and again promulgated the decree he had formally made in Richmond county. This the judge had the right to do, and the legal effect is the same as if he had rewritten and again signed and entered the Richmond decree in eisdem terminis. No answers were filed at that time, no issues raised, and there was no reason why the decree should not have then been rendered. In this view of the case it is immaterial to consider whether the Richmond decree of April 8th was absolutely void or only voidable. It was in writing and spread on the minutes of the court, and the decree of May term gave it vitality by reference to it as much so as if it had been copied in the May decree. *Id certum est quod certum reddi potest.*

This conclusion at which we have arrived, after a full investigation of the record, we think disposes of every assignment of error.

The judgment of the superior court rendered by his honor, Judge Long, is affirmed.

CLARK, C. J., not sitting.

(150 N. C. 789)

**CLARK et al. v. CROMPTON & KNOWLES
LOOM WORKS et al.**

(Supreme Court of North Carolina. April 1, 1909.)

Appeal from Superior Court, Lee County; Long, Judge.

Proceeding by David Clark and others against the Crompton & Knowles Loom Works and others for dissolution of the corporation. From the decree, defendants appeal. Affirmed.

A. A. F. Seawell and K. R. Hoyle, for appellants. Womack & Pace and Aycock & Winston, for appellees.

PER CURIAM. The matters presented upon this appeal are the same as are involved in the case of David Clark, the Eugenia Mfg. Co. et al. v. Saco-Pettee Machine Co. et al., 64 S. E. 178.

The assignments of error are covered by and disposed of in the opinion of Justice Brown, delivered for the court in that case at this term. Affirmed.

CLARK, C. J., not sitting.

(150 N. C. 298)

**MELVIN v. PIEDMONT MUT. LIFE INS.
CO.**

(Supreme Court of North Carolina. April 7, 1909.)

1. INSURANCE (§ 349*)—NONPAYMENT OF PREMIUMS—FORFEITURE.

Under a policy stipulating that on the failure of insured to pay the weekly premiums for five weeks all claims on insurer are, by such arrears, forfeited, the failure of insured to pay weekly premiums for five weeks operates as a forfeiture of his rights.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 900; Dec. Dig. § 349.*]

2. INSURANCE (§ 365*)—NONPAYMENT OF PREMIUMS—FORFEITURE—REINSTATEMENT.

A partial payment of arrears of premiums by insured in a policy stipulating for a forfeiture for nonpayment of weekly premiums for five weeks and for reinstatement on payment of all dues, etc., does not work a reinstatement, in the absence of an agreement to that effect.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 365.*]

3. INSURANCE (§ 365*)—NONPAYMENT OF PREMIUMS—FORFEITURE—REINSTATEMENT.

Where a life policy provided for a forfeiture for nonpayment of weekly premiums for five weeks, and authorized the reinstatement of insured on his paying all back dues, provided he was in good health and so remained for five weeks thereafter, insured, who paid his dues in arrears and died two days later, was not reinstated.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 365.*]

Appeal from Superior Court, Cumberland County; Biggs, Judge.

Action by Charles Melvin, by his next friend, R. L. Melvin, against the Piedmont Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

At the close of plaintiff's evidence there was motion for nonsuit, under the Hinsdale act (Revisal 1905, § 539), motion overruled, and defendant excepted. The case was submitted to the jury on issues as follows:

"(1) Did the insured fraudulently misrepresent his age in the application for the policy in controversy? Ans. No.

"(2) Is the defendant indebted to the plaintiff, and, if so, in what amount? Ans. Yes, forty-five dollars, the amount of the policy."

Sinclair & Dye, for appellant. Thos. H. Sutton, for appellee.

HOKE, J. The policy declared on contains a stipulation, made a part of the contract of insurance, in terms as follows:

"(5) Whenever the insured shall fail to pay the weekly premium on this policy for five weeks and shall be due five weeks' premium, all claims on the company are by such arrears forfeited. But the insured may be reinstated by paying up all back dues, and shall be entitled to full benefits sixty days from date of paying such dues; provided the insured shall be in good health when such dues are paid and for five weeks thereafter."

There was evidence showing that, on January 18, 1908, the deceased was indebted for six weeks' unpaid weekly dues and premiums, and on that day he paid four weeks of such arrears, which was received by the agent and by him turned over to the superintendent, who entered the same on the company's books to the credit of the insured; and, on the 20th of January, 1908, the insured died.

The court below was of opinion that the plaintiff was entitled to have the issue of defendant's liability submitted on the question of waiver, by reason of the payment of the four weeks' back dues, and the receipt of same by the company, but we do not think this is a correct view of the case on the facts presented. By the terms of the contract, "on a failure to pay the weekly premiums for five weeks, all claims on the company are by such arrears forfeited," and, at the time the payment on these six weeks of back dues was made, the rights of the insured under his policy had ceased. *Freckmann v. Royal Arcanum*, 96 Wis. 133, 70 N. W. 1113; *Supreme Lodge v. Keener*, 6 Tex. Civ. App. 267, 25 S. W. 1084; *Carlson v. Supreme Council*, 115 Cal. 466, 47 Pac. 375, 35 L. R. A. 643. While provision for reinstatement is contained in the policy, the stipulation is that such reinstatement shall occur on the payment of "all back dues"; and the authorities are very generally to the effect that, under such a stipulation, a partial payment of back dues will not work a reinstatement. *Continental Life Ins. Co. v. Willets*, 24 Mich. 268; *Hudson v. Insurance Co.*, 28 N. J. Eq. 167; *Supreme Lodge v. Oeters*, 95 Va. 610, 29 S. E. 322. Certainly no such result could be allowed unless there was evidence of some understanding or authorized agreement to that effect. Apart from this, by the express provisions of the contract, a reinstatement is only to occur after 60 days from paying the back dues, and on condition that the insured shall be in

good health when such dues are paid, and for five weeks thereafter. He died in two days after the partial payment was made.

We are of opinion that the defendant's motion for nonsuit should have been allowed, and it is so ordered.

Reversed.

(150 N. C. 419)

HOOKFIELD v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. April 7, 1909.)

1. EVIDENCE (§ 271*)—ADMISSIBILITY.

Where the paragraphs of the answer put in evidence by plaintiff were complete in themselves, the court properly excluded distinct averments in defendant's own interest when offered by him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1101; Dec. Dig. § 271.*]

2. PRINCIPAL AND AGENT (§ 178*)—EXISTENCE OF RELATION.

A transfer company in the habit of hauling goods for a consignee and others in a town is only the agent of the consignee, as concerning notice to the agent as to goods actually hauled.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 680, 681; Dec. Dig. § 178.*]

3. PRINCIPAL AND AGENT (§ 178*)—NOTICE TO AGENT.

Where, in an action against a carrier for its failure to notify the consignee of the arrival of freight and the charges thereon, it appeared that a transfer company was in the habit of hauling goods for the consignee and others, but there was no evidence that the company was told to haul the freight in question, evidence of notice to the transfer company of the arrival of the freight was properly excluded, in the absence of proof that such notice, if given, was communicated to the consignee.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 680, 681; Dec. Dig. § 178.*]

4. PLEADING (§ 248*)—AMENDMENTS—DISCRETION OF COURT.

Where the original complaint in an action against a carrier demanded judgment for the value of goods received for transportation but not delivered, and for the penalty provided in Revisal 1905, § 2632, an amendment alleging that the carrier failed to notify plaintiff of the arrival of the goods and the charges thereon, as required by section 2633, and demanding the penalty imposed by the section, did not state a cause of action different from that set up in the original complaint, and the allowance of the amendment was in the discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

5. COMMERCE (§ 33*)—INTERSTATE COMMERCE.

Where goods received by a carrier for transportation from a point outside of the state to a point within the state were misssent, and the carrier rebilled the goods from a point in the state to the point of destination over the line of another carrier, which received and transported the goods, the transportation by the latter carrier was not an interstate shipment.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.*]

6. COMMERCE (§ 33*)—INTERSTATE COMMERCE—INTERFERENCE BY STATES.

Revisal 1905, § 2633, requiring a carrier to inform the consignee of the freight charges and to deliver the freight on tender or payment of the charges, subject to a penalty for failure to do so, is not invalid as interfering with interstate commerce, a failure to deliver freight not being interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.*]

7. APPEAL AND ERROR (§ 959*)—DISCRETION OF TRIAL COURT—REVIEW.

The refusal to permit defendant to amend his answer so as to plead the statute of limitations, being a matter of discretion for the trial court, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

8. CARRIERS (§ 191*)—ACTION FOR NONDELIVERY OF FREIGHT—COUNTERCLAIM FOR WAREHOUSE CHARGES.

A carrier, wrongfully withholding and refusing to deliver freight, when sued therefor cannot counterclaim for warehouse charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 878; Dec. Dig. § 191.*]

Appeal from Superior Court, Durham County; E. B. Jones, Judge.

Action by S. Hockfield against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was a civil action instituted before a justice of the peace. The plaintiff did not file any written complaint. The summons required the defendant "to answer the complaint of plaintiff for the nonpayment of \$200 and interest from August 21, 1907, until paid, \$97, value of box of pants shipped him by Manhattan Pants Company, and \$103, penalty for delay in such case provided in section 2632, Revisal of 1905."

The defendant filed a written answer in the justice's court denying that it was indebted to plaintiff, and set up a counterclaim for \$25 for storage of the box of pants. The justice gave judgment for \$93, value of the goods, and \$50. The case was carried by appeal to the superior court. The plaintiff was allowed to amend and allege that "the defendant received at Durham, N. C., the box of pants addressed to plaintiff at Durham; that the defendant, upon the arrival of said box of goods so addressed to plaintiff as consignee, failed to notify plaintiff of its arrival and the charges thereon, as required by section 2633 of Revisal of 1905, and for such failure demands the sum of \$50, as penalty imposed by said section 2633 of Revisal of 1905."

The jury responded to the issues as follows: "(1) What is the value of the case of pants shipped to plaintiff? Ans. \$93. (2) Did defendant unlawfully refuse to deliver the case of pants to plaintiff? Ans. Yes. (3) Did defendant, upon the arrival of the case of pants, notify plaintiff, the consignee, of the arrival and the charge for transportation upon the same? Ans. No. (4) What damage,

if any, by way of penalty, is plaintiff entitled to recover of defendant? Ans. \$50. (5) What amount, if anything, by way of counterclaim for storage is defendant entitled to recover of the plaintiff? Ans. Nothing." Judgment accordingly. Appeal by defendant.

Guthrie & Guthrie, for appellant. Manning & Foushee, for appellee.

CLARK, C. J. The plaintiff introduced two of the four paragraphs of the answer filed before the justice of the peace. The defendant offered the other two paragraphs. In *Lewis v. Railroad*, 132 N. C. 382, 43 S. E. 919, it is said: "Where a paragraph of an answer admits a specific fact, and in another part of the same paragraph denies the allegations of the corresponding paragraph of the complaint, the plaintiff is entitled to introduce the admission without introducing the part denying the allegations of the complaint." Here the paragraphs of the answer put in evidence by the plaintiff were complete in themselves, and it was not error to exclude the distinct averments in its own interest made by the defendant. It could put on evidence in support of them at the trial. *Stewart v. Railroad*, 136 N. C. 385, 48 S. E. 793.

A transfer company was in the habit of hauling goods for plaintiff and others, but that only made it the agent of plaintiff as to goods actually hauled. There was no evidence that the transfer company was told to haul these goods, and it was not error to exclude a question asked of an agent of such transfer company to show notice given to him of plaintiff's goods being in the depot, when there was no evidence that such notice, if given, was communicated to the plaintiff. The plaintiff testified that he applied for the goods in person repeatedly.

The court allowed the plaintiff to amend its complaint, and the defendant to amend its answer, but not to plead the statute of limitations. The amendment did not set up a cause of action wholly different, but merely amended complaint to claim the penalty of \$50 under Revisal 1905, § 2633. Such amendment was in the discretion of the court, as was also the refusal of an amendment pleading the statute of limitations. *Parker v. Harden*, 122 N. C. 111, 28 S. E. 962; *Goodwin v. Fertilizer Co.*, 123 N. C. 162, 31 S. E. 373.

The fourth exception is abandoned. The fifth exception presents the contention that this is an interstate shipment, and that Revisal, § 2633, does not apply. It is true that the shipment originated at Baltimore, Md., but it seems to have gotten "missent" and left its route, which was via Dunn, N. C., thence over Durham & Southern Railroad to Durham, N. C. The defendant's answer avers that by reason of said error or mistake the A. C. L. Railroad Company "rebilled" the goods

from Selma to Durham over defendant's line, and that it received and transported the goods by virtue of said Selma to Durham, B/L, and that the original waybill or B/L from Baltimore to Durham never came into its possession. Clearly this is an intrastate matter. But if it had been an interstate transaction, the penalty imposed by Revisal, § 2633, has nothing to do with interstate transportation, but deals only with the neglect of duty of the defendant after the transportation was fully completed and the goods lay in its warehouse, not in the cars, at Durham. The plaintiff demanded his goods again and again, but the defendant would not make out its freight charges nor deliver the goods. The penalty laid by Revisal 1905, § 2633, has been held not a burden on interstate commerce (*Harrill v. Railroad*, 144 N. C. 532, 57 S. E. 388), and indeed the failure to deliver freight is not interstate commerce (*Morris v. Express Co.*, 146 N. C. 171, 59 S. E. 667, 15 L. R. A. [N. S.] 983).

Exception 6 is for refusal to permit defendant to amend answer so as to plead the statute of limitations. This was a matter of discretion, and not reviewable.

The defendant still has the goods, and the plaintiff has been sued by consignor and been forced to pay their value, with court costs added. There is no possible ground for defendant's counterclaim for warehouse charges on goods it wrongfully withheld and refused to deliver.

No error.

(150 N. C. 837)

STATE v. ROBERSON.

(Supreme Court of North Carolina. April 7, 1909.)

1. HOMICIDE (§ 146*)—PRESUMPTIONS OF MALICE.

Where defendant admits that he killed deceased with a pistol, the law presumes malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 269; Dec. Dig. § 146.*]

2. HOMICIDE (§ 147*)—DEGREES—EVIDENCE—BURDEN OF PROOF.

Though malice is presumed from the fact that defendant shot deceased, the burden is on the prosecution to show such deliberation and premeditation as to justify a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 272, 272½; Dec. Dig. § 147.*]

3. HOMICIDE (§ 269*)—PREMEDITATION—QUESTION FOR JURY.

Evidence in a murder case held to justify submitting the question of premeditation and deliberation to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563; Dec. Dig. § 269.*]

4. HOMICIDE (§ 169*)—EXECUTION OF EVIDENCE.

In a prosecution for murder, it appeared that defendant and R. had been employed by deceased, and that there was a dispute about their wages; that defendant was armed, and after threatening to make trouble for deceased, if he did not get his money, went to the shop

of deceased and shot him. Defendant sought to show that just before going to the shop R. came along the street, and said to him, "I have got mine," and that he then went to the shop to get his wages, thinking that deceased had concluded to pay his men, but the court excluded the remark of R. Held, that the ruling was not error, as such remark threw no light on the question of defendant's premeditated intention to shoot deceased, unless he received his money, and could not have affected the result.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 169.*]

5. HOMICIDE (§ 14*)—"PREMEDITATION" AND "DELIBERATION."

By "premeditation" and "deliberation" is meant that "the reason and judgment is exercised, that the fact of the killing is weighed and considered, and that as a result there is in the mind the fixed purpose to kill, which must precede the act of killing, although the length of time between its formation and the killing is not material."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 19, 20; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1951-1955; vol. 6, pp. 5503-5507; vol. 8, pp. 7632-7760.]

6. HOMICIDE (§ 146*)—MALICE—PRESUMPTIONS.

The killing with a deadly weapon raises the presumption of malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 269; Dec. Dig. § 146.*]

7. HOMICIDE (§ 286*)—TRIAL—INSTRUCTIONS—PRESUMPTIONS.

An instruction "that killing with a deadly weapon raises a presumption of malice" is not subject to the objection that the jury might have understood the court to mean that such killing "raised the presumption of murder in the first degree."

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 286.*]

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Martin County; W. R. Allen, Judge.

Robert Roberson was convicted of murder in the first degree, and appeals. No error.

Wheeler Martin and Winston & Everett, for appellant. Attorney General Bickett, for the State.

BROWN, J. 1. The most important contention made by the prisoner upon this appeal is that there is no evidence of a premeditated and deliberate homicide. The prisoner having admitted that he slew the deceased with a pistol, the law presumes malice, but nevertheless places the burden on the state to fully satisfy the jury that it was deliberately and premeditatedly done, to justify a conviction of murder in the first degree. The state examined several witnesses, whose testimony, set out fully in the record, tends strongly to prove that the prisoner and Will Roberson had been employed by deceased, and that there was a dispute about their wages, which had greatly incensed prisoner. On the day of the homicide prisoner armed himself with a pistol, and threatened that,

unless the deceased paid him his money, he was going to give him trouble about it; that he had the pistol in his bosom while at the shop of one Moore, and there made threats against deceased that, if he did not pay him, he would give him trouble; that he took the pistol from his bosom and started from Moore's place towards the butcher shop of deceased near by. The butcher shop has a lattice window, which was raised. Deceased was inside, leaning on the butcher's block. Prisoner fired at him three times from the outside of the market house, and then ran. The evidence tends to prove that deceased was unarmed, that a small knife was on the block, and a hatchet under the counter, but that deceased had hold of neither. The only witness examined for the prisoner was the prisoner himself. His evidence makes out a clear case of self-defense. He testifies that he saw Will Roberson come from Whichard's shop, and that Will said, "I have got mine"; that he went to the shop to get his money, and asked deceased for it; that deceased cursed him, and refused to pay him; that the deceased grabbed the hatchet, and endeavored to kill prisoner; and that then prisoner fired on him. We think that the evidence was amply sufficient to justify his honor in submitting the question of premeditation and deliberation to the jury. The prisoner was angry with deceased about the wages he claimed. He had armed himself with a pistol the morning of the homicide, and concealed it in his bosom. He made threats against the deceased that, unless he was paid, he would give deceased trouble. Such threats, coupled with the character of the weapon with which the prisoner had armed himself, justify the inference that he meant to kill or do serious bodily harm. He carried the pistol concealed, but took it out at the market house, and fired at the unarmed man from the outside of the structure, as deceased was leaning on the block, and repeated his fire until he had shot three times, and then ran. From these facts, supported by abundant evidence, the inference that the shooting was deliberately and purposely done, with intent to kill if the prisoner did not get his money, is well warranted. State v. Hunt, 134 N. C. 684, 47 S. E. 49, State v. Teachey, 138 N. C. 587, 50 S. E. 232, State v. Exum, 138 N. C. 599, 50 S. E. 283, State v. Daniel, 139 N. C. 549, 51 S. E. 858, and State v. Conly, 130 N. C. 683, 41 S. E. 534, are cases somewhat in point. The prisoner was evidently "taking the law in his own hands," and avenging his own wrongs. In this connection we may well quote from an eminent English writer: "Let it be observed that in all possible cases deliberate homicide upon a principle of revenge is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for

which the laws of society will give him an adequate remedy, thither he ought to resort, but be they of what nature soever, he ought to bear his lot with patience." Foster's Crown Law, 296.

2. J. D. Moore, a witness for the state, testified: "I was sitting in front of my shop when I heard the report of a pistol, and saw the prisoner shoot Whichard three times, and then run." "Just before the shooting the prisoner was sitting down at my stove and talking to me. He said that Whichard (the deceased) owed him some money, and he was going to have it or give Whichard some trouble about it. After a while he got up and went immediately to the market. He took his pistol out of his shirt front and commenced firing. I saw Will Roberson come across the railroad from Whichard's market just before the defendant went there." On cross-examination of this witness the prisoner proposed to show that Will Roberson, who had been at work with the prisoner for Whichard, came from Whichard and held up some money, and said to prisoner, "I got mine." Defendant's counsel stated that the purpose was to show that witness induced defendant to think that Whichard had changed his mind, and was paying off, and that this showed why defendant went to the market. This evidence, on objection by the state, was excluded and defendant excepted. We are of opinion that the rejected evidence tended to throw no light upon the real question at issue, and could not possibly have been of any value to the prisoner had it been admitted, and could not have affected the result. The reason assigned for its competency is that this declaration of Will Roberson conveyed to the prisoner the information that Will Roberson had received his money, and induced the prisoner to go at once to Whichard in order to get his pay, in the belief that he would get it, and thus to disprove any premeditation. The rejected declaration is a circumstance tending to prove only one fact, viz., that the prisoner went to Whichard's market to demand the money he claimed that Whichard owed him, but it failed to throw any light whatever upon the prisoner's purpose in case Whichard still refused to pay him. It was offered solely upon the question of premeditation and upon no other phase of the case, and if it fails to disprove that, then it is worthless for any purpose. An examination of the evidence and contentions of the state and of the prisoner discloses the worthlessness of the rejected declaration. The evidence of the state is very strong, and tends to prove that prisoner armed himself and went to the deceased intending to kill him, or do him bodily harm, only in the event that he did not get his money, that he did not get his money, and that, without any sort of provocation, he shot the deceased, who was unarmed, three times and killed him. The defense of the prisoner is self-defense, and rests entirely upon his own evidence. It

is evident that the jury utterly rejected the prisoner's evidence, or else they must have acquitted him. Had they credited his evidence, they could not have done otherwise under the instructions of his honor. It is thus perfectly plain that the rejection of the declaration of Will Roberson, "I got mine," did not in the least affect or detract from the prisoner's defense. Did the rejection of it militate in any degree against prisoner upon the question of premeditation? The state did not contend that the prisoner went to the market armed, and with one purpose to kill the deceased in any event, but only in the event that deceased refused to pay him. The deceased did refuse, and the prisoner carried out his previously formed purpose and killed him. The rejected declaration tends to prove why prisoner went to the market at the time he did, viz., to get his money, a fact admitted by the state, and, had he received his money, there would have been no homicide. But the contention and evidence of the state is that the prisoner went to the market to get his money, and that he intended to kill the deceased only in the event he failed to do so. The rejected declaration throws no light whatever on prisoner's intentions in case of such failure. On the contrary, the decided probability is that the knowledge that the deceased had paid Will Roberson, and refused to pay him, "added fuel to the flame," and but hardened the prisoner's previously formed purpose to kill the deceased if he did not pay him.

3. The prisoner submitted some prayers for instruction upon the question of premeditation, and excepted because the court declined to give them, and further specifically excepted to the charge of the court as follows: "By 'premeditation' and 'deliberation' is meant that the reason and judgment is exercised, that the fact of the killing is weighed and considered, and that as a result there is in the mind the fixed purpose to kill. The fixed purpose to kill must precede the act of killing, although the length of time between the time it is formed and carried into effect is not material." "This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining there was such, the jury may consider evidence of absence of provocation, absence of a quarrel at the time of the killing, and threats, if there is such evidence. Not that you are compelled to find premeditation and deliberation from such evidence, but that, if there is such evidence, you may consider it in determining whether there was such premeditation and deliberation as I have indicated." Almost every word in this charge has been repeatedly upheld by this court. It follows all the decisions from Fuller's Case, 114 N. C. 885, 19 S. E. 797, to Banks' Case, 143 N. C. 652, 57 S. E. 174. The charge is substantially the charge which was approved by this court in State v. Teachey, 138 N. C. 598, 50 S. E. 232. See, also, State v. Exum,

supra; State v. Booker, 123 N. C. 713, 31 S. E. 376. The prisoner excepts to the following charge: "Malice, which is a necessary element of murder in the first and second degrees, means killing without legal excuse, and is presumed from killing with a deadly weapon." This is a correct proposition of law. The killing with a deadly weapon raises a presumption of malice. That is all the charge says. There is no intimation that it raises a presumption of murder in the first degree. Such a charge would be obnoxious to Lochler's Case, 118 N. C. 1154, 24 S. E. 410. In another part of the charge the court gave the jury explicit instructions that the defendant must have weighed and determined the matter, and formed a fixed purpose to kill, and must have killed as a consequence of this fixed purpose. The portion of the charge excepted to is evidently a part of the judge's charge that murder is the unlawful killing of another with malice aforethought, and that killing with a deadly weapon raises a presumption of malice. The jury could not, in any view of the charge as to deliberation and premeditation, have possibly thought that the judge intended to say that the killing with a deadly weapon raised a presumption of murder in the first degree, and as a matter of fact the judge did not say it. The able and painstaking judge who tried this case below delivered a most exhaustive and clear charge to the jury, in which he did the prisoner full justice.

We have examined the entire record, and each exception taken, with the care demanded in a matter of such solemnity, and we find no error of which the prisoner can justly complain.

No error.

WALKER, J. (dissenting). While I concur with the majority in the rulings upon the other exceptions, I think the court below erred in not admitting what was said and done by Will Roberson, in the presence and hearing of the defendant, before he went to the market for the purpose of seeing Whichard about his wages. That he went there to get his money was shown by the testimony of the state's witness J. D. Moore, for he told Moore, not that he intended to give Whichard trouble because he had refused to pay him, but that he intended to have his money, or give Whichard some trouble, implying that he would first demand it of Whichard. The defendant and Will Roberson had worked together for Whichard, and the latter had before refused to pay their wages. It seems that afterwards Whichard changed his mind, and paid Will Roberson what was due to him, and the latter then, in the presence of the defendant and J. D. Moore, held up his hand with the money in it, and said, "I have got mine." We must assume this to be true, as the court excluded the testimony. This was not hearsay evidence. It was itself a fact or circumstance, and its competency and rele-

vancy depend upon what impression it made on the mind of the defendant. It was surely competent for the defendant to show, if he could, that he went to see Whichard with a peaceful, and not a hostile, purpose. The state had introduced evidence tending to show that his purpose was a hostile one, and any fact or circumstance tending to show the contrary would seem to be relevant to the issue. It was not an unreasonable inference for the defendant to draw from what Will Roberson said and did that Whichard had changed his mind, and intended to pay both of them what he owed. Why should he pay the one, and not the other? They had both worked under the same circumstances, and were equally entitled to their hire. No reason appears from the evidence why he should distinguish between them or discriminate against the defendant. The jury may have convicted the defendant of murder in the first degree because they found from his previous threat, or the conversation with Moore, that he went to the market with the deliberate intent to kill Whichard, and not that he had formed his purpose to kill after he had reached there. In this view it was material for the defendant to show, if he could, that he approached Whichard with no homicidal intent, but believing from what he had heard Will Roberson say that he would receive his wages, and would have no trouble with Whichard. The jury should have been permitted to hear the excluded evidence, so that they might determine, in the light of all the facts and circumstances, whether there had been premeditation and deliberation on the part of the defendant. I cannot say the evidence was so slight as to render harmless the ruling of the court by which it was rejected. The state of the defendant's mind was the question involved. If the evidence had been admitted, and upon it, when considered in connection with the other facts, the jury had found that the defendant went to see Whichard for the sole purpose of getting his money, thinking that Whichard would pay him as he had paid Will Roberson, and that there would be no trouble, the question of premeditation and deliberation would naturally have been restricted to evidence of what occurred after the defendant had reached the market. It is true the jury, with the evidence admitted, might have found that the defendant had fully made up his mind to kill Whichard if he refused to pay his wages, although he may have thought that he would get his money without any trouble, but the question of premeditation and deliberation must be decided by the jury from all the facts as they may find them to be, and the slightest circumstance, forming substantially a part of the *res geste*, and closely connected with the act of killing, may sometimes turn the scales in favor of the defendant.

If we are permitted to draw only that inference from the rejected testimony which is favorable to the state and unfavorable to the

defendant, it may be the judge's ruling was correct, but is this the proper method of interpretation? Where the question is one of intent, the slightest circumstance, especially where it accompanies an act of the defendant immediately preceding the homicide, may be of sufficient weight to change the verdict. The jury, in this case, may have rejected the plea of self-defense, and convicted the defendant for the very reason that the testimony he offered was excluded by the court, as he was thereby left with nothing except his own testimony (viewed, of course, with some suspicion) and the state's testimony as to the threat alleged to have been made to J. D. Moore. If he had, at one time, conceived the purpose to kill Whichard in the event of his refusal to pay him, may not the jury have found upon the rejected testimony, if it had been admitted, that he had abandoned that purpose, and approached Whichard fully believing that there would be no occasion for trouble, as there was no reason why he should not be paid which did not apply with equal force to Will Roberson. The question was as to the state of his mind when he went to the market, where Whichard was, and not what he may have decided to do after Whichard refused to pay him, if there was such refusal. The defendant was entitled to have the jury consider every fact or circumstance tending to enlighten them upon this question. The exclusion of the evidence was tantamount to an absolute acceptance of the state's theory, and the truth of the evidence supporting it, that he went to the market for the purpose of killing Whichard if he refused to pay his wages. It is true the rejected testimony tended to prove that the defendant went to collect his money, but this is not all it tended to prove, as I have shown.

HOKE, J., concurs in dissenting opinion.

(150 N. C. 433)

PARKER v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. April 7, 1909.)

1. RAILROADS (§ 259*)—LEASES—LIABILITY OF LESSOR FOR NEGLIGENCE OF LESSEE.

A lessor railroad company would be liable for the negligent killing of an employé by its lessee company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 813; Dec. Dig. § 259.*]

2. PLEADING (§ 350*)—FRIVOLOUS DEMURRER—JUDGMENT—NECESSITY FOR MOTION.

Under Revisal 1905, § 560, providing that, if a demurrer be frivolous, the party prejudiced thereby may apply to the court or judge for judgment thereon, and judgment may be given accordingly, the prejudiced party must move for the judgment, if he desires it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1070; Dec. Dig. § 350.*]

3. PLEADING (§ 222*)—DEMURRER—RIGHT TO ANSWER OVER.

Where a demurrer to the complaint is overruled, even if it be frivolous, the court may in its discretion refuse to give plaintiff judgment by default, and may permit defendant to answer over.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570-574; Dec. Dig. § 222.*]

Appeal from Superior Court, Durham County; E. B. Jones, Judge.

Death action by Mollie C. Parker against the North Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Guthrie & Guthrie, for appellant. V. S. Bryant, Aycock & Winston, and A. L. Brooks, for appellee.

WALKER, J. This action was brought to recover damages for the death of the plaintiff's intestate, which is alleged to have been caused by the negligence of the defendant's lessee, the Southern Railway Company. It is alleged in the complaint that prior to August 6, 1907, the defendant leased its road, fixtures, and franchise to the defendant for a term of years, and that on said day "the defendant's lessee, by and with the knowledge, consent, and approval of the defendant, was operating freight and passenger trains along said line of railway," the intestate being one of its locomotive engineers, and that, while so employed and engaged in the performance of his duty, he was killed by the collision of the engine, which was then in his charge as engineer, and a train of the defendant's lessee, and that the collision was caused by the negligence of the said lessee. The defendant demurred, upon the ground that it did not sufficiently appear in the complaint that the lease was in force at the time the plaintiff's intestate was killed, nor that the intestate was acting under instructions given by the said lessee. We have stated only the substance of the complaint and demurrer. The court overruled the demurrer, and permitted the defendant to answer, and to this ruling the defendant excepted and appealed. We do not entertain any doubt as to the correctness of the ruling of the court. It appears, at least substantially, in the complaint, that at the time the intestate was killed the Southern Railway Company was operating the railway of the defendant as its lessee, and that the intestate was in the employ of the lessee and in the discharge of his duty as one of its engineers. That the defendant, as lessor, is liable for the negligent killing of the intestate by its lessee, has been settled by numerous decisions of this court. *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959; *Brown v. Railroad*, 181 N. C. 455, 42 S. E. 911.

The plaintiff contended in this court that the demurrer was frivolous, and judgment by default and inquiry should have been en-

tered in the court below, and that we should direct such a judgment to be entered. But he did not move for judgment, as required by Revisal 1905, § 560, which provides that "if a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply to the court or to the judge thereof for judgment thereon, and judgment may be given accordingly." See, also, Revisal 1905, § 472. Nor did the plaintiff except to the judge's order and appeal. The judge had the discretion to permit the defendant to answer after he had overruled the demurrer, even if it was frivolous. *Dunn v. Barnes*, 73 N. C. 278; *Clark's Code* (3d Ed.) p. 295, § 272, and notes.

The case of *Morgan v. Harris*, 141 N. C. 360, 54 S. E. 382, is directly in point. The Chief Justice, speaking for the court, says: "When a demurrer is overruled, the defendant is entitled to answer over as a matter of right, 'if it appear that the demurrer was interposed in good faith.' Revisal 1905, § 506. But, when the demurrer or answer is frivolous, the plaintiff is entitled to judgment, unless the court, in the exercise of a sound discretion, permits the defendant to answer over. This was not done here, because the judge did not hold the demurrer frivolous, and leave to answer was, therefore, not necessary. The refusal to hold a demurrer or answer frivolous, and to render judgment thereon, is not appealable. *Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713; *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271, where the reasons are given. The plaintiff's appeal must, therefore, be dismissed; but when the case goes back, with this judgment holding the demurrer to be frivolous, the plaintiff will be entitled to judgment by default, unless the court below is of the opinion that, in the exercise of a sound discretion, the facts justify permission to answer over. Revisal 1905, § 1279."

The case of *Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713, cited by the plaintiff, does not sustain his position. The court, in that case, merely held that the demurrer was frivolous, contrary to the ruling of the judge, but did not direct judgment to be given in the superior court for the plaintiff. It was left with the judge to exercise his discretion.

No error.

(150 N. C. 423)

IN RE DENNY.

(Supreme Court of North Carolina. April 7, 1909.)

INSANE PERSONS (§ 33*)—APPOINTMENT OF GUARDIAN—FINDINGS.

A finding on a lunacy inquisition that D. was incompetent to manage her own affairs, but was not wholly deprived of her reason, was a sufficient finding to justify the appointment of a guardian for her, under Revisal 1905, § 1890, authorizing the appointment of a guardian for persons who are incompetent from want of un-

derstanding to manage their own affairs, by reason of excessive use of intoxicating drinks "or other cause."

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 33.*]

Appeal from Superior Court, Person County; E. B. Jones, Judge.

Application for the appointment of a guardian for Melissa Denny on an inquisition of lunacy. The jury returned a verdict finding that Melissa Denny was incompetent from want of understanding to manage her own affairs, but that she was not totally deprived of her reason, on which the clerk refused to appoint a guardian, and dismissed the petition. On appeal to the superior court the clerk was overruled, and the appointment of a guardian directed, from which the lunatic appeals. Affirmed.

Aycock & Winston, Bryant & Brogden, and L. M. Carlton, for appellant. W. T. Bradsher and N. Lunsford, for appellee.

CLARK, C. J. This proceeding is brought under Revisal 1905, § 1890, which was Code, § 1670. This section clearly makes four classes of persons for whom a guardian may be appointed, namely: (1) Idiots; (2) lunatics; (3) inebriates; and (4) those who are incompetent from want of understanding to manage their own affairs by reason of the excessive use of intoxicating drinks or other cause. The verdict of the jury settles the fact that Melissa Denny belongs to the fourth class, and is a sufficient finding. In *re Anderson*, 132 N. C. 243, 43 S. E. 649; *Sims v. Sims*, 121 N. C. 298, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665. *Armstrong v. Short*, 8 N. C. 11, was decided under chapter 15, p. 383, Laws 1784, when such inquisition was limited to the first three classes: (1) Idiots; (2) lunatics; (3) inebriates. The fourth class was added by Code, § 1670.

The same point now presented came up in *re Anderson*, 132 N. C. 243, 43 S. E. 649, where it was held that a finding that Anderson was "not an idiot or lunatic, but that he was of unsound mind and incompetent from want of understanding to manage his own affairs," was "sufficient to meet the language and the spirit of the statute." The finding herein is in the exact language of the statute. The cause of such want of understanding would often be impossible to assign, and the jury is not required to find it. It is the fact of a want of understanding sufficient to manage her own affairs which requires the court to appoint a guardian, whatever the cause. The appointment of a guardian is not restricted to cases where the want of sufficient understanding is due to the excessive use of intoxicating drinks, but extends to cases where it is due to "other cause." It is said in *re Anderson*, supra, that the provision creating the fourth class may be subject to abuse, but that the sole function of

the court is to construe and apply the law. The same case upholds the jurisdiction upon the same procedure.

Revisal 1905, § 1890, is somewhat stronger than Code, § 1670 (under which in *re* Anderson, supra, was decided), in that it adds the words, "Incompetent person," so that the concluding paragraph of Revisal 1905, § 1890, reads: "And he [the clerk] shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic, or incompetent person."

No error.

(150 N. C. 417)

CAMP MFG. CO. v. DURHAM FERTILIZER CO.

(Supreme Court of North Carolina. April 7, 1909.)

1. JUDGMENT (§ 849*)—ASSIGNMENT—WARRANTY.

There is an implied warranty on the part of the assignor of a judgment that it is a valid, subsisting obligation against the debtor for the amount specified therein, and has not been paid, in whole or in part.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1560; Dec. Dig. § 849.*]

2. LIMITATION OF ACTIONS (§ 95*)—ASSIGNMENT OF JUDGMENT.

Where plaintiff acquired knowledge on April 25, 1904, that summons had never been served on one of the persons against whom a judgment assigned to plaintiff by defendant had been rendered, and that as to such alleged judgment debtor the judgment was invalid, but plaintiff commenced no action against his assignor, either for money had and received, for deceit, or breach of an implied warranty that the judgment was valid, until October 14, 1907, the action then brought was barred by the three-year statute of limitations (Clark's Code [3d Ed.] § 115, subsec. 9).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 473; Dec. Dig. § 95.*]

Appeal from Superior Court, Durham County; Long, Judge.

Action by the Camp Manufacturing Company against the Durham Fertilizer Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Action to recover the sum of \$860, being the principal, together with interest thereon from January 1, 1893, of a judgment recovered by the defendant at March term, 1893, of the superior court of Durham county, against J. F. Newsome, Robert Holloman, and W. E. Jenkins. This judgment on March 21, 1901, was assigned to plaintiff by defendant "for value received and without recourse on it"; the real consideration paid for the assignment being \$75. The defendant pleaded that it was not liable under the terms of the assignment and the several statutes of limitations. From a judgment upon a "case agreed," dismissing the action, the plaintiff appeals.

Winborne & Lawrence and Manning & Foushee, for appellants. F. L. Fuller, for appellee.

BROWN, J. (after stating the facts as above). In the statement of facts it appears that the judgment assigned was entirely regular upon its face. It afterwards transpired that, while purporting to have been served on the defendant Jenkins, in fact the summons had never been served on him. The defendant admits the general rule to be that there is an implied warranty on the part of the assignor of a judgment that such judgment is a valid, subsisting obligation against the debtor for the amount specified therein, and has not been paid in whole or in part. But it is contended that the use of the words "without recourse on it," in the transfer of the judgment involved in this action, relieved the assignor of that implied warranty. It is further insisted that the plaintiff's cause of action is barred by lapse of time.

The first proposition of the defendant is sustained by a very strong opinion of the Georgia Supreme Court in *Thompson v. Bank*, 102 Ga. 696, 29 S. E. 610; but it is unnecessary to pass on it here, as we are clearly of opinion the action is barred, whether it be considered as an action for money had and received, for deceit, or for breach of an implied warranty. The action could not well be maintained on either of the two first-mentioned grounds, as there is not a total failure of consideration, or any fact tending to indicate deceit or fraud. The judgment is valid against the other two defendants, and may eventually be made out of them; and it is admitted that this defendant believed it to be valid as to the other defendant therein, and that it purported on its face to be so. It is admitted that the plaintiff had knowledge on April 25, 1904, that the summons had never been served on Jenkins, and that as to him the judgment was invalid. In any view the plaintiff's cause of action accrued then. It could have then commenced action at once for a breach of the implied covenant of warranty, and, upon establishing that the judgment was invalid, it could have recovered damage, unless prevented by the words of the assignment. As more than three years had elapsed before the commencement of this action on October 14, 1907, it would appear that, giving the plaintiff the benefit of the three-year statute, his cause is barred. Clark's Code (3d Ed.) § 115, subsec. 9, and cases cited.

It is contended by defendant that the cause of action accrued at date of the assignment, March 21, 1901, and authority is cited in support of that proposition; but it is unnecessary to consider it, as we are clear that, giving the plaintiff the benefit of the shortest period which, under our statutes, can apply to this transaction, the cause of action, if any ever accrued, is barred.

Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(159 N. C. 407)

ELIZABETH CITY v. BANKS et al.

(Supreme Court of North Carolina. April 7, 1909.)

1. MUNICIPAL CORPORATIONS (§ 680*)—POWER TO GRANT GAS FRANCHISE.

In the absence of statutory authority, a city has no power to grant a franchise to construct a gas plant for furnishing light, fuel, and power, and to pipe the streets for distribution of the gas to customers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1459; Dec. Dig. § 680.*]

2. MUNICIPAL CORPORATIONS (§ 680*)—POWER TO GRANT GAS FRANCHISES.

Elizabeth City Charter (Priv. Laws 1905, p. 45, c. 15) § 19, authorizing ordinances for the government of the city not inconsistent with the laws of the state to secure order, health, quiet, and safety, does not authorize the grant of a gas franchise including the right to pipe streets for furnishing gas to customers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 680.*]

3. GAS (§ 7*)—POWER TO GRANT GAS "FRANCHISE."

The right to place gas pipes and mains in the public streets of a city for the distribution of gas for use is a franchise, the privilege of exercising which can only be granted by the state or by the municipal government of the city acting under legislative authority.

[Ed. Note.—For other cases, see *Gas*, Cent. Dig. § 2; Dec. Dig. § 7.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2929-2941; vol. 8, p. 7666.]

4. GAS (§ 6*)—"FRANCHISE"—"LICENSE"—"PROPERTY."

A gas "franchise" is property, a vested right protected by the Constitution, while a "license" is a mere personal privilege, and revocable, except in rare instances and under peculiar conditions.

[Ed. Note.—For other cases, see *Gas*, Dec. Dig. § 6.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4133-4141; vol. 6, pp. 5708-5710; vol. 8, pp. 7768-7770, 7706.]

5. GAS (§ 7*)—VALIDITY OF FRANCHISE—BREACH OF COVENANT BY GRANTEE—RIGHT OF ACTION.

Where the ordinance by which plaintiff city undertook to grant a gas franchise to defendant was ultra vires and void, there was no consideration for the covenants made by defendant in relation thereto, and no action lies on the collateral bond for breach thereof.

[Ed. Note.—For other cases, see *Gas*, Dec. Dig. § 7.*]

Appeal from Superior Court, Pasquotank County; Gulon, Judge.

Action by Elizabeth City against D. B. Banks and the Fidelity Deposit & Trust Company. From a judgment for plaintiff, defendants appeal. Reversed.

The pleadings, upon which judgment was rendered, disclose this case: On the application of defendant D. B. Banks, the plaintiff, a municipal corporation, duly chartered by the General Assembly of North Carolina, through its mayor and aldermen on June 19, 1905, undertook to grant to said Banks by an ordinance duly passed on July 3, 1905, a franchise extending 30 years to construct in said

town a gas plant for the purpose of furnishing gas for light, fuel, and power to the citizens of Elizabeth City. Said franchise carried the right to use the streets of said city as the said Banks deems necessary and requisite for the purpose of laying pipes and other devices incidental and necessary to the establishment, location, and operation of said plant. Permission is given said Banks to use alleys, lanes, highways, streets, bridges, and streams within the limits of said city; also to place poles and string wires along the streets, etc. Permission is given said Banks to contract with the citizens of said town for furnishing gas for light, fuel, and power and to contract with the town of Elizabeth City for said purpose. Maximum rates which said Banks was to charge the citizens for gas were fixed in said ordinance. The city reserved the right to buy the plant at the end of 10 years at a price to be fixed by arbitration. In consideration of the grant of the franchise, Banks contracted with the city that he would begin the erection of said gas plant within 9 months from the passage of the ordinance and complete the same within 21 months from said date, subject to certain contingencies named. For the purpose of securing the performance of the covenants entered into by him, and in consideration of the grant of said franchise, the defendant Banks, as principal and the defendant Fidelity Deposit & Trust Company, executed to plaintiff a bond in the sum of \$5,000, conditioned that, if the said Banks should fail to comply with the stipulations in said contract, they would pay to said city \$5,000 as liquidated damages; it being recited therein that "in the opinion of the undersigned the said amount of \$5,000 is not an unjust, absurd, or oppressive amount, but a fair and just compensation to be paid upon the failure," etc. Plaintiff alleges that defendant Banks began the construction of the plant within 9 months, but failed to complete the same within 21 months. Defendant admitted the execution of the bond, but denied that the plaintiff had any corporate power to grant the franchise, and that its attempts to do so were utterly void; that, by reason thereof, there was no consideration to support the covenants made by Banks, the performance of which was secured by the bond, and that same were void; that, by reason of the absence of power to grant the franchise, the ordinance passed by the board of aldermen was ultra vires and void. Defendants also aver that defendant Banks began to construct said plant within nine months, but was prevented from completing it by the financial panic which overtook the country, rendering it impossible for him to procure the materials necessary for completing the work; that he asked for an extension of time, which was refused, etc. His honor, being of the opinion that the condition of the bond had been forfeited, and that the matter set up in the an-

swer did not constitute a defense thereto, rendered judgment, upon the pleadings, for \$5,000 and cost. Defendants excepted and appealed.

Aydlett & Ehringhaus and Edward Duffy, for appellants. J. Heywood Sawyer, Shepherd & Shepherd, Pruden & Pruden, and Geo. J. Spence, for appellee.

CONNOR, J. The question which lies at the threshold of this case is whether, in the absence of any legislative authority, express or implied, the plaintiff, through its governing body, had any power to grant to the defendant Banks the franchise to use its streets in the manner set forth in the ordinance. It is conceded that prior to the enactment of section 2916, subsec. 6, Revisal, which became effective August 1, 1905, no such power was conferred upon municipal corporations by the General Statutes prescribing the powers of cities and towns. By that statute they are authorized "to grant, upon reasonable terms, franchises to public utilities." Looking, therefore, to the charter of the plaintiff (*Priv. Laws 1905, p. 39, c. 15*), we find no express power conferred upon the board of aldermen to grant franchises in or over the streets of the city. Section 19 confers the power to make such ordinances, as they may deem necessary, for the government of the city, not inconsistent with the laws of the land, and by all needful ordinances, to secure order, health, quiet, and safety within the city limits and for one mile beyond. Such special powers as are conferred are confined to passing ordinances relating to markets, fires, observance of the Sabbath, nuisances, powder, speed of riding and driving vehicles, keeping the sidewalks clear of obstructions, etc., regulating building material, regulating charges for hacks, omnibuses, and appointing inspectors of fish and meats. Provision is made for electing a street commissioner with power to keep in repair the streets, bridges, etc. The board of aldermen are given power to lay out and open streets, to extend or discontinue them, and to condemn land for these purposes. We find no grant of power to make provision for furnishing lights, power, or fuel or for establishing plants for that purpose. No question is presented upon this record in regard to the power by implication for providing for lighting the streets. This would doubtless be found, by necessary implication, in the power to regulate the streets, provide for the safety of the people, etc. This under the more recent decisions of this court would be not only an implied power, but a duty the discharge of which would involve a necessary expense. *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825; *Davis v. Fremont*, 135 N. C. 538, 47 S. E. 671, and other cases reversing *Thrift v. Elizabeth City*, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427. It will be noted that the contract made with defendant Banks makes no other provision for furnishing light for the

streets than a permission to make a contract with the city for that purpose. He is under no obligation to do so. This question is therefore eliminated from the discussion. The purpose of granting the franchise is to permit defendant Banks to supply light, fuel, and power to the citizens of the town. He does not come under any obligation to furnish all of the citizens. It is true that maximum rates are prescribed, and the city reserves the power to buy the plant, after ten years, at a price to be fixed by arbitration. Whether the plant to be established by the defendant Banks is a public utility may be open to controversy, but our decision does not rest upon that question, and it is not necessary to discuss it. We assume, for the purpose of the decision, that it is a public utility. It is an elementary principle of law that a municipal as any other corporation can exercise only such powers as are expressly granted, or necessarily and fairly implied in, or incident to, the exercise of powers, which are granted. Any fair, reasonable doubt concerning the existence of the power is resolved against the corporation. 1 *Dillon, Mun. Corp.* (4th Ed.) 89. Mr. Justice Bynum in *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766, states the doctrine, approved by Judge Dillon, and uniformly followed by this court—in fact, so far as our examination goes, of all American courts. He says: "All corporations derive their powers from legislative grants, and can do no act for which authority is not expressly given or may not be reasonably inferred. But, if we say that they can do nothing for which a warrant could not be found in the language of their charter, we deny them in many cases the power of self-preservation, as well as many of the means necessary to effect the essential object of their creation. Hence they may exercise all the powers within the fair intent and purpose of their creation which are reasonably necessary to give effect to powers expressly granted." *Reese, Ultra Vires*, § 170; *Railway v. Railway*, 114 N. C. 725, 19 S. E. 697.

Applying this general principle to the case at bar, what power has a municipality, through its governing board, to use or permit the use of its streets for other than the purpose of a highway? It does not appear nor do we deem it at all material to inquire whether the city owns the fee in the soil over which the streets are laid out or only an easement. Whatever differences of opinion exist in respect to the rights of abutting owners in regard to the use of the streets for other than the purposes of highways do not affect the merits of this case. In either event the law is well settled that the title either of the fee in the soil or an easement is vested in the municipality in trust for the use of the people as and for a public highway, and that it cannot without legislative authority, divert them from this use. How far the power of the Legislature to permit other burdens to be imposed upon

them may be exercised, without providing for compensation to the municipality, is not involved in this discussion, and we only refer to it to exclude any suggestion that, in defining the power of the Legislature to impose burdens upon the streets of a municipal corporation, we are referring to that question. We held in *Brown v. Electric Co.*, 138 N. C. 533, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554, and *Staton v. Railroad*, 147 N. C. 428, 61 S. E. 455, 17 L. R. A. (N. S.) 949, that the Legislature could not do so without providing for compensation to the abutting owner. That the Legislature has very extensive powers over the public streets as a part of the public highways of the state is well settled, and that such power as the municipal authorities have are derived from legislative grant is equally well settled. Judge Dillon says: "Public streets, squares, and commons, unless there be some special restriction when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large as distinguished from the municipality because they are situated within the limits of the latter, and because the Legislature may have given the supervision, control, and regulation of them to the local authorities. The Legislature of the state represents the public at large and has, in the absence of special constitutional restraint and subject to the property rights and easements of the abutting owners, full and paramount authority over all public ways and public places." 2 Mun. Corp. (4th Ed.) 656. That the commissioners of a town cannot, without legislative authority, sell a street or park, has been uniformly held by this court. *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; *White v. Railroad*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; *Southport v. Stanly*, 125 N. C. 465, 34 S. E. 641; *Turner v. Commissioners*, 127 N. C. 153, 37 S. E. 181. In *White v. Railroad*, supra, Shepherd, C. J., discusses the question in the light of the authorities: The opinion is amply sustained, both by reason and authority. When we look beyond our own jurisdiction for cases "in point," we find that the principle has been applied to attempted grants of franchises to put gas pipes in the streets. In *Gaslight Co. v. Norwich Gas Co.*, 25 Conn. 19, it appears that the common council of the city, whose general powers are much the same as the board of aldermen of plaintiff, undertook by a resolution to confer upon the plaintiff an exclusive franchise for 15 years to lay and maintain its pipes over or under the streets of the city. *Hinman, J.*, says: "The right of way over the streets being public to all who may have occasion to use them, and the only power of the city over them being given by its charter in order to regulate such use, it seems clear that the city can make no grant which shall convey to the grantee any inter-

est in them which can in any proper sense be deemed property." The opinion is quoted with approval by Judge Dillon. 2 Mun. Corp. 693. The franchise in that case was exclusive, but, as will be seen, the decision is put upon the ground stated. The plaintiff also claimed the franchise under an act of the Legislature and in respect to this the court held that the grant of an exclusive franchise was void because of constitutional inhibition. In *N. O. Gaslight Co. v. Light & Heat Co.*, 115 U. S. 659, 6 Sup. Ct. 252, 29 L. Ed. 516, it is held that the right to place gas pipes and mains in the public streets of a city for the distribution of gas for public and private use is a franchise, the privilege of exercising which can only be granted by the state or by the municipal government of the city acting under legislative authority. In *State v. Cin. Gas Co.*, 13 Ohio St. 262, the court, holding the same opinion, said: "This franchise may be granted directly by the state or by a municipal corporation if it is clothed with power to make the grant. Such power in the municipality must either be expressly granted or arise out of the terms of the statute by necessary implication so direct and necessary as to be clearly conferred." *Purnell v. McLane*, 98 Md. 589, 56 Atl. 830. In *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, Van Fleet, vice chancellor, says: "The defendants claim the right to use the public streets of Jersey City for the purpose of placing pipes therein, through which they may furnish gas to their customers. This is a right which the sovereign power alone can confer. The rule must be considered settled that no person can acquire a right to make a specific or exceptional use of a public highway not common to all the citizens of the state except by a grant from the sovereign power." In *Boston v. Richardson*, 13 Allen, 146, it is said that the right of putting gas pipes in public highways has never been exercised except by virtue of an express statute. *Mobile v. L. & N. R. R.*, 124 Ala. 182, 26 South. 902; *R. R. v. Ocola, etc., R. R.*, 39 Fla. 306, 22 South. 692; *Gaslight Co. v. Middletown*, 59 N. Y. 228. The authorities are quite uniform upon the subject.

The wisdom of putting the limitation upon the power of governing boards of towns and cities is apparent. If they be permitted, without express power known to the people who select them, to grant to persons and corporations franchises over the public streets, the arteries of business, social and community life would be to subject them to burdens unwisely or otherwise conferred, limiting and restricting their use by the people for whose benefit they have been laid out and by whose taxes they are maintained. In the absence of any express grant of power in the charter, it would be difficult if we adhere to the canons of construction of corporate charters to find it by implication. It will hardly be

contended that the laying of gas pipes for the purpose of furnishing light, fuel, and power to the citizens by a private business enterprise is essential to, or implied in, the power to regulate and control the use of the streets. As we have seen, the courts have not found the power except as an express grant from the sovereign. If the attempt to confer the franchise upon defendant Banks is ineffectual because the plaintiff had no power to do so, the result is that the ordinance was ultra vires, and therefore void. The doctrine is strongly stated in Penn. R. R. v. Nat. Ry. Co., 23 N. J. Eq. 441: "Whether franchises are delegated by special charters or under general laws, they are emanations from the people in their sovereign capacity. What is not conferred is withheld, and remains in their original source. The attempt to exercise them by individuals or companies until so conferred can be nothing but an unwarrantable usurpation of power. This doctrine is rooted and grounded in the common law, and equally so in public policy and public expediency." If it be suggested that, while the ordinance was ineffectual to confer a franchise for 30 years, it was valid as a license, and protected defendant Banks from prosecution for maintaining a nuisance, the obvious answer is that a franchise is property, intangible it is true, but none the less property, a vested right protected by the Constitution, while a license is a mere personal privilege, and, except in rare instances and under peculiar conditions, revocable. The plaintiff did not undertake to give, or defendant to acquire, a license, but a franchise, upon the faith of which he was to invest a large sum of money and establish a business of permanent character. In the absence of power in the board of aldermen to grant a franchise in the streets, we can see no reason why the Legislature at the next or any future session could not, in the exercise of its right to control and prescribe the use to which streets might be subjected, have prohibited the defendant Banks from continuing to use the streets or maintain his pipes, lines, poles, and "other devices" thereon. Whether a succeeding board of aldermen would have been estopped to do so after the pipes were laid and the other means for maintaining and operating the plant established it is not necessary to decide. That corporations may, under some conditions, be estopped from avoiding ultra vires acts is

settled, but the question does not arise upon this record because it does not appear that any substantial work was done under the authority of the ordinance, and the plaintiff declared the franchise forfeited under the terms of the grant. It is again suggested that the ordinance was ratified by the plaintiff subsequent to the act of 1905. Revisal 1905, § 2918.

Without discussing the question whether a contract void because ultra vires can be ratified, we find in the pleadings nothing to indicate a purpose to ratify or any act which is capable of being construed into a ratification. It is alleged in the complaint that defendant Banks failed to commence the erection of the plant within 9 months and to complete it within 21 months. The defendant Banks alleges that he laid a part of the pipes within nine months from the date of the ordinance. It does not appear that he laid any pipe after August 1, 1905, or that any other act was done by him in connection with the work. He has never used the franchise. The plaintiff does not allege any ratification or any act which could be so construed. If, as we have seen, the ordinance was void, because the plaintiff was without authority to grant the franchise, it is evident that the defendant Banks acquired nothing of any value by reason of its passage. If he had, in the performance of his covenant, begun the work within the prescribed period, he would have been liable to be enjoined or prosecuted for obstructing the streets. It is manifest that, as he acquired nothing, his covenants are without any consideration to support them. There is a total failure of consideration, and no action can be maintained for damages by either party. It is manifest that plaintiff cannot maintain an action for damages because of the failure of defendant to do an unlawful act—that is, obstruct the streets—which is indictable at common law. The plaintiff conferred no right upon the defendant Banks, and therefore can claim nothing from him on account of its unauthorized attempt to do so. We forbear discussing the other questions raised by defendants in their brief.

The judgment must be reversed, with direction to the superior court to set it aside, and take such further action as is in accordance with law.

Reversed.

(150 N. C. 444)

SINK et al. v. SINK et al.

(Supreme Court of North Carolina. April 14, 1909.)

1. WILLS (§ 614*)—ESTATE CREATED—LIFE ESTATE—"DURING TERM OF HER WIDOWHOOD."

A devise to a widow "during the term of her widowhood, and, after her marriage," the property to be divided between other persons, creates in the widow only a life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1406; Dec. Dig. § 614.*]

For other definitions, see Words and Phrases, vol. 3, p. 2281.]

2. WILLS (§ 587*)—DESCRIPTION OF PROPERTY—RESIDUE.

The provisions of a will for the sale of some of testator's property to pay debts and legacies, and that, if any surplus remains, it should go to his widow, do not make her the chief residuary legatee so as to vest in her the remainder in other property after her life estate therein.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 587.*]

Appeal from Superior Court, Davidson County; E. B. Jones, Judge.

Action by H. J. Sink and others against Mahaley Sink and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Walser & Walser, for appellants. E. E. Raper, for appellees.

WALKER, J. This action was brought to recover damages for waste alleged to have been committed by the defendants on the land described in the complaint, and for an injunction against the further commission of waste. The court virtually intimated that the plaintiffs could not recover, as under the will of William A. Sink his widow acquired a fee-simple estate, and not merely an estate for life. The plaintiffs excepted to the ruling, submitted to a non-suit, and appealed.

The decision of the case must turn upon the construction of the eleventh item of the will, which is as follows: "I give and bequeath to my beloved wife Mahaley the remainder of my land, after selling off, as directed in the 10th item, whatever there may be remaining, to have and to hold to her own proper use and behoof, to embrace my Mansion house and other out houses and improvements of the land I now live on, during the term of her widowhood, and after her marriage to be equally divided between my brother and sisters or their legal representatives share and share alike." W. A. Sink died without having had any children, leaving as his heirs at law a brother and sisters. In his will he directed that certain land and other property be sold to pay his debts and the legacies given in the will, and that if, after paying the same, any surplus remained, it should go to his widow Mahaley Sink. We are of opinion

that the estate in the land devised to the widow could not endure beyond her life. Blackstone says that, if an estate be granted to a woman during her widowhood or to a man until he be promoted to a benefice, in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. 2 Blk. 121. In *Fuller v. Wilber*, 170 Mass. 506, 49 N. E. 916, the devise was as follows: "I give and bequeath to my beloved wife all my real and personal estate of whatever name, for her sole use and benefit so long as she remains my widow, except the legacies to my children." With reference to this devise the court, by Morton, J., said: "The first question in these cases is: What interest did the widow of Elijah Wilber take under her husband's will? There is some ground, perhaps, for saying that, with the exception of the legacies to the children, she took the entire estate absolutely and in fee, subject to be divested of it if she married again; but we think that the better construction, and the one which is according to the weight of authority, here and elsewhere, is that she took a life estate determinable on the happening of that event. *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; *Loring v. Loring*, 100 Mass. 340; *Dole v. Johnson*, 3 Allen (Mass.) 864; *Mansfield v. Mansfield*, 75 Me. 509, 512; *Nash v. Simpson*, 78 Me. 142, 147, 3 Atl. 53; *Evan's Appeal*, 51 Conn. 435; *Cooper v. Pogue*, 92 Pa. 254, 257, 37 Am. Rep. 681; 4 Kent, Com. 26, 27; 2 Bl. Com. 121; 1 Washb. Real Prop. (5th Ed.) 63. The words 'so long as she remains my widow' imply a continuance of the estate during widowhood, and no longer; and, at most, it could not extend beyond her life." In *Kratz v. Kratz*, 189 Ill. 276, 59 N. E. 519, the devise was to the wife during her widowhood of the real and personal estate "absolutely and unconditionally," and the court held that her interest was limited to the period of her widowhood—that is, during her life or until she remarried. See, also, *Batterton v. Yoakum*, 17 Ill. 288. This court decided in the case of *In re Brook's Will*, 125 N. C. 136, 34 S. E. 285, that where a testator devised all his property to his wife during her widowhood, with the condition that, "should she marry, then the law is my will," gave the widow no more than a life estate, as her death terminated her widowhood, and therefore her interest in the property. We have carefully examined the whole will, and can find

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 64 S.E.—13

nothing therein to change the settled meaning of the words used by the testator in devising certain land to his widow. There is no general residuary clause in the will. The direction to pay the surplus of any money arising from the sale of some of his real and personal property did not constitute her his general residuary devisee, so as to vest the remainder after her life estate in her. There are some expressions indicating a contrary purpose; that is, an intention that it should go to his heirs.

The cases cited by the defendants' counsel (*Foust v. Ireland*, 48 N. C. 184, and *McKrow v. Painter*, 89 N. C. 437) are not in point, as they were decided upon a construction of language quite different from that contained in the will now under consideration. In this will the devise to the widow is "during her widowhood," and hence is no more and no less than a devise for life. It is not in contemplation of law less than a devise for life, because it may, at her pleasure, endure for life. It is plainly an express limitation of the estate to her for life, subject to be divested in favor of the persons designated in the will as the ulterior devisees if she should remarry. *Rausch v. Rausch* (Sup.) 31 N. Y. Supp. 786; *Dubois v. Van Valen*, 61 N. J. Eq. 381, 48 Atl. 241; *Patton v. Church*, 168 Pa. 321, 31 Atl. 1079; 30 Am. & Eng. Enc. of Law (2d Ed.) 748.

There was error in the ruling of the court. The nonsuit will therefore be set aside.

Error.

(150 N. C. 438)

LOWDER v. HATHCOCK.

(Supreme Court of North Carolina. April 14, 1909.)

1. LIMITATION OF ACTIONS (§ 102*)—ACCRUAL OF CAUSE OF ACTION—GUARDIANSHIP—ACCOUNTING.

The express trust imposed in the guardian of a lunatic terminates upon the lunatic's death, and limitations begin to run at that time against the right of the lunatic's distributees to call for an accounting.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 505; Dec. Dig. § 102.*]

2. LIMITATION OF ACTIONS (§ 83*)—SUSPENSION OF STATUTE—DEATH OF DEBTOR.

Revisal 1905, § 367, provides that if a person entitled to sue die before the expiration of the time limited for the commencement of the action, and the cause of action survive, an action may be commenced after the expiration of that time and within one year from his death, but, if the debtor dies, the action must be begun within one year after issuing letters testamentary or of administration. *Held*, that where there is at the death remaining unexpired any part of the time limited which part will expire in less than one year after issuing letters on the debtor's estate, the "one year" is not added to the statutory time.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 83.*]

3. LIMITATION OF ACTIONS (§ 83*)—SUSPENSION OF STATUTE—DEATH OF DEBTOR.

Where a guardian had survived his ward 11 years, an action to recover a balance due the ward begun against the guardian's administrator more than 2 years after the issue of letters on his estate was barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 83.*]

Appeal from Superior Court, Stanly County; Webb, Judge.

Action by D. T. Lowder, administrator of Nancy Adderton, against T. A. Hathcock, Jr., administrator of T. A. Lowder. Judgment for defendant, and plaintiff appeals. Affirmed.

T. F. Klutz and J. R. Price, for appellant. R. L. Smith, R. E. Austin, and Montgomery & Crowell, for appellee.

CLARK, C. J. T. A. Lowder qualified as guardian of Nancy Adderton, a lunatic, in 1854, and filed his last annual account in November, 1858. She died in 1887 or 1888, and D. T. Lowder qualified as her administrator November 9, 1901. T. A. Lowder, the guardian, died in 1890, and T. A. Hathcock qualified as his administrator September 13, 1899. The annual account filed in 1858 showed a balance then in hands of the guardian of \$1,087.10, and this action is to recover said sum, with compound interest from that date. The guardian survived his ward 11 or 12 years, and, if action had been brought during his lifetime, doubtless he would have shown some disbursements on account of his ward in the 30 years between 1858 and 1887 or 1888, when she died, if not of all the fund. Of course, no statute runs against an express trust, but the express trust was terminated by her death (*Parker v. Harden*, 121 N. C. 58, 28 S. E. 20; *Fagart v. Bost*, 122 N. C. 522, 29 S. E. 838; *Dunn v. Dunn*, 137 N. C. 534, 50 S. E. 212; 15 Am. & Eng. Encyc. 45), as was also the disability of her lunacy.* It was then incumbent upon the ward's distributees to have letters of administration taken out, and to call for an accounting.

There is a distinction as to the suspension of the statute when the debtor dies and when the creditor. When the latter dies, as in this case, Code, § 164 (then in force) now Revisal 1905, § 367, provided: "If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive an action may be commenced after the expiration of that time, and within one year from his death." When it is the debtor who dies, the action must be begun "within one year after issuing letters testamentary or of administration." It is true this is an enabling and not a disabling statute, and does not cut down the time given by the general statute, but extends it (if not expired) to at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

least one year after death of a creditor and at least one year after issuing letters to the representative of a debtor. *Person v. Montgomery*, 120 N. C. 111, 28 S. E. 645. But whether the three years or six years or ten years statute bars (all of which are pleaded) is immaterial as more than thirteen years elapsed after the ward's death before this action began. When there is at the death remaining unexpired any part of the time limited, but it will expire in less than "one year after the death" of the creditor, or in less than "one year after issuing letters" on the debtor's estate, such "one year" embraces and is not added to, the unexpired statutory time. In this case the guardian had been exposed to an action for over 11 years after the death of the ward, and the time limited for an action against him had expired at his death. Even if it had not quite expired, this action was not begun until more than "a year" (in fact, more than two years) "after issuing letters" to his administrator. *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77; *Winslow v. Benton*, 130 N. C. 58, 40 S. E. 840.

In every aspect the plea of the statute was a complete bar, and it was properly sustained. Affirmed.

(150 N. C. 400)

REDMAN v. NORFOLK & W. RY. CO.

(Supreme Court of North Carolina. April 7, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

In an action by a railway employé for injuries caused by the alleged sudden moving of a train used with a ditching machine, whether the train was suddenly moved *held*, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 286.*]

2. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—DUTY TO WARN OF DANGER.

It would be the duty of those in charge of a train used with a ditching machine, before moving the train at a time when the dipper of the machine was not in such a position as to make it necessary and proper, to give some warning or signal, so that employés on the cars liable to be injured could protect themselves.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 270; Dec. Dig. § 137.*]

3. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—DUTY TO WARN OF DANGER.

The duty imposed on an engineer in charge of a work train to signal before moving the train is for the protection of employés who are on duty at the places assigned to them, and he is not required to look out for those, who, leaving their posts, have voluntarily or in violation of their duties assumed a more dangerous position.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 270; Dec. Dig. § 137.*]

4. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—DUTY TO WARN OF DANGER—LEAVING POST OF DUTY.

Where a railroad employé was assigned to work on a car of a work train attached to a ditching machine, his duty being to hook a chain onto the machine, which could only be

done while standing and which was required to be done every two or three minutes, he did not deviate from the line of his duty by sitting on the side of the car, so long as he could rise and promptly hook the chain when signaled, and hence the engineer owed him the duty to signal before starting the train at an unexpected time.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 270; Dec. Dig. § 137.*]

5. MASTER AND SERVANT (§ 203*)—ASSUMPTION OF RISK—MASTER'S NEGLIGENCE.

An employé does not assume the risk of an injury sustained from the master's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 538; Dec. Dig. § 203.*]

6. MASTER AND SERVANT (§ 247*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

If a railway employé on a work train was negligently sitting so near the edge of a car that, when the train started without signal, he fell off and was injured, his negligence would be the proximate cause of the injury, and he could not recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

7. MASTER AND SERVANT (§ 210*)—ASSUMPTION OF RISK—NATURAL RISKS OF EMPLOYMENT.

If a railway employé on a train working with a ditching machine placed himself in a position on a car such that, when the ditching machine started, he was jarred and threw his hand onto a snatch block of the machine, receiving injuries from a running cable, he could not recover, as the motion of the machine properly operated was one of the risks he assumed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 554-556; Dec. Dig. § 210.*]

8. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—SELECTING DANGEROUS POSITION.

If a railway employé working on a car with a ditching machine was injured while occupying a dangerous position on the car, when there were other positions he could have occupied on the car which were safe, and a man of ordinary prudence would not have selected the position he occupied, he was negligent, and could not recover for the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 751-756; Dec. Dig. § 240.*]

9. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action by a railway employé on a work train for injuries from the alleged starting of the train without signal, a charge that plaintiff alleges that he was injured by defendant moving its train without giving him notice by ringing the bell or blowing the whistle, which it was its duty to do, was not objectionable as charging that it was defendant's duty to give plaintiff a signal by ringing the bell or blowing the whistle.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 293.*]

Appeal from Superior Court, Person County; E. B. Jones, Judge.

Personal injury action by Charles Redman, by his next friend, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff sues for personal injuries alleged to have been sustained by defendant's negligence. The plaintiff testified that at the

time he sustained the injury he was employed by defendant on one of its trains, engaged in cleaning out ditches with a ditching machine, to which a dipper was attached. He said it was his duty to hook the chain on dipping machine. The machine set on a flat car. It is run by a hoisting engine, which sets on the car next to the locomotive, which runs behind the cars, on which the dipper and the hoisting machine sets. The dipper sets on the foremost car from locomotive and the hoisting engine on the one next to the locomotive. A cable runs from the hoisting engine to the dipping machine. The overseer gives the signal, and the dipper is let down into the ditch. It is worked by cables. The dipper takes up the dirt, and places it on the flat car in front. His duty was to hook up the machine, and the hoister runs the machine back towards locomotive, so as to make room for the next pile of dirt. He was two or three cars from the hoisting engine at the time he was hurt. When dipping dirt, he hooked up the machine every two or three minutes. He was required to be at the hooking chain. When signal was given, he unhooked chain. Locomotive stopped while machine was being hooked. Train would move while dipper was being filled. He could not tell when the engine moved except by the whistle or bell ringing. Cable, on hoisting machine and dipper, would begin to move after dipper had filled and ready to unload on car. He was sitting on side of flat car, waiting for signal to be given to hook up the chain and snatch block. The dipper was coming up from ditch with dirt. No signal was given to fix chain. The locomotive moved forward and threw him over, and he caught at something, and caught the chain, which drew his hand into snatch block and injured him. No signal was given him that train was going to move. It was a sudden movement of the car. He was not looking for it. It was a harder movement than any he had experienced since he went to work. The custom had been to work the hoisting machine only when cars were not moving. If he had not thrown his hand on the chain, his head would have gone on it. At the time he was injured he was sitting down. He did his work while standing up. He could not perform his duty sitting down. He was sitting where he could get up and perform duty on signal. He was sitting on side of car. No one told him to sit there. His feet were hanging down. When dipper got on car, it was his duty to hook it up, but it was not necessary, at this time, to hook it up. He was waiting for them to give him the signal. He had his back to the chain which caught his hand. The cable was running. He knew it was running. He knew if he put his hand in it he would be hurt. The evidence on the part of defendant tended to show that plaintiff should not have been sitting down at the time of the injury, that

his duty required him to stand up, and that the men in charge of the locomotive did not know that he was sitting. The defendant's witnesses also denied that the engine moved when plaintiff was injured. Plaintiff, being recalled, said that he was sitting so that he could get up, turn, and attend to his business; that, if he had been sitting three feet further away, which he could have done, he would not have been hurt. He sat at the place of his own accord. At the conclusion of the evidence defendant moved for judgment of nonsuit, which was denied. Defendant excepted. The usual issues directed to defendant's negligence and plaintiff's contributory negligence were submitted to the jury. Defendant submitted a number of prayers for special instructions, several of which directed the jury to return a verdict for defendant. Others presented questions of law applicable to certain phases of the evidence. His honor declined to give them as drawn, and defendant excepted. The instructions given, to which exceptions were taken, are set out in the opinion. There was a verdict for the plaintiff upon both issues, and his damages assessed on the third issue. Motion for new trial denied. Defendant excepted. Judgment upon the verdict. Appeal.

Guthrie & Guthrie, for appellant. L. M. Carlton, for appellee.

CONNOR, J. (after stating the facts as above). The negligence alleged and found by the jury was in moving the train suddenly and without giving the usual signals. The plaintiff says that when the dipper was filled, ready to be unloaded—that is, drawn over the car to deposit the mud upon it—the train did not move; that it was in motion when the dipper was filling with mud from the ditch on the roadside; that he was sitting on the side of the car, waiting for the signal to hook the chain, which would have required him to stand up. The sudden motion of the train, without signal or warning, caused him to throw his hand back, and it was thereby thrust, or thrown, into the snatch block and injured. His honor instructed the jury in this aspect of the testimony that if they found that plaintiff's post of duty was on the car where the snatch block or hoisting chain was suspended; that by the rules of the company or by custom a signal should be given before the train moved and that plaintiff was on the car, where his duty required him to be, waiting for the dipper to come over and on the car to be hooked by him; and that the engineer, without notice or signal, negligently caused the train to move or jerk at a time when it was not necessary to do so, and because of the sudden movement of the train plaintiff was jarred and about to fall and lose his balance and threw out his hand to catch, and his hand came in contact with the chain or snatch block and was injured, and the sudden negli-

gent moving of the train was the proximate cause of the injury—they should answer the first issue “Yea.” To this instruction defendant excepted. In the light of the conflicting evidence, the question of the alleged sudden moving of the train, as testified to by plaintiff, was properly submitted to the jury. If, as alleged by him, the movement was unusual and not when the position of the dipper was such as to make it necessary and proper, certainly some warning or signal should have been given, so that employes on the cars liable to be injured should be warned and given an opportunity to avoid injury. It is a matter of common knowledge and everyday experience that a sudden movement of a train of cars is calculated to throw persons standing on them down and subject them to serious injury. The duty to give warning of unusual and unexpected movement to employes whose duty it is to be on the cars is manifest. This has been too frequently and uniformly held by this court to require the citation of authority. Defendant insists that plaintiff cannot avail himself of this principle because he was not at his post of duty, but had voluntarily placed himself in a position of obvious danger.

It is true, as contended by defendant, that the duty imposed upon the engineer to give the signal is for the protection of the employes who are on duty and at the place assigned to them. He is not required to look out for those who leaving the post or place assigned to them have voluntarily or in violation of their duty assumed a more dangerous position. In *Howard v. Railroad*, 132 N. C. 709, 44 S. E. 401, the plaintiff employe, riding in a shanty car, in violation of the rules of the company and without any necessity, sat on the steps of the car, and was injured by striking his foot against a pile of wood on the side of the track. We held that he could not recover. His proper place was in the car where seats had been provided and the rules of the company required him to be. It is elementary that it is negligence for a passenger to ride on the platform of a moving train, when seats have been provided, and there is room for him to be seated inside the car. *Wagner v. Railroad*, 147 N. C. 315, 61 S. E. 171. In the case before us the plaintiff was required to stand up only when he was hooking the chain. We see nothing to justify the conclusion that, while the dipper was gathering the mud and placing it upon the car, he was under any obligation to stand up. If he was at his post to hook the chain when signaled, he performed his full duty. It was necessary for him to remain on the car, so that, when he was called upon, he could promptly hook the chain. This was done every two or three minutes. There is no suggestion that, by sitting on the side of the car in the manner described, he was out of the line of his duty. It is the duty of a conductor on a passenger train to pass through the

cars to take up the tickets and look after his train; but it would not be contended that if while “on his run” he sat down, and was injured by the negligent management of the engine by the engineer, he could not recover because he was not “standing up” or passing through the cars. He is none the less on duty when sitting down than when passing through his cars. So, with the plaintiff, his place was on the car, near to the chain and snatch block. If he negligently sat so near the edge of the car that, by the usual movement of the train, he fell off, his negligence would be the proximate cause of the injury and he could not recover for an injury sustained thereby.

This view of the case was put before the jury by his honor, who told them that if he was sitting down as he testified, and by the motion of the ditching machine he was jarred and threw his hand onto the snatch block, and was thereby injured, he could not recover. This was obviously correct because the motion of the ditching machine, when properly operated, was one of the risks which plaintiff assumed when he took the employment. But the sudden, unusual, and unnecessary movement of the train, without signal, was negligent, and the employe never assumes the risk of an injury sustained by defendant's negligence. It may well be that the engineer did not know that the plaintiff was sitting down near the snatch block, or that by suddenly and without warning moving the train he would cause him to sustain the injury. This is not the test of liability for negligent conduct. He did know that employes were on the flat cars operating the ditching machine, that, while the dipper was being drawn onto the car for the purpose of placing the dirt or mud, the engine should not move, certainly not do so, without giving warning. He further knew that it was hazardous to men at work on the cars to suddenly, and without warning, move the train. To do so was negligence, and his employer, the defendant, is liable for such injury as was the proximate result of such negligence. Human life and limb is of too much value in the estimation of the law to permit it to be sacrificed or destroyed by negligent handling of such powerful agencies without warning and signals to those to whom the common employer owes the duty of giving warning. The defendant's witnesses deny that the train was moved, but the issue has been settled against them by the verdict. We find no error in his honor's charge upon the first issue.

The defendant contends that as a matter of law upon his own evidence plaintiff was guilty of contributory negligence. The learned counsel stresses upon our attention plaintiff's statement that the engine started the car, and he threw his hand back and struck the chain; that he knew the cable was running; that he knew, if he put his hand in it,

he would be hurt. Of course, if plaintiff had put his hand in the snatch block or on the cable, knowing the danger, his negligent act would have been the proximate cause of his injury, and he could not recover. This is manifest. He says that, as the train moved suddenly, he lost his balance, and threw his hand back, and struck the chain; that, if he had not done this, he would have fallen, and his head would have struck it. His honor submitted the testimony upon the second issue under the following instructions. After explaining to them the duty of the employer to select a safe place in which to perform his work, when two are open to him, he said: "If you should find the facts in this case to be that the plaintiff selected a dangerous place in which to wait until the dipper should be placed on the car, and by him unhooked, in accordance with his duty, when there were other places or positions on the cars that were safe, and you further find that a man of ordinary prudence would not have selected a position such as that occupied by the plaintiff at the time of the injury, then, and under these circumstances, if you find such was the condition and facts, the plaintiff would be guilty of contributory negligence, you should answer the second issue, 'Yes.'" This was correct. We notice an exception to the following language used by his honor: "The plaintiff alleges that he was injured by the defendant moving its train of cars without giving him notice or signal by ringing the bell or blowing the whistle, which it was its duty to do." In their brief the learned counsel assume that in using this language his honor instructed the jury that it was the duty of defendant to give plaintiff signal by ringing the bell or blowing the whistle. We do not so interpret his honor. He was stating the plaintiff's contentions. When he came to instruct the jury, he explained to them that the duty to give a signal was dependent upon the rules of the company or the custom. We have carefully examined the record and the briefs of counsel, and find no error. There were no exceptions to the instruction upon the measure of damages.

No error.

(150 N. C. 454)

SPAUGH et al. v. HARTMAN et al.
(Supreme Court of North Carolina. April 14, 1909.)

1. SLAVES (§ 25*)—LEGALIZING "COHABITATION."

The cohabitation meant by the act of February, 1879 (Laws 1879, p. 136, c. 73), adding to the canons of descent by legitimatizing children of colored parents born at any time before January 1, 1868, of persons living together as husband and wife, and conferring on such children all the rights of heirs at law or next of kin with respect to the estate of such parents or either of them, is not casual sexual intercourse, but an exclusive cohabitation such as is

usually signified by the words "living together as man and wife."

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115; Dec. Dig. § 25.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1243-1245.]

2. SLAVES (§ 25*)—MARRIAGE—EVIDENCE.

Under the act of February, 1879 (Laws 1879, p. 136, c. 73), legitimatizing the children of colored parents born before January 1, 1868, of persons living together as husband and wife, etc., the common-law rule that, except in actions for criminal conversation, reputation, cohabitation, and the declarations of the parties are competent evidence that the marriage relation subsisted between them, applies in proving that the quasi marriage relation referred to in the statute existed between slaves.

[Ed. Note.—For other cases, see *Slaves*, Dec. Dig. § 25.*]

Appeal from Superior Court, Davidson County; Long, Judge.

Action by Bynum Spaugh and others against A. J. Hartman and others. Judgment for defendants, and plaintiffs appeal. New trial.

Civil action to recover land, tried in the superior court of Davidson county, November term, 1908. The case was made to turn upon the finding of the jury upon this issue, submitted by consent: "Are the plaintiffs the heirs of Wesley Delap and entitled to the possession of the lands described in the complaint? Ans. No." The plaintiffs moved for a new trial, assigning errors. Motion denied. Plaintiffs excepted and appealed from the judgment rendered.

Walser & Walser and McCrary & McCrary, for appellants. Emery E. Raper, for appellees.

BROWN, J. The land in controversy was devised by Alex Delap to James Wesley Delap, colored, who had been his slave. Upon the death of the testator the said devisee entered into possession and remained there until he died intestate in 1906. The defendants then entered upon the lands and have remained there since, claiming as heirs of Alex Delap. The plaintiffs claim the lands as the children of Calvin Delap, who, it is alleged, was the son of Wesley Delap and his "slave wife," Martha Spaugh. Calvin was born of said Martha about 1853, and it is contended that Wesley Delap was his father, acknowledged the paternity, and that at the time the child was born was living with its mother in the relation of husband and wife, and that in consequence thereof such issue became legitimate and capable of inheriting from either parent under Acts 1879, p. 136, c. 73, now rule 13, "descents" (Revisal 1905, § 1558). There was much evidence introduced by plaintiffs tending to establish the affirmative of the issue.

These questions were put by plaintiffs' counsel to witness Manuel Spaugh and excluded by the court, to which ruling the

plaintiffs excepted: "State what the general reputation as to who Martha Spaug's husband was, and who Wesley Delap's wife was relative to slave relations? Did or did not Martha and Wesley live together as man and wife as was custom amongst slaves at and before the time of the begetting and birth of Calvin Spaug?" The act of February, 1879, adds to the canons of descent by legitimatizing the children of colored parents born at any time before the 1st day of January, 1868, of persons living together as husband and wife, and confers upon such children all the rights of heirs at law or next of kin with respect to the estate of such parents or either of them. Its efficacy depends upon two essential facts to be established—a cohabitation subsisting at the birth of the child and the paternity of the person from whom the property claimed is derived. The cohabitation meant by the statute is not casual sexual intercourse, but an exclusive cohabitation such as is usually signified by the words "living together as man and wife." *Branch v. Walker*, 102 N. C. 85, 8 S. E. 896. While the marriage of slaves was not recognized as a legal bond, it is well known that in numberless instances the marriage relation was assumed by them, and to all intents and purposes, except in law, they became man and wife, and the appellation of husband and wife was used in reference to the parties to such unions by their owners and their associates. By the common law it is held to be a general rule of universal application in civil cases, except in actions for criminal conversation, that reputation, cohabitation, the declarations, and conduct of the parties are competent evidence to prove that the marriage relation subsisted between them. *Archer v. Hathcock*, 51 N. C. 421; *Jones v. Reddick*, 79 N. C. 291; *Weaver v. Cryer*, 12 N. C. 337. We are of opinion that the same rule of evidence should apply in proving that the quasi marriage relation referred to in the statute existed between slaves. It is not the legality of such a relation that is an issue in this case, but only the fact that such a relation was assumed by the putative grandparents of the plaintiffs.

The syllabus in the case of *Nelson v. Hunter* (upon a rehearing) 144 N. C. 763, 56 S. E. 506, would appear to sanction the ruling of his honor; but an examination of the case will disclose nothing inconsistent with our present ruling. 140 N. C. 599, 53 S. E. 439. The facts of that case were that a marriage ceremony was performed during the War between Solomon Nelson and Jackie Cook, and the evidence tended strongly to prove that the relation thus assumed continued to exist until after the act of March 10, 1866 (*Pub. Laws 1866*, p. 99, c. 40), had legalized it, and that the plaintiff Nel-

son claimed the property of his mother Jackie as her only legitimate child, the product of that union. For the purpose of showing that the relation of Solomon with Jackie was not exclusive, and not that of husband and wife, it was sought to be proven by general reputation that Solomon some time in 1867 abandoned Jackie, and lived with a female of color named Viley, in Beaufort county, with whom he had lived prior to the War. The court held that the general reputation that Viley was Solomon's wife before the War and her declarations claiming him as her husband were valueless and incompetent, saying in reference thereto: "If Solomon resumed his cohabitation with Viley after the passage of the act of March 10, 1866, it could have no effect upon the legitimacy of his and Jackie's children. If his relations with Jackie continued long enough to have become legalized by the act, his conduct after that could not render the offspring of that union illegitimate." 140 N. C. 601, 53 S. E. 439. There was no purpose in that case to prove a slave marriage between Solomon and Viley nor was there any issue of their cohabitation. Neither is the case of *Erwin v. Bailey*, 123 N. C. 632, 31 S. E. 844, authority for the defendant's contention. It was there held that general reputation that the plaintiff was not the child of Caesar Swinton was properly excluded, with which ruling we fully agree. It was an attempt to prove illegitimacy by general reputation.

We think his honor erred in excluding the evidence.

New trial.

(150 N. C. 846)

STATE v. COX.

(Supreme Court of North Carolina. April 14, 1909.)

CRIMINAL LAW (§§ 721½, 730*)—IMPROPER ARGUMENT—FAILURE OF WIFE TO TESTIFY—ACTION OF COURT.

Under Revisal 1905, § 1634, making accused's wife competent to testify for him, but providing that her failure to do so shall not prejudice the defense, it was improper for the solicitor in his argument to comment on accused's failure to corroborate his testimony by her, and for the judge, on accused objecting, to state that the wife could not testify against accused, that she could testify in his behalf only, and that the jury could not consider what she knew, or did not know, and to instruct that it was not for the state to examine the wife against accused, but that he could use her as a witness, whereas the court should have instructed that the jury could not consider accused's failure to use her.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1673, 1693; Dec. Dig. §§ 721½, 730.*]

Appeal from Superior Court, Randolph County; Long, Judge.

Simeon Cox was convicted of an offense, and he appeals. Reversed.

Morehead & Sapp, for appellant. The Attorney General, for the State.

CLARK, C. J. The state called the wife of the defendant, who was present under subpoena, and tendered her to the defendant. The court ruled that the state could not examine her as a witness; that she was a competent witness only for the defendant. The solicitor in his argument to the jury commented on the failure of the defendant to corroborate his own testimony by his wife. On objection made his honor stated that "the wife was not competent, and would not be allowed to bear witness against the husband, that her testimony would be competent only in behalf of her husband, and that, as the wife was not permitted to testify against her husband and had not done so, the jury could not consider what she knew or did not know." And in his charge the court told the jury "it was not for the state to examine the wife of the defendant as a witness against her husband, but it was competent for the defendant to use her as a witness." Revisal 1905, § 1634, provides: "The husband or wife of the defendant, in all criminal actions or proceedings shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense." The tender of the wife by the state, and the remarks of the solicitor, sharply called attention to the failure of the defense to examine the defendant's wife. Objection was made, but the court, instead of telling the jury that they should not let that fact prejudice the defendant, on both occasions rather accentuated the matter by telling the jury that the state could not use the wife of the defendant as a witness, but that he could. The effect, though unintentional on the part of his honor, was to throw the fault of the wife not being a witness upon the defendant, since he could have put her on, and the state could not. There was no caution that such failure to use the wife as a witness should not be considered by the jury. Yet the tender, and the remarks of counsel, being called to the judge's attention, called for such caution, and his failing to give it was prejudicial.

Error.

(150 N. C. 447)

DAVIS v. FRAZIER.

(Supreme Court of North Carolina. April 14, 1909.)

1. LOGS AND LOGGING (§ 3*)—TIMBER CONTRACTS—CONSTRUCTION.

A deed to all standing timber exceeding a specified size, subject to the conditions that timber not cut within five years should revert to the grantor, and that the grantees should not cut over the lands a second time for timber, conveyed a base or qualified fee, determinable as to all timber not cut within five years, the

latter condition not being invalid for repugnancy to the grant; and, if the land has been cut over once, the grantees' rights have expired though trees could be found here and there throughout the different tracts covered by the deed.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—TIMBER CONTRACTS—UNAUTHORIZED CUTTING.

A cutting of timber by a grantee, or his successor, after the time allowed for cutting is an actionable wrong.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. 11; Dec. Dig. § 3.*]

3. CONTRACTS (§ 162*)—CONSTRUCTION—REPUGNANT PROVISIONS.

A clause of a contract, irreconcilable with a preceding clause, and repugnant to the general purpose of the contract, will be set aside, subject to the rules that the intent of the parties as embodied in the entire instrument is to be determined, and that every part of the contract must be given effect if that can be done by fair or reasonable interpretation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 744; Dec. Dig. § 162.*]

Appeal from Superior Court, Granville County; E. B. Jones, Judge.

Action by Anne A. Davis against B. F. Frazier. Judgment dismissing the action, and plaintiff appeals. Reversed.

There have been temporary restraining orders issued and served in the cause, and pending the action certain cross-ties have been seized, and are now held under process of claim and delivery, issued in the same at plaintiff's instance. These cross-ties are claimed by one John Bullock, who has been allowed to interplead for the purpose, and who alleges that he bought and paid for the ties, and owned same at the time of action instituted. On the hearing, and as determinative of the controversy, issues were framed for submission to the jury as follows:

"(1) Did the defendant unlawfully enter upon the land of plaintiff and cut and remove therefrom a lot of cross-ties and hickory timber, as alleged in the complaint? Answer.

"(2) What damages, if any, has the plaintiff sustained? Answer.

"(3) Is the plaintiff the owner of, and entitled to the possession of, the cross-ties described in the affidavit filed in the claim and delivery proceedings in this action? Answer."

At the close of plaintiff's testimony, on motion, the action was dismissed as on judgment of nonsuit, and plaintiff excepted and appealed.

A. A. Hicks and B. S. Royster, for appellant. V. S. Bryant, Aycock & Winston, and T. Lanier, for appellee. Graham & Devin, for interpleader.

HOKE, J. (after stating the facts as above). The evidence showed that, on May 31, 1905, the plaintiff, by written deed, had conveyed to Heidlebaugh and Le Fever all the stand-

ing timber on three certain tracts of land in Granville county, fully described, "which now measures, or shall measure during the term of years hereafter set out, as much as ten inches in diameter at the butt," etc. "To have and to hold said timber unto the said Heidelbaugh and Le Fever, and their heirs and assigns, in fee simple, subject to the following conditions and agreements: (1) That the parties of the second part may enter on said land, etc., and cut and remove said timber in such manner, and at such place and places as they may deem necessary, and may construct and operate all such mills and other devices in cutting and preparing such timber for market; roads, tramroads, railroads, stables, shanties, and other buildings over and upon such land as may be deemed necessary for cutting and removing said timber, and may have full power and authority to remove from said land, at any time, all machinery, buildings, etc., placed upon the land for said purpose." "(3) And the said parties of the second part, and their heirs and assigns, have the right to enter upon and begin to cut and remove the said timber at any time they may desire, and all the timber not so cut and removed within five years from May 26, 1905, shall revert to and become the property of the party of the first part, and her heirs and assigns. (4) And it is expressly agreed and understood that the said parties of the second part shall not have the right to cut over the lands hereinafter described a second time for timber, and that the said Mrs. Anne A. Davis shall have the right to take up the wood and cut any trees for her own use after the same have been cut over by the parties of the second part, and the parties of the second part agree not to injure the wire fences now upon said land."

There was evidence tending to show that the grantees entered the land under this deed, placed their mills, built shanties, and constructed the necessary roads for the purpose, and, having cut over all the land included in the contract, removed their mills, machinery, etc., except the shanties, which they sold, and that, after this was done, the defendant, claiming the right to do so, had entered on the land, and cut the timber and ties, and committed the spoil and injury for which the plaintiff now seeks redress. On this question, Dr. I. H. Davis, among other things, testified as follows: "Am son of Mrs. A. A. Davis, plaintiff. Heidelbaugh and Le Fever cut over all the land described in the deed or contract, and then took up their mills, machinery, etc., and moved everything off the land, except some shanties, which they sold. They moved away from the land in August or September, 1907, and went to Virginia, I think. They cut over all the land described in the deed or contract. Mr. Frazier, the defendant, had hands cutting timber on the lands in October, 1907; and, acting un-

der instructions from my mother, I ordered them to stop, and I also notified Frazier personally to stop, but he paid no attention to such notice, and this suit was brought in March, 1908, and a restraining order was served on the defendant." It does not clearly appear from the testimony that the defendant entered as assignee under this deed, but, assuming this to be true, we are of opinion that the plaintiff is entitled to have her cause submitted to a jury, and there was error in dismissing the same as on judgment of nonsuit. According to our decisions the deed in question conveyed to the grantees, Heidelbaugh and La Fever, a fee simple in the timber of the specified dimensions, determinable as to all timber not cut and removed from the land within five years, and subject to the further provision "that the land should not be cut over for timber a second time." If the evidence of I. H. Davis, above set out, and other of like tenor, should be accepted by the jury, and it should be established that the land described in the deed had been once entirely cut over, or that a distinct and definite portion of the land had been once cut over, then the right of the grantees, or persons claiming under them, to cut and remove timber, as to all or the stated portion of said land, by the express provision of the contract, would cease and determine, and any further cutting would amount to an actionable wrong. And, if this land had been entirely cut over once, within the meaning of the term as contained in the contract, the result indicated would not be affected by the fact that here and there through the different tracts trees could be found which were within the specified dimensions. If, however, there should be distinct and definite portions of the land which had not been cut over at all, as to such portions we are of opinion that the rights granted under the contract will continue until they are cut over once, or the right to cut expires by the limitation as to time.

It is contended for the defendant that the stipulation contained in section 4, to the effect that the land should not be cut over a second time, is in direct conflict with the former parts of the instrument, and entirely repugnant to the estate which is thereby expressly conveyed, and should therefore be rejected; but we do not think this a correct interpretation of the contract in question. It is an undoubted principle that a "subsequent clause, irreconcilable with a former clause, and repugnant to the general purpose and intent of the contract, will be set aside." This was expressly held in *Jones v. Casualty Company*, 140 N. C. 262, 52 S. E. 578, 5 L. R. A. (N. S.) 982, 111 Am. St. Rep. 843, and there are many decisions with us to like effect; but, as indicated in the case referred to, and the authorities cited in its support, this principle is in subordination to another position that the intent of the parties as embodied in the entire instrument is the end to be attained,

and that each and every part of the contract must be given effect if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable. *Jones v. Casualty Co.*, supra; *Lawson on Contracts*, §§ 388, 389; *Bishop on Contracts*, §§ 386, 387.

In *Jones v. Casualty Co.* the doctrine is thus stated: "Another principle applicable to the case before us, and equally well established, is that while clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet a proviso which is utterly repugnant to the body of the contract and irreconcilable with it will be rejected; likewise a subsequent clause, irreconcilable with a former clause, and repugnant to the general purpose and intent of the contract, will be set aside." And in *Lawson on Contracts*, supra, it is said: "The third main rule is that that construction will be given which will best effectuate the intention of the parties to be collected from the whole of the agreement; and, to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it, and the objects which they had in view. * * * Courts will examine the whole of the contract, and so construe each part with the others that all of them may, if possible, have some effect; for it is to be presumed that each part was inserted for a purpose, and has its office to perform. So, where two clauses are inconsistent, they should be construed so as to give effect to the intention of the parties as gathered from the whole instrument. So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties." And in *Bishop on Contracts* the author says (section 386): "After interpretation has exhausted itself in harmonizing the several clauses and words, if there is a residue which cannot be reconciled, the repugnancy must be got rid of by rejecting what will free the writing from it." And in section 387: "If the main body of the writing is followed by a proviso wholly repugnant thereto, it must necessarily be rejected, because otherwise the entire contract will be rendered null. But where it can be construed to qualify the main provisions, so that all may stand together; it will be retained." A proper application of the doctrine correctly stated in these authorities will show that there is no irreconcilable conflict in the provisions of this contract, but that each and every part of it can be given effect. The instrument conveys to the grantees a base or qualified fee in the timber, determinable as to all timber not cut and removed within the time specified—i. e., five years—and then provides that the cutting may commence at

any time within the five years the grantees may desire, and that the land embraced in the contract shall not be cut over a second time. This last stipulation does not at all nullify the grant, but only establishes a method or condition by which the right or interest granted may be made available; and there is no reason, as stated, why this provision, made a substantial part of the contract by express agreement of the parties, should not be given effect. The insertion of this provision was no doubt caused by the suggestion indicated in *Hardison v. Lumber Co.*, 136 N. C. 175, 48 S. E. 588, where it is said in substance that, if the parties desired protection against a "second cutting, they should have so contracted."

It is further urged for defendant that the fourth clause of the contract, being a condition subsequent working a forfeiture of the estate, should be strictly construed. If it be conceded that the clause in question is a condition subsequent, the position contended for by defendant is well recognized, but it is only a rule of interpretation, and does not obtain when the meaning of the contract is so plain that no construction is permissible. This is clearly illustrated and upheld in the case to which we were referred by counsel. *Epperson v. Epperson (Va.)* 62 S. E. 844. In that case the court held as follows: "While courts regard with disfavor conditions and defeasances which are calculated to prevent or defeat the absolute vesting of titles, they will not hesitate to give effect to the intention of the parties when the condition or defeasance is clear and explicit."

We have purposely refrained from definite expression as to the right to certain cross-ties, and their seizure by process of claim and delivery sworn out in this action. The cause having been dismissed as on judgment of nonsuit at the close of plaintiff's testimony, the evidence which makes for the right and claim of the interpleader to these ties has not been disclosed, and we have considered it well to withhold our opinion until the facts concerning them shall be more fully ascertained and presented.

For the reasons heretofore stated, this order of nonsuit will be set aside, and the cause restored to the docket.

Reversed.

(150 N. C. 433)

LASSITER v. SEABOARD AIR LINE RY.
(Supreme Court of North Carolina. April 14, 1909.)

1. MASTER AND SERVANT (§ 149*)—OBLIGATION OF MASTER—CARE REQUIRED.

A road master directing the unloading of iron rails from flat cars must use ordinary care to see that the rails can be handled with safety in the manner directed by him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 291; Dec. Dig. § 149.*]

2. MASTER AND SERVANT (§ 97*)—INJURY TO SERVANT—LIABILITY OF MASTER.

Where the method pursued in doing work in the manner directed by the employer's superintendent was not unusual, unusual results could not be reasonably anticipated, and the employer was not responsible therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

3. MASTER AND SERVANT (§ 97*)—INJURY TO SERVANT—LIABILITY OF MASTER.

An employé was injured while unloading iron rails from a flat car. The rails were loaded in the usual way. The employé and co-employé unloaded the rails by first lifting one end of them over the standard and letting them fall to the ground, and then by lifting the other end in the same way. While a rail was so removed, it bounded back and injured the employé. There was nothing to show that the end lifted over the standard would not, as other rails had done, similarly situated and handled, fall to the ground. The method pursued was shown to be safe. *Held*, that the injury was the result of unavoidable accident, relieving the employer from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

Appeal from Superior Court, Chatham County; Webb, Judge.

Action by W. G. Lassiter against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Reversed.

Action for personal injury alleged to have been sustained by reason of defendant's negligence. The evidence tended to show that plaintiff was, by direction of defendant's superintendent or road master, engaged, with other employes, in unloading iron rails from a flat car, that the rails were laid upon the car in the usual way, and that upon either side of the car "fish bars" or "angle plates," about 18 inches long, were used as standards. They were put in the "stirrups" or "cuffs" on the side of the car for the purpose of holding the standards. Some of the rails had been taken up from the cross-ties and were being used to build a siding. The "fish bars" were suitable for standards and "constantly used for that purpose." The rails were loaded in the usual way. There were several cars of rails. In unloading the cars other than the one on which plaintiff was injured, the standards, or "fish bars," were removed, and the rails thrown upon the ground. When the hands undertook to unload the car upon which the plaintiff was injured, it was found that the rails pressed against the standards, so that they could not be removed. The plaintiff and other hands were directed to unload by raising one end of the rail, lifting it over the standard, and letting it fall to the ground, and then lifting the other end over in the same manner, or, as plaintiff says, the order was, "Pick up the end of the iron and throw it off." He says that, as he did so, "it bounded some way or other and dashed back to the car." In reply to the question, "When you picked up the end of the rail to toss it over, it caught at the

other end and flew back, is that the way you described it? A. It bounded and flew back. * * * I was not thinking about it. I was just trying to carry out orders. I thought it would go to the ground." Mr. Cain, the section master, a witness for plaintiff, says that Capt. Tussey, the road master, ordered the hands to throw the rails off. "He said he could not get the standards out until after he got the rails from around the standards. They were piled against the standards." This witness said the car was loaded in the usual way, that the fish bars made good standards, were constantly used for that purpose, that he had unloaded rails in that way before, had often seen it done, and they had thrown out two or three rails before the plaintiff was injured. The rail struck plaintiff's leg, as it "bounded back," and inflicted the injury for which he sues.

The foregoing is the substance of the evidence, on behalf of the plaintiff, in regard to the way in which he received the injury. He alleges that defendant was negligent in several respects. His honor instructed the jury that there was no evidence that the car was not properly loaded, or that there was not a sufficient number of hands for that purpose. The defendant requested his honor to instruct the jury: "From all of the evidence in this case, the cause of the injury was an accident—and that they will answer the first issue, 'No.'" This was refused, and defendant excepted. His honor instructed the jury that if they found that, as the plaintiff picked up the rail to toss it off the car, the other end of the rail was caught, or hung, and if they should further find that Cain or Tussey knew that the rail was caught, or hung, or that they could have known it by observation or ordinary care that it was caught, and failed to do so, and that after knowing it was caught at the end and it was tossed over and rebounded, and by reason of the fact that it was caught before it was picked, or after it was picked up and hurt plaintiff, they would answer the first issue, "Yea." Defendant excepted. There was a verdict for plaintiff. Judgment and appeal.

Murray Allen and Hayes & Bynum, for appellant. Long & Long, for appellee.

CONNOR, J. (after stating the facts as above). The defendant lodged several exceptions to his honor's refusal to give special instructions and to the instructions given; but error is assigned only for the refusal to nonsuit and, what is equivalent, to instruct the jury that the injury sustained by plaintiff was the result of an accident. The uncontradicted evidence is that the rails were loaded in the usual way, and that the "fish bars" were suitable and usually used for standards. His honor instructed the jury that there was no evidence that the cars were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not properly loaded, or that there were not a sufficient number of hands to assist in unloading. It is evident that plaintiff and Mr. Cain, who helped him, were able and did lift one end of the rail over the standard. It does not appear that the fact that the standards were not removed was the proximate cause of the injury. We do not find any suggestion in the evidence that the method of handling the rails was unusual or dangerous, provided a sufficient number of hands were furnished to lift them over the standard. His honor eliminated every suggestion of negligence other than the question whether Tussey, who gave the order, and Cain, who assisted the plaintiff in executing it, saw, or could have seen by the exercise of ordinary care, that the rail was hung. We see no ground for exception to the measure of duty imposed upon them. It was undoubtedly the duty of the person giving the order to unload the rails to use ordinary care to see that they could be handled with safety, in the manner directed by him. There is no evidence, or suggestion, that either of them did in fact see that the rail was "hung," nor does it very clearly appear how it was "hung." We are unable to find any evidence that there was anything in the position of the rail to suggest to them that the end lifted over the standard would not, as others had done similarly situated and handled, fall to the ground. All of the witnesses concur in saying that the rails were loaded in the usual way. Two or three had been unloaded without accident. The method pursued in unloading was not unusual. Therefore unusual results could not be reasonably anticipated. We are unable to find any suggestion, in the evidence, explaining why the end of the rail, when lifted over the standard, rebounded. We, of course, know that there was some obstruction to the anticipated action of the other end of the rail which should, and, but for some obstruction, would, have moved upwards as the end next plaintiff went to the ground. The plaintiff, in answer to the question what caused it to spring back, said: "I suppose it got caught at the other end, or some way. It got down so quick. It bounded in some way and flew back and struck me." He further says: "I could not say how it was done. It came back with pretty smart force, very quickly."

In *Keck v. Tel. & Tel. Co.*, 131 N. C. 277, 42 S. E. 610, where it appeared that there was nothing unusual in the conditions under which the work was done—no lack of hands, and "no mishap or danger anticipated"—the injury was held to be the result of an accident, which is "an event from an unknown cause or an unusual and unexpected event from a known cause; chance; casualty." *Crutchfield v. Railroad*, 76 N. C. 322. In *Martin v. Highland Park Mfg. Co.*, 128 N.

C. 264, 38 S. E. 876, 83 Am. St. Rep. 671, it is said: "Injuries resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore not expected, must be borne by the unfortunate sufferer." In *Bryan v. Railroad*, 128 N. C. 387, 38 S. E. 914, Douglas, J., said: "The employer is not responsible for an accident simply because it happens, but only when he has contributed to it by some act or omission of duty."

In this case a new trial was ordered, with the suggestion that a nonsuit should have been granted. *Alexander v. Mfg. Co.*, 132 N. C. 423, 43 S. E. 1008; *Frazier v. Wilkes*, 132 N. C. 437, 43 S. E. 1004. While we regret the painful injury which the plaintiff sustained, we are unable to see how, by reasonable human foresight, or precaution, the eccentric course of the rail could have been anticipated and therefore prevented. We cannot think that it was negligent to pursue a course which none of the witnesses suggest was either unusual or hazardous. Mr. Tussey says: That he had been at that kind of work 14 years. That he had ample force. "It is always customary to take hold of the rail and throw one end off to prevent accident. Some men will throw quicker than others and let the rail fall down, and for this reason we have adopted the plan to throw one end off at the time. It makes it much safer than trying to throw the entire rail off. It was the method adopted by all of the roads that I have worked for in unloading rails." W. C. Wooten, who was section foreman and present when the accident occurred, says of the method of unloading: "It is safer one end at a time. If you try to pick up both at the same time, sometimes the rail will turn and catch your fingers." This is not contradicted and is consistent with plaintiff's evidence. We think that his honor should have granted the motion for nonsuit. Upon the whole of the evidence, the plaintiff's injury was the result of an unforeseen and unavoidable accident.

There is error.

(150 N. C. 428)

COOK v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. April 7, 1909.)

1. JUDGMENT (§ 341*)—VACATION—MODIFICATION.

An order or decree during the term is under the absolute control of the judge, and may be vacated or modified to meet the ends of justice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 667; Dec. Dig. § 341.*]

2. PLEADING (§ 258*)—AMENDMENT.

Where an order continuing a case by consent was entered by mistake, the court had

power during such term to permit defendant to file an amended answer setting up plaintiff's failure to file a claim for the damages sued for within the time required by the contract.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 258.*]

Appeal from Superior Court, Alamance County; B. B. Jones, Judge.

Action by Jacob Cook against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

King & Kimball, for appellant. Morehead & Sapp, for appellee.

WALKER, J. This action was brought to recover damages for the negligent failure of the defendant to deliver a telegram. The plaintiff filed his complaint August 2, 1906, and the defendant filed its answer, which contained a general denial of the allegations of the complaint, on September 15, 1906. At a special term of the superior court held in July, 1907, it appeared from the minutes the cause was continued by consent on July 16, 1907, but the court finds as a fact that counsel were not present at the time, and that the defendant's counsel did not know of the entry until September term, 1908. On July 23, 1907, during the second week of the special term, the court made an order allowing the defendant to amend its answer by averring that the plaintiff had not presented his claim within 60 days after the message was filed with the company, which by the terms of the contract between it and the plaintiff exonerates the defendant from liability for the alleged act of negligence. The amendment to the answer was filed on August 6, 1907. The plaintiff first learned at September term, 1907, that the order for the amendment had been made, and that the amended answer had been filed, but did not move at that term to strike out the order or the amendment of the answer, but did move at March term, 1908, to strike out the amendment. The motion was continued from time to time and heard at September term, 1908, when the judge, then presiding, ordered that the amendment be stricken out. Defendant excepted and appealed.

In *Gwinn v. Parker*, 119 N. C. 19, 25 S. E. 705, it appeared that the plaintiff had filed his complaint, and judgment by default for want of an answer was entered. During the same term, the court set aside the judgment and allowed the defendant to answer. This court, holding that there was no error, declared it to be the settled rule that any order or decree is, during the term, in fieri, and the court, during the (same) term, can vacate or modify it, and that the court has the discretion to enlarge the time for filing pleadings. To the same effect is *Halyburton v. Carson*, 80 N. C. 16, in which Ashe, J., says: "It is familiar learning that all the proceedings of a court of record are in fieri—under the ab-

solute control of the judge, subject to be amended, modified, or annulled at any time before the expiration of the term in which they are had or done." *Faircloth v. Isler*, 76 N. C. 49; *Dick v. Dickson*, 63 N. C. 488; *Sneed v. Lee*, 14 N. C. 364. In *Penny v. Smith*, 61 N. C. 35, Pearson, C. J., for the court, said: "The motion to dismiss the appeal, upon the ground that the county court had no power to amend the petition after dismissing it and granting an appeal to the superior court, was put on the ground that the court was functus officio in respect to the case, and had no further control over it. In this the counsel for the defendant is mistaken. The proceedings of the court are in fieri until the expiration of the term, and, until then, the record remains under the control of the court. It may strike out the judgment, and enter a different one; it may amend the pleadings, and do any other act necessary to effect the purposes of justice—and this as well after, as before, what purports to be a final judgment has been entered. In other words, the court has the whole term during which to consider of its action, and any entry made on a former day does not affect its power on a subsequent day. It is every day's practice in the superior courts to allow the writ to be amended, by entering a larger sum, or, in ejectment, to extend the time of the demise, and these amendments are usually applied for and allowed, after judgment has been entered, and an appeal taken." But we need not and do not rest our decision upon the ground stated in the cases cited, for it appears in this case sufficiently by the findings of fact that the order continuing the case by consent was entered by mistake. That is the substantial meaning and effect of the findings. It follows, of course, that the court had the power and the discretion to allow an amendment of the answer and permit the defendant to set out, as defensive matter, the terms of the contract between the parties.

It is unnecessary to consider the other reasons assigned by the defendant's counsel for reversing the order of the court.

Reversed.

(150 N. C. 473)

JONES v. SEABOARD AIR LINE RY. CO.
(Supreme Court of North Carolina. April 14, 1909.)

1. MASTER AND SERVANT (§ 306*)—ACTS OF SERVANT—LIABILITY OF PRINCIPAL.

A master is liable for the torts of his servant committed wantonly or willfully while on duty, and within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1280; Dec. Dig. § 306.*]

2. MASTER AND SERVANT (§ 332*)—ACTS OF SERVANT—LIABILITY OF MASTER—ISSUES.

Where, in an action against a master for an assault committed by his servant, the court

submitted the issues whether plaintiff was injured by the wanton act of the servant as alleged, and whether the servant was at the time acting within the scope of his employment, the second issue was consistent with the first, and, though the first was answered affirmatively, an affirmative answer to the second was essential to support the action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1279; Dec. Dig. § 332.*]

3. RAILROADS (§ 282*)—REMOVAL OF TRESPASSERS—ACT OF SERVANT—SCOPE OF EMPLOYMENT—QUESTION FOR JURY.

Where, in an action against a railway company for an assault committed by its flagman on plaintiff, the undisputed evidence showed that plaintiff attempted to climb on a moving freight train; that the flagman told plaintiff to come to him; that plaintiff started to run; and that, when eight feet from the car, the flagman shot him twice—it was for the jury to draw the inference whether the flagman was acting at the time in the scope of his employment.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 920; Dec. Dig. § 282.*]

4. APPEAL AND ERROR (§ 218*)—OBJECTIONS IN LOWER COURT—FINDINGS OF FACT.

Where the jury in an action against a master for an assault committed by a servant found that the servant was not acting within the scope of his employment, and no exception was taken or motion made to set aside the verdict, it will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1320, 1321; Dec. Dig. § 218.* Trial, Cent. Dig. § 818.]

Clark, C. J., dissenting.

Appeal from Superior Court, Scotland County; Long, Judge.

Action by Farrior Jones, by next friend, against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Action for damages alleged to have been sustained by plaintiff by reason of an assault committed upon him by defendant's agent while acting in the scope of his employment. The plaintiff testified that he attempted to climb upon defendant's box car attached to a moving freight train, catching hold of the iron bars, for the purpose of stealing a ride; that a flagman on top of the car told plaintiff to come up to him, when he, plaintiff, started to run, had gone about eight feet from the car when the flagman shot him, shot him twice, inflicting the injury from which he suffered, etc. Plaintiff was at the time of the shooting 16 years of age. This was the entire evidence in regard to the transaction. There was evidence regarding the extent of the injury. Defendant moved the court for judgment of nonsuit. Motion denied. Exception. His honor submitted the following issues to the jury:

"(1) Was the plaintiff injured by the reckless and wanton acts of the defendant's agent as alleged in the complaint?

"(2) If the plaintiff was injured by the reckless and wanton acts of the defendant's

agent, as alleged in the complaint, was such agent at the time acting in the line of his duty, scope of his employment, and furtherance of the business of defendant company?

"(3) What damage, if any, is plaintiff entitled to recover?"

The jury answered the first issue "Yes," the second "No," and the third "\$200." Defendant moved for judgment upon the verdict. Motion denied. Defendant excepted. Judgment for plaintiff. Defendant excepted, assigned errors, and appealed.

John D. Shaw and Murray Allen, for appellant. Jonathan Peele and J. A. Lockhart, for appellee.

CONNOR, J. Passing the question raised by defendant's exception to his honor's refusal to grant the motion for judgment of nonsuit, and assuming, for the purpose of disposing of this appeal, that the question whether the flagman when he shot plaintiff was acting in the scope of his employment or the line of his duty was properly submitted to the jury, the defendant is entitled either to a judgment upon the verdict or to a new trial. While the members of the court are not agreed in regard to the correctness of his honor's ruling upon the motion for judgment of nonsuit, a majority of them are of the opinion that defendant was entitled to have its motion for judgment upon the verdict allowed. Whatever differences of opinion may have existed in the past, the decided weight of judicial opinion concurs that for torts committed by the servant while on duty and acting within the scope of his employment, or line of his duty, proximately injurious to another, the master is liable. The fact that the tort was committed recklessly, wantonly, or willfully, if within the scope of the employment, does not exonerate the master. The view which has after most careful consideration been adopted by both English and American courts is thus stated by Sir Frederick Pollock, probably the most accurate writer on the subject now living: "A master may be liable for the willful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes." For an interesting and exhaustive discussion of this subject, see 2 Beaven on Neg. book IV, p. 554. This limitation is both scientific and practical. Certainly no one will seriously contend that a master is an insurer of his servant's conduct in respect to torts committed by him while in his employment without regard to the pivotal question whether such conduct had any relation to or was in the scope of the employment. To maintain that he is, it must follow that almost unlimited control should be given the master over the servant, to the end that he may

protect himself against such unlimited liability. The law must be both reasonable and practical; that is, it must commend itself to the sense of justice of the average man, and be capable of practical application to the manifold relations of our modern, industrial, social, and domestic life. It is manifest that judicial thought upon the subject since the decision of *McManus v. Crickett*, 1 East, 106, has been affected by the introduction of the industrial corporation into the field of litigation, and the measure and standard of liability of the master for the torts of the servant has been enlarged and extended to meet the changed conditions of employment of servants by these impersonal agencies. Liability has been fixed upon corporations for torts of its servants, which, if applied to natural persons, engaged in mercantile, mechanical, and agricultural employments, and especially to those employing domestic servants would shock the reason, produce startling consequences and be restricted by legislation. Mr. Beaven, speaking of the development of the doctrine of liability of the employer for the torts of his employé, says: "From this limited beginning its scope has become so almost universal in modern law that Jessell, M. R., thus comments on it: 'It is clear that on principle a man is liable for a man's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority. I agree that the court ought to be very careful how it extends the doctrine of respondeat superior. It has been carried in our law very far indeed. I think quite far enough.'" *Smith v. Keal*, 9 Q. B. D. 351. However this may be, and whether the law is at present upon a permanent and satisfactory basis, it is manifest that for the torts of the servant the master's liability is limited to those committed within the scope of the employment in furtherance of his business, for, as said in *McManus v. Crickett*, supra, "no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him." The same thought is clearly expressed by Mr. Justice Walker in *Daniels v. Railroad*, 136 N. C. 530, 48 S. E. 818, 67 L. R. A. 455: "When a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts." The subject has been so recently discussed by all of the members of this court and all of our own and many other authorities cited in *Stewart v. Lumber Co.*, 146 N. C. 47, 59 S. E. 545, that no good results would come from a repetition of what was there written. While the writer of this opinion upon the verdict of the jury in that case dis-

sented from some of the views expressed in the prevailing opinion, he does not understand that the decision in that case brings into question the principle that liability of the master for the torts of the servant is limited to those done in the scope of the employment. The principle upon which the opinion of Mr. Justice Brown was concurred in by the Chief Justice and Mr. Justice Hoke was that, when the master placed in the control of his servant a dangerous instrumentality for the purpose of carrying on his business, the law imposed upon him the duty of prevision and precaution. This view was very strongly stated in the concurring opinion of Mr. Justice Hoke. While the writer differed from the justices in the application of the principle to the instrumentality used in that case, he concedes that the principle is sustained both by reason and authority, and regards the question as settled in the future cases coming before the court by that decision.

Applying the principle to the record in this appeal, we find that his honor, without objection by plaintiff, submitted two issues—the first directed to the allegation that plaintiff was injured by the reckless and wanton conduct of defendant's agent; and second, whether at the time the assault was committed the agent was acting in the line of his duty, etc. It is true that the first issue concluded with the words, "As alleged in the complaint." When we refer to the complaint, we find that plaintiff sets out the transaction in detail and in several aspects. We think that, read in the light of his honor's instruction and the submission of the second issue, the finding by the jury upon the first issue referred to the manner in which the assault was committed; that is, recklessly and wantonly. In stating the contentions of the parties his honor calls attention to the testimony of the plaintiff and the contention of defendant that plaintiff was shot "at some other time and place, and was not shot by any agent of the defendant company." He concludes this part of the charge by saying that the burden is upon plaintiff to satisfy the jury that "what he says about it is true." His honor then defines a wanton, reckless act, saying: "You will notice that this issue presents to you the question as to whether this was a wanton act, and I undertake to tell you what in the eye of the law a wanton act is. If under the instructions I have given you, gentlemen, if your answer should be 'No,' it will not be necessary for you to answer the second and third issues." We quote the charge to show that the only question presented to the jury upon the first issue was whether the flagman shot plaintiff in a reckless and wanton manner. His honor recognized the fact that plaintiff must not only establish the allegation that defendant's servant assaulted him, but must go further, and show that the wanton,

reckless assault was committed by the employé while acting in the scope of his employment and line of duty. The second issue was therefore consistent with the finding upon the first, and necessary to establish a complete cause of action. While the plaintiff's evidence was uncontradicted, it was the province of the jury to draw the inference whether the employé was acting in the scope of the employment. "The inquiry as to the scope of the servant's employment being for the jury (unless the act is manifestly out of the course of the servant's employment where a nonsuit is proper), the reported cases turn in nearly every instance either on the validity of the finding or on the question whether there is evidence for the jury." Beaven, Neg. 584. The question involved in the second issue might have been tried and determined on the first if his honor had seen proper to do so. This was done in *Pierce's Case*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316, where the court charged the jury that, if they found that the injury was inflicted by the servant in the course of his employment, to find the issue for the plaintiff. The plaintiff did not except to the submission of the second issue to the jury, or the instruction of the court. The question is, therefore, not presented whether as a matter of law his honor should have held that the servant was acting in the full scope of his employment. We have been unfortunate if we have not been able to make ourselves understood in this case. We do not hold nor is there any word in the opinion to justify the suggestion to the contrary that corporations or natural persons are privileged to shoot people. No such question is raised by any exception in the record. Nor was it suggested upon the argument. We simply hold that, when without objection or exception an issue is found by the jury, that the defendant servant was not acting within the scope of the employment when he committed the assault, the employer is not liable. This is elementary, and the courts "without variableness or shadow of turning" have uniformly so held.

In *Palmer v. Railroad*, 131 N. C. 250, 42 S. E. 604, the opinion concludes with the words: "The employé must have been acting at the time within the scope of his employment on the defendant's car." The jury, not the court, found that in this case he was not so acting. We are unable to perceive how we can in the face of this finding without a single exception by the plaintiff do otherwise. No motion was made to set the verdict aside. This disposition of the appeal renders it unnecessary to consider the charge in regard to the character and measure of damages which could be awarded. The judgment must be reversed, with direction to enter judgment that defendant go without day, etc.

Reversed.

BROWN, J. (concurring). I concur in the opinion written for the court by Mr. Justice CONNOR, which to my mind is conclusive that the defendant company is not liable for the unwarranted and unauthorized act of its brakeman in shooting at the plaintiff. There is not a scintilla of evidence in the record that the brakeman shot at the plaintiff in an endeavor either to keep plaintiff off the train or to put him off after he was on. Upon all the evidence the act of the brakeman was neither authorized by the defendant or done in the discharge of the brakeman's duty to it. It was plainly a reckless, "devil may care," act, for the consequences of which the person who did it should be punished, and not his innocent employer who could not prevent it and did not ratify it.

In the *Stewart Case* in my opinion the company is held liable upon a well-defined ground, supported by most respectable authority, to the effect that a steam locomotive is such a dangerous instrumentality that the company is liable for the manner in which the engineer selected by the company uses it when running it in the company's business. That principle is not involved in the case.

I do not understand, nor do I think any one else seriously believes, that railway or other corporations claim for their employes the privileges of the ancient nobility of France to shoot down innocent persons at will or to commit other lawless acts. I have so much respect for the great mass of railway employes that I do not think they merit any such severe censure. My experience has convinced me that they are very generally a most faithful, law-abiding, as well as highly respected, class of our industrial population. But now and then, as in all other callings, however great or however humble, some reckless individual will be found. When his lawless act is done in the discharge of his duty to his master, or when it is authorized or ratified by him, then the master is justly held to be liable for the damage inflicted, however innocent the master may be. But, when such act was not done in furtherance of the master's business, and was neither authorized nor ratified by him, but was the wanton, reckless, personal act of the servant which the master could neither foresee nor prevent and does not ratify, then it is neither law nor justice to hold the master responsible, and this applies to corporate as well as individual employers of labor.

Such has been the law of this and our mother country from time immemorial.

CLARK, C. J. (dissenting). The plaintiff was attempting to climb up on the defendant's box car to steal a ride. A flagman on top discovering him told him to "come on up" to him. Whether the menacing tone or the fact that he was discovered, or as is

probable, the flourish of a pistol, intimidated the plaintiff, he started to run, and when about eight feet from the car the flagman shot the plaintiff, striking him twice. This was one continuous act. The flagman was in discharge of his duty in discovering the plaintiff, and could not put off that character and without change of position assume another while the plaintiff was running eight feet, which a calculation shows was less than half a second. He could not be an employé of the railroad when he frightened the man and cease to be an employé and fire two accurate shots within the half second, or $\frac{1}{120}$ part of a minute while the badly frightened man was running eight feet. As the flagman fired and struck the fleeing man twice before he could run eight feet, the pistol must have been drawn and presented before the plaintiff turned to fly. The remark of the flagman "Come up here" must have been accompanied by the presented pistol which caused the precipitate retreat of the plaintiff. The act of the flagman was continuous and the shooting was so quick—two shots that were hits before the scared man could move more than eight feet—that it cannot be divided. But, independent of that, the flagman was at his post in the exercise of his employment, and for his conduct the defendant is responsible. *Hayes v. Railroad Co.*, 141 N. C. 195, 53 S. E. 847. This court has held again and again that a railroad is liable for the conduct of its agents, whether negligent or willful and wanton, when the act is done in the course of their employment. In *Jackson v. Telegraph Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 788, it was held that the corporation must answer for the servant's wrongful act "if committed in the scope and course of the servant's employment," and that he is in such scope and course of employment if he "is at the time about his master's business." If this were not so, the corporation would never be liable, for it does not hire its employés to do negligent acts or commit wanton and willful wrongs.

The company was held liable when its station agent got into a difficulty with an ex-passenger over the delivery of a trunk and killed him, though he was certainly not employed to kill passengers (*Daniel v. Railroad*, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. [N. S.] 485); nor was the conductor employed to kiss a female passenger, but he was on duty, and the company was held liable in *Strother v. Railroad*, 123 N. C. 197, 31 S. E. 386; nor was the fireman employed to throw a chunk of coal to frighten a boy who was stealing a ride on the tender, but the company paid for the resultant injury (*Pierce v. Railroad*, 124 N. C. 84, 32 S. E. 399, 44 L. R. A. 316); nor were the employés authorized to throw stones at a tramp stealing a ride, in fact, the duties of some did not involve that of making the

tramp get off, but the company was held liable (*Cook v. Southern Ry. Co.*, 128 N. C. 333, 38 S. E. 925). The fact that here the employé used a pistol instead of stones, and that a half second after the man had gotten off and was eight feet away, is an aggravation and not a defense. In *Stewart v. Lumber Co.*, 146 N. C. 47, 59 S. E. 545, the company was held liable for the wanton conduct of employés as to one neither a passenger nor a trespasser by blowing the whistle and hollering to frighten plaintiff's horse who was injured in the resultant run-away. The question in that case which divided the majority of the court, whether the plaintiff could recover punitive damages or actual damages, does not now arise, but four of the court agreed that the action could be maintained, as had been done on a similar state of facts in *Brendle v. Railroad*, 125 N. C. 474, 34 S. E. 634; *Hussey v. Railroad*, 98 N. C. 84, 8 S. E. 923, 2 Am. St. Rep. 312. The company was held liable for torts of its agents, even when ultra vires. *Gruber v. Railroad*, 92 N. C. 1; *White v. Railroad*, 115 N. C. 636, 20 S. E. 191, 44 Am. St. Rep. 489; *Waters v. Lumber Co.*, 115 N. C. 652, 20 S. E. 718. In the unanimous opinion of the court in *Foot v. Railroad*, 142 N. C. 52, 54 S. E. 843, the railroad was held liable for the willful and wanton misconduct of its employé, citing *Brendle v. Railroad*, 125 N. C. 474, 34 S. E. 634.

There are many other cases to same effect in this and the other states. It is difficult to see how the company is liable if the employé throws stones or coal at a trespasser, or frightens him, by cursing, into jumping off (*Hayes v. Railroad Co.* 141 N. C. 195, 53 S. E. 847), but is not liable if lead is used, nor how it is responsible to one off the right of way for injuries resulting from frightening his horse by shouts and blowing the whistle, and not liable for shooting one on the right of way, and not eight feet from the car. The liability of a farmer, merchant, or other citizen in the performance of his inherent right to do business for the conduct of his agents is necessarily not as broad as that of these great corporations, which are given artificial existence and great special privileges, on the ground not only that they shall be used for the public benefit, but on the implied agreement that they shall not be used to the public detriment. Using vast physical and pecuniary power, they must be liable for its misuse, and employing great numbers of men they alone can control them and are responsible for their discipline. They are liable for negligence of a fellow servant and for public regulation of their charges and conduct. If an employé on a rapidly moving train throws rocks or fires into a crowd, he could rarely be identified or found able to respond in damages. If he killed a citizen's horse or cow by shooting from the top of a train, the

company would be responsible. Why not when he shoots a man? Jaggard on Torts, § 86, thus correctly sums up the result of the authorities: "The master is liable for the conduct of his servant within the course of his employment, not only where responsibility would attach under the test of scope of his employment, but also where the conduct is not intended to be for the master's benefit, but for the servant's malicious, capricious, or other private purpose, and whenever a duty rests on the master to avoid doing harm to the third persons and the servant violates that duty in the course of his employment." Under the reign of privilege in France one of the privileged class was seen to shoot a workman from the top of a building for the pleasure of seeing him tumble to the ground. He was not held to account, but the incident aided to topple over the French monarchy to its death. Corporations cannot claim such privileges for its officers or employés. If employés on a moving train can fire at cattle or at people along its track at will without any responsibility on the part of the company because the act is willful and wanton, then the company is using its vast privileges not upon terms of liability for good behavior to the public, but upon the narrow ground that, like a private business, it is only responsible for the conduct that it authorizes. It was wrong for the plaintiff to attempt to steal a ride; but the penalty for such offense is not execution by shooting. Upon the finding on the first and third issues, the court properly rendered judgment. The finding on the second issue very clearly was meant not to negative the finding on the first issue that the shooting was "reckless and wanton and as alleged in the complaint," but merely to negative that it was "in furtherance of the business" of the defendant. The second issue was immaterial and irrelevant, and should be disregarded.

(150 N. C. 425)

SMITH v. ALPHIN.

(Supreme Court of North Carolina. April 7, 1909.)

1. APPEAL AND ERROR (§ 758*)—BRIEFS—EXCEPTIONS—FAILURE TO SET OUT.

Under Supreme Court rule 34 (53 S. E. 1x), requiring the briefs to contain the several grounds of exception, exceptions not set out in the brief are abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 753.*]

2. SALES (§ 40*)—MISREPRESENTATION.

That the seller did not inform the buyer that certain powders for use with a fumigating apparatus, the patent for which was the subject of the sale, contained sulphur, the use of which as a fruit preservative was forbidden by statute, did not constitute deceit or misrepresentation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 79-83; Dec. Dig. § 40.*]

3. SALES (§ 50*)—MISREPRESENTATION—WAIVER.

The buyer cannot rely on alleged deceit by the seller in failing to inform him that powders used with an apparatus sold for preserving fruit contained sulphur, the use of which was prohibited by law, where the buyer afterward, with full knowledge of the facts, made a second trade with the seller with reference to the article.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 50.*]

4. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT.

Any error in instructing, in an action for breach of warranty in the sale of preservative powders, that the important question was: "Did defendant warrant that the powders * * * would preserve fruit at a nominal cost?" etc., on the ground that the falsity of the warranty was the important question, was immaterial, where the jury answered the question in the negative.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

5. SALES (§ 262*)—WARRANTIES—RELIANCE BY BUYER.

To constitute a warranty, the buyer must have relied upon the statement with reasonable ground to do so, and a test of whether language was a warranty is whether it purported to state a fact upon which it could be fairly presumed the seller expected the buyer to rely, and upon which the buyer ordinarily would rely.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 262.*]

6. FOOD (§ 26*)—CONTRACTS—LEGALITY OF CONSIDERATION.

One selling a powder for use with an apparatus for preserving fruit, which contains sulphur, could not recover the purchase price, where the use of sulphur for that purpose was prohibited by law.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 19; Dec. Dig. § 26.*]

7. FOOD (§ 1*)—REGULATION—STATUTORY PROVISION.

The Legislature had the constitutional power to enact Pure Food Law (Laws 1905, p. 340, c. 306) § 3, declaring the use of sulphur, etc., deleterious and dangerous to health when used in human food, and making its use illegal.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 1.*]

8. FOOD (§ 26*)—REMEDIES OF BUYER—RECOVERY OF PRICE.

Though Pure Food Law (Laws 1905, p. 340, c. 306) § 3, declares the use of sulphur, etc., deleterious and dangerous when added to human food, and makes its use illegal, the buyer could not recover back the price of an apparatus for preserving fruit because powders used therewith contained sulphur if the use of sulphur for that purpose was not in fact deleterious, so as to render the apparatus worthless.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 26.*]

9. FOOD (§ 26*)—CONTRACTS—REMEDIES OF BUYER—RECOVERY OF PRICE.

The pure food law (Laws 1899, p. 216, c. 86), as amended by Laws 1905, p. 339, c. 306 (Revisal, § 3970a, subsec. 6), declaring sulphur, etc., deleterious and dangerous when used in food, has reference to the adulteration of food kept for sale, section 8969 in the same subchapter prohibiting the manufacture or sale of any article of food which is adulterated within the meaning of this subchapter; and hence, in an action for breach of warranty and de-

ceit in not informing a buyer that powders used with an apparatus sold for preserving fruit contained sulphur to enable the buyer to recover the price, the pure food law would be inapplicable.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 26.*]

10. FOOD (§ 26*)—REMEDIES OF BUYER—RECOVERY OF PRICE.

Under Pure Food Law (Laws 1899, p. 219, c. 86) § 8 (Revisal, § 3972), authorizing the board of agriculture to cause all compounds or blended products to be properly branded, etc., and from time to time fix the limits of variability in any article of food, etc., but providing that, when standards have been fixed by the Secretary of Agriculture of the United States, they shall be accepted as the standards of this state, if sulphur fumes were approved by the United States authorities as a means of preserving fruit, the pure food law would not give a right of action for breach of warranty or deceit in not informing the buyer that powders used with an apparatus sold for preserving fruit contained sulphur, even if it were otherwise applicable.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 26.*]

Appeal from Superior Court, Wayne County; Neal, Judge.

Action by J. E. Smith against G. E. Alphin. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff alleged two causes of action; i. e., false warranty in the sale of certain letters patent for an improved fumigating apparatus, which in connection with certain sanitary powders "would preserve all fruits and vegetables at a nominal cost"; and also for deceit and false representation in the sale thereof, the said powders being alleged by plaintiff to be hurtful, their use contrary to law, and valueless. The answer was a full denial. Verdict for defendant and appeal by plaintiff.

Aycock & Winston, M. T. Dickinson, and F. A. Daniels, for appellant. J. D. Langston and W. C. Munroe, for appellee.

CLARK, C. J. Exceptions 1, 4, 5, 6, 9, 10, and 12 are abandoned, not being set out in appellant's brief. Rule 34 (53 S. E. ix).

Exception 2 was for refusal to submit issues as to the second cause of action—for deceit and misrepresentation. But there was no evidence to justify the submission of those issues. The plaintiff relies upon his evidence that the defendant did not divulge the nature of the powders—charcoal and sulphur—until after he had paid, and that the state law forbade the use of sulphur. Laws 1905, p. 340, c. 306, § 8. If this last applied to this case, this might have been a defense if the defendant had brought suit for the purchase money (*Vinegar Co. v. Hawn*, 149 N. C. 255, 63 S. E. 78); but it does not establish deceit or misrepresentation. Besides, as subsequently, with full knowledge, the plaintiff made a second trade with the defendant, he cannot now

rely upon this allegation. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234.

Exception 3 was that the judge told the jury that the second issue—"Did the defendant warrant that the said powders, when used in connection with said apparatus, would preserve fruits and vegetables at nominal cost, so that they would at all times be as fresh, palatable, and wholesome as when picked from the trees or gathered from the garden"—was the crucial one. The jury answered this issue "No." Therefore the plaintiff's contention that the third issue, "Was the warranty false?" was the crucial one, becomes immaterial.

The court charged: "One of the decisive tests whether the language used is a mere expression of opinion or a warranty is whether it purported to state a fact upon which it may be fairly presumed the seller expected the buyer to rely, and upon which the buyer would ordinarily rely." The plaintiff's seventh exception was to this paragraph of the charge and the eighth was to the following instruction: "In addition to this, in order to constitute a warranty, the plaintiff must have relied on it, and must have reasonably relied upon it." We cannot sustain these exceptions. *Baum v. Stevens*, 24 N. C. 411; *Beaseley v. Surles*, 140 N. C. 605, 53 S. E. 360.

Exception 11: The food chemist, Mr. Alphen, testified substantially that it was against the statutes of North Carolina for one to sell a preparation containing sulphur to be used in the preservation of fruit. Counsel for the plaintiff commented upon this evidence; but the court charged the jury that the act in question had nothing to do with the case. The plaintiff contends that it had much to do with the case, for, if the preparation was outlawed by the state, it was worthless, that the person using it would be guilty of a misdemeanor, and the contract between plaintiff and defendant would be not only contra bonos mores, but a violation of a plain statute, and therefore there would be no consideration whatever to support the contract, and the contract would be inoperative and void, that this contract was solvable only in North Carolina, and it was useless and worthless in said state, and no valid cause of action can grow out of a breach thereof—citing Pure Food Law (chapter 306, p. 340, Laws 1905) § 8; *Leathers v. Tobacco Co.*, 144 N. C. 343, 57 S. E. 11, 9 L. R. A. (N. S.) 349. It is true that the defendant could not recover the purchase price if the use of sulphur for that purpose was forbidden, but it does not necessarily follow that the article would be deleterious or worthless, and that the plaintiff could therefore recover back the money paid. The Legislature had the constitutional right to enact the statute, but its judgment as to the laws of chemistry may be incorrect and the

article not deleterious. If so, while the seller could not recover the purchase price, the buyer cannot recover it back. The pure food law (chapter 86, p. 216, Laws 1899; chapter 306, p. 339, Laws 1905; Revisal 1905, § 3970a (6)) manifestly has reference to the adulteration of foods kept for sale (Revisal 1905, § 3969), and therefore, if for no other reason, does not apply to this controversy, and the judge instead of the witness, was right. Section 8, c. 89, p. 219, Laws 1899, now Revisal 1905, § 3972, is as follows: "But when standards have been or may be fixed by the Secretary of Agriculture of the United States they shall be accepted by the board of agriculture and published as the standards for North Carolina." It is asserted in defendant's brief that at the time this contract was made preserving by sulphur fumes was approved by the agricultural department of the United States, and that a circular has been issued by it approving of such preservatives. If so, then for this additional reason the pure food law had nothing to do with this case.

No error.

(150 N. C. 426)

HILL et al. v. BEAN et al.

(Supreme Court of North Carolina. April 14, 1909.)

1. EVIDENCE (§ 222*)—ADMISSIONS—DECLARATION IN DISPARAGEMENT OF TITLE.

In an action to recover land claimed by defendants through adverse possession, testimony of a witness as to a conversation with one of the defendants while the defendant was living on the land concerning a letter to plaintiffs was properly admitted, in so far as it did not relate to the contents of the letter, to prove a declaration by the defendant in acknowledgment of plaintiffs' title, and in disparagement of her own.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 768-808; Dec. Dig. § 222.*]

2. APPEAL AND ERROR (§ 204*)—RESERVATION OF GROUNDS OF REVIEW—FAILURE TO RAISE POINT IN LOWER COURT.

Where the objection that evidence introduced which was competent as against one defendant was not so as against the others was not raised by a request that the court restrict it, and no such ground of objection is stated in the statement of case, the question cannot be considered on appeal under Supreme Court Rule 27, 140 N. C. 662 (53 S. E. viii), providing that it will not be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless appellant ask at the time of admission that its purpose be restricted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1274; Dec. Dig. § 204.*]

3. PRINCIPAL AND AGENT (§ 21*)—EVIDENCE OF AGENCY—TESTIMONY OF AGENT.

Testimony of a person that he was the agent of others, and as such had charge of land, paid taxes, and collected rents, was competent to prove the agency; it not being proof of agency by declarations of the alleged agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.*]

4. ADVERSE POSSESSION (§ 116*)—TRIAL—INSTRUCTIONS.

In an action to recover land claimed by defendants through adverse possession, where the court correctly charged as to what would constitute adverse possession by defendants such as to defeat plaintiffs' recovery, and that, if a third person cut timber on the land without the knowledge or acquiescence of defendants, it would not affect their claim, but that it would be otherwise if he was recognized by defendants as acting for plaintiffs, it was not error to refuse a charge that possession of the land for the continuous period of 20 years raises a presumption that the person in possession had a title therefor, and the fact that a third person cut timber from the land without defendants' knowledge would not be such a possession as to defeat their title by adverse possession, and rebut the presumption.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

Appeal from Superior Court, Randolph County; Long, Judge.

Action by Charlotte L. Hill and others against Kirby Bean and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

The special instruction asked by defendants was as follows:

"The court instructs the jury that possession of the land for the continuous period of 20 years raises a presumption that the party in possession has a title therefor, and the fact that the witness Thayer cut timber from the land in controversy without the knowledge of the defendant would not be such a possession as to defeat the title of the defendants by adverse possession and rebut the said presumption."

J. G. Brittain and Elijah Moffitt, for appellants. Hammer & Kelly and J. A. Spence, for appellees.

WALKER, J. This action was brought to recover two contiguous tracts of land containing about 168 acres. Title was admitted to be out of the state, and the plaintiffs own the land unless the defendants have acquired title thereto by adverse possession. The plaintiffs alleged that the defendants' possession was not adverse, but they held the same by permission of the plaintiffs. In order to show that the defendants were merely tenants of the plaintiffs, the latter introduced as a witness Scott Smoke, who testified as to a conversation between him and Emily Bean, one of the defendants, while she was living on the land, concerning a letter to the plaintiffs. The court excluded the testimony so far as it related to the contents of the letter, but admitted it as tending to prove a declaration by Emily Bean in acknowledgment of the plaintiffs' title and in disparagement of her own. For this purpose, it was clearly competent, and the testimony was properly restricted to that purpose. *Yates v. Yates*, 76 N. C. 142; *Suaffner v. Gaynor*, 117 N. C. 24, 23 S. E. 154; *Ratliff*

v. Ratliff, 131 N. C. 428, 42 S. E. 887, 63 L. R. A. 963. The testimony of A. D. Hamilton, which was objected to by the defendants, was substantially to the same effect as that of Scott Smoke, except that it related to a declaration of Richard Bean in disparagement of his title, and tended to show that Bean was in possession, not claiming in his own right, but in subordination to the plaintiffs' title. This kind of evidence has always been held to be competent as will appear by reference to *Shaffer v. Gaynor*, supra, and the cases therein cited. The testimony of the witness Scott Smoke was competent against Emily Bean, and, if the defendants intended to raise the question that it was not so against the other defendants, they should have requested the judge to restrict it, but no such ground of objection is stated in the case. See Rule 27, 140 N. C. 662 (53 S. E. viii). The same may be said of the testimony of the witness A. D. Hamilton. It was competent for Mr. Bradshaw to testify that he was the agent of Francis A. C. Hill and others, and as such had charge of the land, paid the taxes, and collected the rents. This is not a case of proving an agency by the declaration of the alleged agent, but by the testimony of the agent under oath.

We do not see any error in the refusal of the court to give the instruction requested by the defendants. The judge correctly charged the jury as to what would constitute such adverse possession of the land by the defendants as to defeat the plaintiffs' recovery. He told the jury that, if Thayer's acts in cutting the timber were committed without the knowledge or acquiescence of the defendants, they would not affect their claim or impair their rights, but it would be otherwise if he was recognized by the defendants as acting for and in behalf of the plaintiffs. This instruction was as favorable to the defendants as they had any reason to expect.

The jury found in response to the issues that the plaintiffs are the owners of the land in controversy and awarded damages. Upon this verdict judgment was entered for the plaintiffs, and defendants appealed. We find no error, after a most careful examination, in the rulings or judgment of the court.

No error.

(150 N. C. 457)

CAMPBELL v. CRONLY et al.

(Supreme Court of North Carolina. April 14, 1909.)

1. SUBMISSION OF CONTROVERSY (§ 1*)—SPECIFIC PERFORMANCE.

A submission of controversy without action on agreed facts, where a contract to sell land has been made, and a dispute arises as to the title of the vendors, will be entertained as a bill for specific performance.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. VENDOR AND PURCHASER (§ 175*)—DEFECTIVE TITLE—ABATEMENT IN PRICE.

Where vendors are unable to convey a fee, as they have contracted, the vendee may, unless it will be inequitable, take such interest as they can convey, and have a reasonable deduction from the contract price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 360; Dec. Dig. § 175.*]

3. SUBMISSION OF CONTROVERSY (§ 3*)—INTERESTS IN LAND.

Under Laws 1893, p. 87, c. 6 (Revisal 1905, § 1589), providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim, there may be a submission of controversy without action on agreed facts to determine the interest of parties in land under a deed of trust.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. § 4; Dec. Dig. § 3.*]

4. TRUSTS (§ 140*)—SURVIVORSHIP—SHIFTING USE.

Under a deed to F. in trust, to hold for the use of L., A., and E. in fee, "and to the survivors of them," on the death of L., by way of a shifting use, the beneficial interest in the entire property vested in A. and E. in fee, and this without right of survivorship as between A. and E.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 186; Dec. Dig. § 140.*]

5. TRUSTS (§ 140*)—CONSTRUCTION OF DEED —"ISSUE."

Under a deed to F. in trust, to hold for the use of L., A., and E. in fee, and to the survivors of them, "provided, however, that if the said A. or E. shall die leaving issue, then to the use of such surviving issue who shall take the same per stirpes and not per capita," the word "issue" includes grandchildren of A. and E. whose parents predecease them, so that under the rule in *Shelley's Case* the fee would not, on the death of L., vest absolutely in A. and E.; but on the death of either the use shifts to her issue.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 186; Dec. Dig. § 140.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3782-3793; vol. 8, p. 7693.]

Clark, C. J., dissenting. Brown, J., dissenting in part.

Appeal from Superior Court; New Hanover County; W. R. Allen, Judge.

Submission of controversy between Annie H. Campbell, as plaintiff, and Eliza W. Cronly and others, as defendants. From the judgment, both sides appealed. Affirmed.

See, also, 61 S. E. 1134.

This is a controversy submitted without action for the purpose of quieting title to real estate pursuant to section 1589 of the Revisal of 1905. The agreed facts are: On May 20, 1869, H. C. Brock conveyed to Wm. B. Flanner the land in controversy, being a lot in the city of Wilmington, upon certain trusts fully set forth in the deed which was duly admitted to probate and registration. On the 2d day of March, 1895, certain persons entitled to beneficial interest in said property instituted an action in the superior court of New Hanover county against certain

other persons likewise interested and the heirs at law of the trustee who had died, for the purpose of having certain corrections made in said deed, all of which will fully appear by reference to the record in said cause, made a part of the case agreed. Pursuant to the prayer of the plaintiffs, judgment was rendered by said court correcting said deed by inserting words "of inheritance" therein which had been inadvertently omitted by the draughtsman. The deed, as corrected by said judgment vested the title to said real estate in the said W. B. Flanner in fee upon the following trusts: To hold for the use of Emily B. London, her heirs and assigns, wife of Mauger London, and Annie H. London, her heirs and assigns, and Eliza W. London, her heirs and assigns, children of the said Mauger London, and the survivors of them: Provided, however, that, if the said Annie H. London or Eliza W. London shall die leaving issue, then to the use of such surviving issue, who shall take the same per stirpes, and not per capita; and provided, further, that if the said Annie H. or Eliza W. should die without issue, leaving the said Emily B. surviving, then to the use of the said Emily B. and such survivors, and if the said Annie H. and Eliza W. should die, leaving the said Emily B. surviving, then to the use of the said Emily B. during her life, and, if she should die leaving issue, then to the use of such issue and their heirs, and if the said Emily B. should die, leaving the said Annie H. or Eliza W. surviving, then to the use of such survivors, and, in case of the death of the said Emily B., Annie H., and Eliza W. without issue, then to the surviving children of the said M. London and their issue, if any such said children be living, to take per stirpes, and not per capita. Mauger London, who is mentioned in the said deed, died intestate on the 10th day of May, 1894. He left him surviving his wife, Emily B. London, and by a former marriage his child, Annie H. London. Emily B. London, who was the second wife of Mauger London, and who is mentioned as one of the beneficiaries under the aforesaid deed, died on the 6th day of June, 1897, leaving her surviving Eliza W. Cronly, her only child and sole heir at law. On the 16th day of March, 1903, all of the heirs of Mauger London executed their deed to Annie H. Campbell and Eliza W. Cronly, conveying any and all such right, title, and interest which they had in said real estate. Said deed was duly proven and recorded. Annie H. London married Archibald R. Campbell. The only child by this union was James Douglas Campbell, now living. Eliza W. London married Joseph M. Cronly, and is now a widow. By her marriage she has had three children, to wit, Jean Murphy, Robert Dixon, and Margaret Cronly, all of whom are minors, but in this proceeding are represented by Geo. H. Howell, their duly appointed guardian ad litem. The said Annie H. Campbell and Eliza W.

Cronly, claiming that, as tenants in common, they are the owners in fee of the said property, agreed to sell the same for the sum of \$12,000 to the defendant John London, but he is advised that the said parties are not seised in fee of the said property, and have only a life estate therein, and that, upon the determination of the life estate, the property descends to their issue, and he declines to purchase the property until it is determined whether the said parties have a life estate or fee simple in said property; but, if it is adjudged that they have a right to convey, he stands ready and is able to comply with his contract of purchase. Eliza W. Cronly contends that she has an undivided two-thirds interest in the property; that the deed of trust from Brock to Flanner vested a fee simple in Emily B. London, her mother, Annie H. Campbell, and herself, each having an undivided one-third interest therein; that by the death of Emily B. London, her mother, she, the said Eliza W. Cronly, inherited as her sole heir the undivided interest vested in the said Emily B. London, and that by reason thereof, and her own one-third interest in her own right, she is vested with an undivided two-thirds interest in the fee in said property. Annie H. Campbell contends that, by the deed of trust from Brock to Flanner, the property vested in Emily B. London, Eliza W. London, and herself, and, upon the death of the said Emily B. London, by survivorship the fee vested in Annie H. Campbell and Eliza W. London in equal parts, and therefore she contends that she has an undivided one-half interest therein. The minor defendants, Jean Murphy Cronly, Robert Dixon Cronly, and Margaret Cronly, by their guardian ad litem, Geo. H. Howell, make no contention in regard to the title to said premises, but will abide the judgment of the court upon the facts here agreed as to any rights, future or contingent, they might have under the deed of Brock to Flanner, trustee.

His honor was of the opinion upon the foregoing case agreed that the plaintiff Mrs. Annie H. Campbell and the defendant Mrs. Eliza W. Cronly were the owners in the proportion of one-half each of the real estate in controversy; that, upon the death of each, their interest will pass to their "heirs at law, such heirs to take per stirpes"; that they could not convey the land in fee simple to the purchaser. Judgment was rendered accordingly. Plaintiff Mrs. Campbell and defendant Mrs. Cronly assigned error, and appealed.

Emple & Emple, for plaintiff. Moares & Ruark, for defendants.

CONNOR, J. When this cause was before us on appeal at the last term, the purchaser of the land was not a party. We remanded the case to the end that further parties be made which has been done. The first question which confronts us is whether, in the present condition of the record we can take

jurisdiction and decide the several questions presented in regard to the title to the locus in quo. This court has frequently entertained and decided controversies wherein parties have entered into a contract to sell land, and the purchaser has refused to comply because of doubts entertained in regard to the title. We have treated such suits as bills by the vendor against the vendee for specific performance. It is well settled by uniform decisions of this and other courts of equitable jurisdiction that the purchaser will not be required to take a doubtful title. It therefore became necessary to inquire into the vendor's title, which was sometimes done, by a reference to the clerk and master or a referee selected for that purpose. *Bispham*, Eq. § 378; *Gentry v. Hamilton*, 38 N. C. 376. While the vendee will not be required to pay the contract price and take a doubtful or imperfect title, he may, if he so elect and it be not inequitable, have a decree for such part of the land or such interest as the vendor can convey, with a deduction from the contract price. Mr. Bispham thus states the equitable doctrine: "It may sometimes happen that defects exist which render the property less valuable than the contract price; but which nevertheless may not be of so vital a character as to induce the purchaser entirely to throw up his bargain. In such a case the equity of specific performance with compensation comes into play for the benefit of the vendee." *Equity*, 390. It is said in the note to *Seton v. Slade*, 7 Ves. 265, L. C. Eq. vol. 11, part 11, 15: "It may be laid down as a general rule, subject, however, to some exception, that a purchaser may, if he chooses, compel a vendor who has contracted to convey a larger interest in an estate than he has to convey to him such interest as he is entitled to with compensation." Lord Eldon in *Mortlock v. Buller*, 10 Ves. 315, says: "For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and, if the vendee choose to take such as he can have, he has a right to that and to an abatement, and the court will not hear the objection by the vendor that the purchaser cannot have the whole." *Jacobs v. Locke*, 37 N. C. 286. In such cases it becomes necessary for the court to inquire into the state of the title of the vendor, to the end that it may mould its decree as to do complete equity to all of the parties. So in this appeal, if the vendee so desires, he may, unless it would be inequitable, acquire under his contract of purchase at a reasonable deduction from the contract price such interest, if any, as either of the vendors have a right to convey.

There is, however, another ground upon which a majority of the court are of the opinion that we have and are compelled to take jurisdiction and decide the controversy in regard to the disputed title. It is well settled that prior to St. 1893, p. 37, c. 6 (Re-

visal 1905, § 1589), the jurisdiction of courts of equity to entertain bills to remove cloud from title or to quiet title was restricted within well-defined limits. *Busbee v. Macy*, 85 N. C. 329; *Busbee v. Lewis*, 85 N. C. 332. In the opinions in these cases by Ruffin, J., this court adhered to the decisions in this and other states, many of which he cited and commented upon. *Pearson v. Boyden*, 86 N. C. 585, and cases cited. The Legislature at the session of 1893 enacted a statute for the purpose of enlarging the power of the courts to entertain suits to quiet titles where the conditions were such that a possessory action could not be brought. Of course, if the plaintiff had a complete remedy by means of a civil action, there was no necessity for resorting to the statutory remedy. *Pearson v. Boyden*, supra. The material part of the statute is in the following words: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." Prof. Pomeroy (4 Eq. § 1396), after discussing the jurisdiction of courts of equity prior to the passage of this and similar statutes in other states, says: "The action has been greatly extended by statute and in many states is the ordinary mode of trying disputed titles." He gives in a note a list of the states in which the statutes have been enacted. He further says: "In almost every instance the statutes, either by express terms or through broad and general language, allow the action to be maintained by persons having equitable titles. In other words, a plaintiff need not have a legal title. * * * The statute is an enabling act, and the action may be brought against one or more claimants without regard to the interest or title—legal or equitable—which he or the plaintiff may have." The California statute is in the same words as ours. Chief Justice Field in *Curtis v. Sutter*, 15 Cal. 259, says: "It is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him, and until judgment has been passed in such suit in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claims an estate or interest adverse to him. He can immediately upon knowledge of the assertion of such claim require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity that the determination of questions purely of a legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law. The court sitting in equity may direct whenever in its judgment it may become proper an issue to be framed upon the pleadings and

submitted to the jury * * * There is no difficulty in so conducting a suit under the statute as to fully protect the legal rights of the parties, and at the same time to secure the beneficial results afforded by a court of equity in bills of peace, which is repose from further litigation. Indeed, the remedy under the statute is eminently simple, direct, and efficacious for this purpose." The Nebraska statute, being practically in the same language, was discussed by the same eminent jurist while a justice of the Supreme Court of the United States in *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, when he said: "Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate in it for the purpose of determining such estate and quieting the title. It is certainly for the interest of the state that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoyment should be removed; for, so long as they remain, they will prevent improvement and consequent benefit to the public. It is a matter of everyday observation that many lots of land in our cities remain unimproved because of conflicting claims to them. * * * It is manifestly to the interests of the community that conflicting claims to property thus situated should be settled so that it may be subject to use and improvement. To meet cases of this character statutes like the one in Nebraska have been passed by several states, and they accomplish a most useful purpose." It was held that the federal courts would enforce the statutes when they had jurisdiction by reason of diverse citizenship. In *Parrish v. Ferris*, 67 U. S. 606, 17 L. Ed. 817, the Ohio statute was enforced. See, also, *Fry v. Summers*, 4 Idaho, 424, 39 Pac. 1118, where the statute was in the same language as ours. In *Walton v. Perkins*, 33 Minn. 357, 23 N. W. 527, Mitchell, J., says: "This statute is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources." In *Adler v. Sullivan*, 115 Ala. 582, 22 South. 87, Harrolson, J., says: "The statute is an extension of the remedy in equity theretofore existing for the removal of clouds on title." Discussing the equitable remedy prior to the statute, he says: "This statute goes in advance of that remedy, and, in addition, allows any person in peaceable possession of lands claiming to own the same, whose title thereto or any part thereof is denied or disputed, or where any other person claims or is claimed or is reputed to own the same, or any interest therein, or to hold any lien or incumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim, or incumbrance, to bring and maintain a suit in equity to set-

tle the title to said lands, and clear up all doubts and disputes concerning the same." In *Holmes v. Chester*, 26 N. J. Eq. 79, the Chancellor, discussing a similar statute, says: "It is highly remedial and beneficial. It should therefore be construed liberally. It is a statute of repose. It deprives the defendant of no right. His claim may be tried at law if he desires it." So Beasley, C. J., in *Jersey City v. Lembeck*, 31 N. J. Eq. 255, says: "The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner in which land another person claimed an interest which he would not enforce, and the hardship was that the person so in possession could not force his adversary to sue and thus put the claim to the test." *Albro v. Dayton*, 50 N. J. Eq. 574, 25 Atl. 937. This court in *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635, held that it was not necessary that plaintiff should be in possession of the property to maintain his action. In *Rumbo v. Manufacturing Co.*, 129 N. C. 9, 39 S. E. 581, it was held that, when the alleged cloud upon the title was found to be invalid, the court should not dismiss the action, but should adjudge such invalidity, and remove the cloud. The present Chief Justice said: "It was because the Legislature thought the equitable doctrines (as laid down in *Busbee's Case*) inconvenient or unjust that the act (1893) was passed." *Beck v. Meroney*, 135 N. C. 532, 47 S. E. 613; *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426. The statute provides that, if the defendant disclaims title, the cost is adjudged against the plaintiff. The wisdom of enlarging the power of the court to deal with the subject is manifest. It is highly important to private right and public interest that titles shall be rendered secure and certain. As said by Judge Field, it is a matter of common observation that in almost every town or city are lots either without any improvement, or such as have been erected in the past falling into decay, the growth and development of the town impeded by some obscure, uncertain cloud upon, or question in regard to, the title. In many cases, without the aid of the statute, it is impossible to bring the claimants before the court, and have them assert and "try out" their claim. It sometimes happens that obscure contingent limitations imposed upon titles operate to impoverish an entire generation, when, upon a careful judicial examination, the title may be cleared up, rights adjudged, and property unfettered, bringing it either into market or enabling the owners to improve and receive an income from it. It is this evil which the Legislature has sought to remedy by providing a simple, inexpensive, and efficient procedure which the courts, by reason of precedents from which they were unwilling to break away, were unable to afford. The unanimity with which the judges have recognized the wisdom of

the legislation giving it a liberal construction has made it effective.

This brings us to a consideration of the assignments of error made by both plaintiff and defendants to his honor's judgment. The conveyance by Mr. London to Flanner, trustee, vests the legal title in him in fee with a declaration of the use to Mrs. London, his wife, and Annie H. and Eliza W., his daughters, in fee "and to the survivors of them." Whatever difficulty we would have found in giving effect to these last words in a common-law conveyance, operating by livery of seisin, is obviated in a deed operating under the statute of uses in which the intention of the grantor may be effectuated. "It is a maxim of the common law that no estate can be limited upon a fee simple; or, in other words, an estate in fee simple cannot be made to cease as to one, and take effect, by way of limitation, upon a contingent event, in another person. It is clearly settled that limitations of that kind may take effect by way of use." Coke, Lit. 271 (note), cited by Mr. Justice Ashe in *Smith v. Brisson*, 90 N. C. 284, where the authorities are collected. In *Rowland v. Rowland*, 93 N. C. 215, the conveyance was to two children of the grantor in fee as tenants in common; "and upon the death of either one then to the survivor and his or her heirs forever." Ashe, J., said: "Its effect was to transfer the use to the two donees in fee, and, upon the death of Ophelia, to shift the use of her moiety to John and his heirs. By a shifting use a fee may be limited after a fee." After an interesting discussion of the subject, the learned justice says: "Our opinion is a defeasible fee in common was given to Ophelia and John, and, upon the death of Ophelia, the absolute fee vested in John as survivor, because such was the manifest intention of the donor, and because that construction is not in violation of any principle of law or rule of construction." Mordecai's Lectures, 871. This authority is conclusive to the effect that by way of a shifting use the beneficial interest in the entire property upon the death of Mrs. London vested in Annie H. and Eliza W. London in fee. Did it vest in them absolutely, or did the right of survivorship attach, carrying the equitable title or use to the last survivor? It will be observed that the grantor uses the words "and to the survivors of them." If controlling effect is given the word "survivors," the language of the deed is complied with upon the death of Mrs. London, and the daughters take the entire estate absolutely. In *Hilliard v. Kearney*, 45 N. C. 221, Pearson, J., discusses the question of successive survivorships at much length. There the property was given to five daughters with a proviso that, if either of them died without issue, "her part to be equally divided between her other sisters." It was held that upon the death of the first sister without issue the shares

of the survivors became absolute. He invokes the rule that, when the language of the maker of the instrument leaves his intention in doubt, that construction will be adopted which will make the estate "absolute and indefeasible." It is said in *Cox v. Hogg*, 17 N. C. 121, that in ascertaining whether a succession of survivorships is created the court will examine other parts of the will. In *Fortescue v. Satterthwaite*, 23 N. C. 566, the limitation was made to depend upon the death of either of the first takers without children, when the property passed to "the children then living." These words were held to create a succession of survivorships. We have examined the cases in our reports, and, as said by Judge Battle in *Biddle v. Hoyt*, 54 N. C. 159, it is difficult to extract any satisfactory principle from them. In *Galloway v. Carter*, 100 N. C. 111, 5 S. E. 4, the limitation was dependent upon "any or either" of the children dying without issue, etc. These words, together with others of like import, were held to create a succession of survivorships. In view of the use of the word "survivors" and the fact that the grantor attaches a limitation to the issue of his daughters, if either of them should die leaving issue, we conclude that, upon the death of Mrs. London, the entire use or interest vested in the daughters in fee.

This would dispose of the appeal, but for the words which follow: "Provided, however, that if the said Annie H. or Eliza W. London shall die leaving issue, then to the use of such surviving issue who shall take the same per stirpes and not per capita." These words would create in the daughters a determinable fee, and, upon the death of either, the use would shift and vest in the "surviving issue" unless the superadded words "they to take per stirpes and not per capita" denotes that the grantor used the word "issue" as synonymous with "heirs," and, by directing the title in the same channel as it would be carried by the canons of descent, make the children and grandchildren of his daughters take by descent, and not by purchase. We think that it was the intention of Mr. London to settle the property, in the event which has happened, the death of his wife, upon his daughters with a limitation to their children and the children of such of them as should predecease their parents, and that he used the words that they should take "per stirpes and not per capita" to remove any doubt in respect to the interests which they would take. Having given it to the daughters in fee, he certainly could not have intended to attach a limitation for their issue, which was ineffectual, and left the estate in the same plight as it was by the language first used. He intended that the word "issue" should include grandchildren of his daughters whose parents had predeceased them, with the provi-

sion that such grandchildren should take by representation; that is, the shares or interest which their deceased parent would have taken if surviving. When language is used having a clearly defined legal significance, there is no room for construction to ascertain the intent. It must be given its legal meaning and effect. This is illustrated by what is said in *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30, in which Merrimon, J., says: "The real intention must have effect, but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it"; or, as the learned Justice says in the same case: "He must express his intention in words appropriate and sufficient to express his real meaning, and, if he employs technical legal words, the technical meaning must prevail, unless the same shall be qualified or modified by superadded words in the will." When, however, the words of limitation are of doubtful meaning, or their usual meaning, as used, is rendered doubtful by superadded words, and we are compelled to resort to construction, they must, if possible, be given such construction as will effectuate the intention of the maker of the deed or will. The word "issue" has been construed to include grandchildren when it was manifest that it was so intended; just as the word "heirs" has been restricted to children when words are superadded showing such intention. *Mills v. Thorne*, 95 N. C. 362. If by this deed the limitation had been to the children of Annie H. and Eliza W. and the children of such as should die before their ancestor, such children to take the share of their parent by representation, it is clear that the rule in *Shelley's Case* would not have operated to vest in the daughters the fee. If, by construction, we give the words used by Mr. London the same meaning, the same result would follow. The other limitations are eliminated by the death of Mrs. London, leaving Annie H. and Eliza W. living and the deed from the children of Mr. London to Mrs. Campbell and Mrs. Cronly.

We conclude, therefore, that his honor correctly held that the plaintiff, Mrs. Campbell, and the defendant Mrs. Cronly cannot convey to the purchaser a good and indefeasible title to the locus in quo. The conveyance by James Douglas Campbell to his mother vests in her his interest, but, if he should die leaving issue before his mother, such issue would take as a purchaser under the limitation in the deed.

The judgment must be affirmed.

WALKER, J., did not sit.

BROWN, J. I concur in the opinion written by Mr. Justice CONNOR in this case so far as it passes upon the title to the prop-

erty contracted to be sold by Annie H. Campbell and Eliza W. Cronly, and holding that they cannot make to the purchaser London a good and indefeasible title in fee.

At a former term we remanded the cause to the end that the purchaser be made a party, which has been done. Having then treated the matter as a bona fide controversy submitted without action under our Code to compel specific performance of a contract to purchase land, and our order having been complied with, I see no reason now why the controversy should not be determined. We have heretofore treated such controversies submitted without action upon agreed facts, where bona fide, as bills in equity by the vendor against the vendee for specific performance. I do not agree, however, that the act of 1893 (Laws 1893, p. 37, c. 6), referred to in the opinion, will permit any kind of a dispute about the title to land to be brought before the courts under the guise of a "controversy submitted without action" simply to obtain the opinion of the court upon an abstract proposition or a moot point in a matter where no present relief can be had or no final judicial process issued. As there is nothing in the record which impeaches the bona fide character of this controversy between vendors and vendee, I concur that the judgment of the superior court should be affirmed.

CLARK, C. J. (dissenting). In the case on appeal it is stated: "This action is brought by the plaintiff against the defendants to determine the rights and liabilities of the several parties hereto in a certain lot of land, located in the city of Wilmington, New Hanover county, of this state. It is agreed by the parties hereto that the facts upon which the controversy depends may be submitted to the court as in an action without controversy, and judgment may be entered thereon, subject to the right of either party to appeal therefrom to the Supreme Court." The proceeding proves on examination to be two interrogatories submitted to the court to ascertain its opinion as to what are the respective interests of two persons in a certain lot, without any real litigation, and there is nothing that the judgment of the court can act upon. Accordingly the judgment of the court below is merely an opinion, or legal advice, as to the respective rights or interests of the parties in the property. Had the property been sold by order of court for partition, the question now asked us might have been presented upon appeal from the judgment distributing the proceeds, and it might come up in other ways in a real litigation. But, as now presented, it is simply a "moot" point, and the court is asked to give its opinion as a matter of advice or legal information. The court is asked to pass its opinion upon an abstract proposition in a matter in which it cannot

adjudge or direct that the parties themselves or the officers of the law shall take any action. This is not a matter of which the courts will take jurisdiction. *McKethan v. Ray*, 71 N. C. 165; *Board of Education v. Kenan*, 112 N. C. 569, 17 S. E. 485. It is the function of counsel, not of the courts, to advise parties as to their rights and answer interrogatories as to the law as herein propounded. A case exactly "on all fours" is *Heptinstall v. Newsome*, 146 N. C. 503, 60 S. E. 416, in which *Brown, J.*, speaking for a unanimous court, says: "The advisory jurisdiction of courts of equity is primarily confined to trusts and trustees, which includes executors, as far as their rights, powers, and duties under the will are concerned." And then, after citing authorities, sums up: "This is not an action brought by the plaintiff against some person claiming an estate or interest in the tract devised to him, but is evidently a proceeding brought in the interest of the several devisees of parcels of land to settle and determine all their respective rights arising under the will in present and in futuro, in which the executors, as such, have no interest. The appeal and the actions are dismissed."

It would add immensely to the volume of business in the courts if any two or more parties could at will propound interrogatories to the courts as to matters about which they are in doubt. "Submission of a controversy without action" was intended only to dispense with summons and pleadings, where there is a real controversy in which the court can render judgment as in any other action. It was not intended to devolve upon the courts the duty of answering legal questions without any judgment to put the opinion into effect. The two interrogatories submitted to the court are solely as to what are the respective interests of *Mrs. Campbell* and *Mrs. Cronly* in the land whether each owns one-third or one-half interest therein, and present only a moot point. Especially is this so, since the court holds that they cannot convey it.

Courts decide legal propositions, not as advisory counsel, but only when necessary in determining the relief to be adjudged.

(32 S. C. 227)

WILLIAMS v. NEWTON et al.

(Supreme Court of South Carolina. April 9, 1909.)

1. ACTION (§ 60*)—SEPARATING CAUSES OF ACTION—DISCRETION OF COURT.

While a widow cannot take both dower and a distributive share of her husband's estate, under the express provisions of *Civ. Code 1902, § 2386*, she cannot be put to her election until she has had full opportunity to be advised as to what her interests require her to do, and where under the will, if valid, there would be no distributive share which she could elect to take, and she sued to set aside the will, she

could not be put to her election until the suit was decided; and, having set up causes of action both for dower and for a distributive share, the court, upon sustaining a demurrer to the complaint as setting up two inconsistent causes of action, acted within its discretion in ordering the causes separated and docketed as distinct actions, under *Code Civ. Proc. 1902, § 193*, providing that upon sustaining such a demurrer the court may in its discretion order the action divided, etc.

[Ed. Note.—For other cases, see *Action, Cent. Dig. § 703*; *Dec. Dig. § 60**]

2. DISMISSAL AND NONSUIT (§ 47*)—DISMISSING ONE OF TWO CAUSES OF ACTION—DISCRETION OF COURT.

Where an action for dower was improperly joined with an action to set aside decedent's will, since the action for dower could not be tried until the action to set aside the will was decided, when plaintiff would be required to elect whether she would claim a distributive share or dower, the court acted within its discretion in refusing to dismiss the cause of action for dower, since otherwise limitation might bar the claim before termination of the litigation over the will.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit, Cent. Dig. § 94*; *Dec. Dig. § 47**]

Appeal from Common Pleas Circuit Court of Marion County; *R. C. Watts, Judge.*

Action by *Mary B. Williams* against *R. C. Newton*, as trustee and executor of *Frank Williams*, and others. A demurrer to the complaint was sustained, and the causes of action set up therein separated, and defendants appeal. Affirmed.

Newton & Owens, for appellants. *Livingston & Muller*, for respondent.

WOODS, J. *Mary B. Williams*, claiming to be the widow of *Frank Williams*, deceased, brought this action against the executor of his will and *Frank Quick* and *William Williams*, stating in her complaint two causes of action. As a first cause of action she alleges her right to dower as the widow of *Frank Williams* in certain real estate, of which he was seised in his lifetime and during his coverture with her. As a second cause of action she alleges that *Frank Williams* undertook by his will to devise all of his property to *Charles S. McCall*, as trustee for the use of the defendant *Frank Quick*, a bastard child of the testator, with contingent remainder to the defendant *William Williams*, a brother of the testator. The relief asked is (1) that the will be adjudged null and void as to the plaintiff, in so far as it purports to be a devise and bequest of more than one-fourth of the estate of testator to his bastard son, and that the plaintiff's interest in the estate be set apart to her in severalty; (2) that the executor account for the personal property that came into his hands; (3) that dower be set off to plaintiff in the real estate, if the court should refuse to set aside the will; (4) that the will be construed, and the rights of the plaintiff established; and (5) for such other

and further relief as may be just. The defendants demurred to the complaint on the ground that a cause of action for dower and a cause of action for a distributive share of the testator's estate could not be united in the same complaint. The circuit judge decided the demurrer in this language: "It is very doubtful whether or not the two causes of action set up in this cause of action are inconsistent (no regard being had to the prayer for judgment, which ought not to be considered in construing the pleading); but, as the plaintiff's counsel seems willing that the demurrer may take the course provided by section 193 of the Code of Civil Procedure of 1902, I will so direct. It is therefore ordered that the demurrer is sustained, and it is further ordered that the two causes of action set up in the complaint be, and the same are hereby, divided into two separate and distinct actions and be docketed accordingly."

Section 193, Code Civ. Proc., provides that, if a demurrer be sustained for the reason that several causes of action have been improperly united, "the court may in its discretion and upon such terms as may be just order the action to be divided into as many actions as may be necessary to the proper determination of the causes therein mentioned." We do not think that defendant's objections to the order are valid. It is true that the plaintiff cannot take, as the widow of Frank Williams, both dower and a distributive share of his estate (Civ. Code 1902, § 2386); but it is also true that she cannot be put to her election until she has had full opportunity to be advised as to the condition of the property and her legal rights. In *Pinckney v. Pinckney*, 2 Rich. Eq. 241, it was held that the widow was not to be required to make her election until the state of the property had been ascertained in the litigation then pending. In *Hall v. Hall*, 2 McCord's Eq. 269, Chancellor De Saussure says the widow is not bound to make her election until the affairs of the estate are so far wound up as to enable her to have a clear perception of what her interests require her to do. Here the testator undertook to dispose of all his property by will, and if the will be valid, then there would be no distributive share which the plaintiff could elect to take. The knowledge of the condition of the estate, necessary to enable the plaintiff to have a clear perception of the election that her interest requires, cannot be obtained until the court determines whether or not the will is valid. Hence until that adjudication the plaintiff cannot be put to her election.

The court did not abuse its discretion in refusing to dismiss the cause of action for dower, because, if the action for dower be dismissed, the statute of limitations might bar the claim of dower before the litigation

as to the will should end. The plaintiff is entitled to maintain her cause of action to set aside the will and for dower at the same time, but the cause of action for dower cannot be tried until the action to set aside the will is decided. After that decision the plaintiff must elect whether she will claim a distributive share of the estate of Frank Williams, or prosecute her action for dower.

The judgment of this court is that the judgment of the circuit court be affirmed.

(85 S. C. 537)

THOMAS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 9, 1909.)

CARRIERS (§ 52*)—SHIPMENT OF GOODS—BILL OF LADING—CONCLUSIVENESS.

The recitals in a bill of lading, issued by a carrier on the actual receipt of goods, that a specified number of packages were delivered for carriage are conclusive on the carrier, as between it and the consignee or transferee of the bill of lading, who has incurred loss or liability in reliance on the correctness of such recitals.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 152-157; Dec. Dig. § 52.*]

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge.

Action by Frank E. Thomas against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

P. A. Willcox and Mark Reynolds, for appellant. L. D. Jennings, for respondent.

JONES, J. In this case the circuit court affirmed the judgment of a magistrate court awarding to plaintiff \$27, the value of 1 ton of cotton seed meal alleged to have been lost out of a shipment of 30 tons of cotton seed meal over defendant's line, the judgment also including \$50 penalty, under an act of February, 1903, for not adjusting and paying the claim within the time required by law. On January 10, 1907, at Columbia, S. C., the defendant issued to the South Carolina Cotton Oil Company its bill of lading, reciting that it had received from the South Carolina Cotton Oil Company 600 sacks of meal in apparent good order, to be delivered in like good order to plaintiff, at Wedgefield, S. C. The defendant received the car containing the shipment from the shipper at Columbia under the shipper's seal, and without counting the sacks. The car reached Wedgefield on January 12, 1907, and on Monday, the 14th, was turned over to the plaintiff, after the defendant's agent at Wedgefield had broken the seal and delivered 10 sacks to one whom he believed was authorized to receive it by the consignee. The consignee testified that he had not authorized the delivery to such person. When the consignee took charge of the car, according to the evidence submitted in his be-

half, there were only 569 sacks of cotton seed meal therein, which, with the 10 sacks delivered by defendant's agent, made 579 sacks, or 21 sacks less than the amount called for in the bill of lading. Plaintiff filed a claim with defendant for 20 sacks shortage, amounting to \$27, and, defendant failing to pay within 40 days, plaintiff brought suit for recovery of that sum and the penalty.

The magistrate charged the jury that, "as between the common carrier and the shipper, the bill of lading is not conclusive as to the quantity of goods received, and parol testimony may be introduced to show that a less quantity has been received, but it cannot prevent the party who is to receive the goods from recovering what he loses from the common carrier," and declined to charge that the bill of lading was merely *prima facie* evidence as to the quantity of goods received; the issue being between the consignee for value and the carrier. When the jury came back for further instructions, the magistrate, in answer to an inquiry from the jury, instructed them: "If the plaintiff, Thomas, proves that he lost the meal, then I charge you that the railroad company is responsible for the loss." In view of the frank admission of counsel and the circumstances this last language of the magistrate is to be construed as meaning only to make the defendant responsible for the shortage between the quantity named in the bill of lading and the quantity delivered to the consignee.

The real question raised by the exceptions is whether a bill of lading, issued by a carrier to the shipper, and transferred to the consignee for value, is as between the consignee and the carrier conclusive evidence as to the receipt by the carrier of the quantity of goods therein mentioned, or is it only *prima facie* evidence thereof? A bill of lading is regarded as having a twofold character—as a receipt for goods delivered, and as a contract for their shipment. In so far as it may be treated as a mere receipt it is generally held that as between the original parties it is not conclusive, but is only *prima facie* evidence of the truth of its recitals, and may be varied or contradicted by parol. Whether as between the carrier and the consignee or transferee, not original parties thereto, the recital as to the receipt of goods is conclusive is a matter of considerable controversy. There is much authority in other jurisdictions for the view that, when no goods have in fact been delivered for shipment, a bill of lading issued by the carrier's station agent is not conclusive evidence of the receipt of the goods, even in the hands of a bona fide consignee or purchaser for value, whether the bill of lading was issued by mistake or collusively with the shipper. Such seems to be the law in England (Grant v. Norway, 70 E. O. L. 665), and is the rule of the Supreme Court of the United States (Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; Friedlander

v. Texas, etc., R. R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991). This doctrine is adopted in several states. *Fellows v. Steamer Powell*, 16 La. Ann. 316, 79 Am. Dec. 581; *B. & O. R. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Williams, Black & Co. v. Wilmington, etc., R. R. Co.*, 93 N. C. 42, 58 Am. Rep. 450; *National Bank of Commerce v. Chicago, etc., R. R. Co.*, 44 Minn. 224, 48 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. The reasons for this view rest mainly on the ground that it is not within the real or apparent authority of the carrier's agent to issue a bill of lading for goods not received, and that, a bill of lading not being itself negotiable, the holder can take no better right nor higher equity thereunder than the consignor or shipper.

The contrary view is taken in other states with strong show of reason. *Bank of Batavia v. New York, etc., R. R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *Sioux City & Pacific R. R. Co. v. First National Bank of Fremont*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; *Brooke v. New York, etc., R. R. Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235, reported in note to 53 Am. Rep. 453; *American National Bank v. Georgia R. R. Co.*, 96 Ga. 665, 23 S. E. 893, 51 Am. St. Rep. 155. The reasons for this view are mainly that the question is not one of negotiability of the instrument, but one of estoppel in pais; that the carrier has clothed the agent with apparent authority to issue a bill of lading; that, the agent having done so with full knowledge or full opportunity to know what, if any, goods are tendered for shipment, the principal should be estopped to deny the truth of the recitals as to goods covered thereby; that it is better to cast the loss upon the carrier whose agent made the false representation than upon an innocent holder of the bill of lading who relied upon the representation; that while not strictly negotiable, a bill of lading is quasi negotiable, symbolizing the property described therein, and that title thereto passes by its transfer or delivery; and that it is in the highest degree important to the large commerce known by the carrier to be built upon the transfer of bills of lading that there should be confidence in their recitals.

Whatever may be the true view as to the effect of a bill of lading when no goods were delivered to the carrier, we think that in a case like this, when goods were delivered, and the question is one merely of shortage in the number of packages in an admitted shipment, the representation of the defendant's bill of lading that a specific number of packages was received without any qualification is conclusive upon the carrier, as between the carrier and the consignee or transferee of the bill of lading who has incurred loss or liability in reliance upon the correctness of the representation. It cannot be said that the issuance of the bill of lading was not

within the scope of the authority of defendant's agent. In was the duty of defendant's agent to check the number of separate packages received for shipment; and, if the agent chose to accept the shipper's count as his own, the loss should fall upon the carrier who gave the agent authority to issue the bill of lading rather than upon the innocent consignee or transferee who relied upon the recitals therein. Note to *Chandler v. Sprague*, 38 Am. Dec. 414. This latter view is supported by our own cases. In *Benjamin v. Sinclair*, 1 Bailey, 174, the court held, in an action by the master of a vessel against a consignee for freight, that the recital in a bill of lading that the goods were shipped "in good order and well conditioned" could not be contradicted by testimony showing that externally the goods were not in good order; there being no evidence of fraud or imposition. The representation as to the external condition of the goods shipped is not in principle different from a representation as to the number of packages shipped. In *Sanford v. Railway*, 79 S. C. 523, 61 S. E. 74, a case involving a claim for statutory penalty of \$5 per day for delay in shipment, the court held that, when a carrier issues a bill of lading for a car of freight, it cannot be heard to say that it did not have possession of the car at the time of issuing the bill of lading, although it alleged that the car was not received by it until about 20 days after the date of the bill of lading.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(82 S. C. 353)

GRIFFITH et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. RAILROADS (§ 447*)—KILLING STOCK—LIABILITY.

In an action against a railroad company for killing stock on the track during a dense fog, an instruction that the jury must decide what was due care in running a train under the conditions, including the presence of a dense fog, emphasized the necessity of caution in running trains in dense fog, and was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1642; Dec. Dig. § 447.*]

2. RAILROADS (§ 406*)—KILLING STOCK—LIABILITY.

Where the stock law is in force, a railroad is not required to use the same care and caution as in localities where such law is not in force.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1400, 1401; Dec. Dig. § 406.*]

3. RAILROADS (§ 441*)—KILLING STOCK—ACCIDENTS—PRESUMPTIONS—BURDEN OF PROOF.

That a railroad company killed stock on the track raises a presumption of negligence against the company, and where it, denying negligence and assuming the burden of proving due care, offers evidence overcoming the burden placed on it by the presumption, the jury cannot

rest their verdict on the presumption alone, but must rest their verdict on the preponderance of the entire evidence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1575; Dec. Dig. § 441.*]

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by John W. Griffith and another, copartners, under the firm name of "J. W. Griffith & Bro.," against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

St. Julien Grimke and Legare, Holman & Baker, for appellants. T. M. Mordecai, for respondent.

WOODS, J. The plaintiffs, who were contractors engaged in the construction of the Charleston & Summerville Railroad, used in their work 34 mules, which at night were kept in one inclosure. On the night of April 24, 1906, the mules broke one of the bars of the inclosure, and 4 of them strayed on defendant's railroad track, where they were killed between 5 and 6 o'clock in the morning by a passenger train. This action was brought to recover damages for the loss. The defenses set up were: First, that defendant's agents in charge of the train exercised due care in the running of it, but a dense fog made it impossible for them to see the mules, and that the accident was unavoidable on their part; and, second, that the loss of the mules was the result of plaintiffs' contributory negligence in keeping the mules in a small and insecure inclosure. On the trial of the issues thus made, the jury found a verdict for the defendant. The plaintiffs appeal, assigning several errors in the charge to the jury.

There is no foundation for the exception alleging error on the part of the circuit judge in assuming that the train was running in a fog. The charge on this subject went no further than a statement that the General Assembly had not laid down by statute a rule as to any rate of speed or other precautions that a railroad company should take to avoid accidents while in a fog, and that the jury must decide what would be due care in running a train under all the conditions, such as the presence of darkness or fog. The charge on this subject was rather favorable to the plaintiff than otherwise, for it emphasized the necessity of caution by the defendant of running in darkness or fog.

The second exception alleges error in the instruction: "That where the stock law is in force the defendant is not required to use the same care and caution as in localities where such law is not in force." The law which requires the fencing of live stock was in force at the place where the mules were killed. In *Harley v. Eutawville R. R. Co.*,

81 S. C. 151, 9 S. E. 782, where the same conditions existed, the court held the defendant was entitled to have an instruction in the precise words here used by the circuit judge. The case is reaffirmed, rather than overruled, by the subsequent case of *Davis v. F. C. & P. R. R. Co.*, 47 S. C. 390, 25 S. E. 224.

The last two exceptions complain of the following instruction: "The jury is instructed that, notwithstanding the presumption of negligence which arises from the fact that the stock has been killed by the railroad company, where all the facts are in evidence, including the fact that the stock law was in force at the place in question, they must find a verdict from the preponderance of the evidence as a whole, and cannot find a verdict against the defendant simply because of the presumption of negligence." The defendant contends that by this instruction the jury were misled as to which party had the burden of proof, and might have inferred from it that the burden of proof rested on the plaintiffs. In opening this charge the circuit judge had said: "Now the law is, as you have heard stated here, that when a man proves that he owns live stock, and that it was killed upon the track of a railroad company, the law raises the presumption of negligence as against the railroad company, and says that, nothing further appearing than that, and there is no showing to the contrary, no explanation on the part of the railroad company, then the man is entitled to recovery, but the law goes on and says that where the railroad company comes in and denies that there was any negligence on its part and explains the killing and overcomes the burden of negligence thrown upon it, explains it satisfactorily to the jury that the killing was unavoidable, and was caused through no negligence on their part, then the presumption is removed, and the party cannot recover because, as you see, his right to recovery is based upon the negligence of the railroad company, and if it is shown that there has been no negligence on the part of the railroad company, he cannot recover." When these instructions are considered together, the meaning seems obvious that the fact of killing live stock on the track raises a presumption of negligence against a railroad company; but when the railroad company, denying negligence, and assuming the burden of proving due care, offers evidence which tends to overcome the burden placed on it by the presumption of negligence, then the jury cannot rest their verdict on the presumption alone, but must consider not only the presumption, but all the evidence on the subject, and rest their verdict on the preponderance of the entire evidence. This was nothing more than an instruction that the presumption from the fact of killing live stock by a railroad train is not controlling

and conclusive against the railroad company, where it offers evidence tending to overcome the presumption. That this is a correct statement of the law will not be doubted, and we think the jury could not have understood the charge to mean anything else.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 238)

HASTEN et al. v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. JUSTICES OF THE PEACE (§ 92*)—PROCEDURE IN CIVIL CASES—PLEADING—TIME FOR FILING ANSWER.

In an action in a magistrate's court to recover \$3 and interest and a penalty of \$50, the only paper served on defendant was one signed by the magistrate and issued "to any lawful constable," stating plaintiffs' cause of action generally and requiring the constable to summon the defendant to appear at the magistrate's office on a date specified. Defendant appeared on the return day and moved that the complaint be made more specific, which motion was overruled on the ground that only a summons had been served on defendant and that the complaint was not filed. Immediately thereafter plaintiffs' counsel filed a complaint, and defendant announced itself ready for trial under the original complaint, but that, if plaintiffs demanded trial under the new complaint, defendant asked for the statutory period of 20 days before going to trial, which motion was overruled. *Held*, that the magistrate, having decided that the original paper was not a complaint and overruled defendant's motion to make it more definite, should have granted defendant 20 days before going to trial after filing the complaint, under Code Civ. Proc. 1902, § 88, subd. 16, providing that "when 25 or more dollars is demanded the complaint shall be served on the defendant not less than 20 days."

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 92.*]

2. JUSTICES OF THE PEACE (§ 79*)—PROCEDURE IN CIVIL CASES—NECESSITY OF SUMMONS.

There is nowhere in the Code of Civil Procedure of 1902 an express requirement for a summons in a civil action in a magistrate's court, except in section 71, which refers exclusively to actions of claim and delivery; section 148, requiring civil actions in courts of record to be commenced by service of a summons, not applying to actions in a magistrate's court, as it is not a court of record.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 79.*]

Appeal from Common Pleas Circuit Court of York County; R. O. Watts, Judge.

Action by J. W. Hasten and J. C. Hallams against the Southern Railway Company. Plaintiffs had judgment before a justice of the peace, and defendant appealed to the circuit court, where a new trial was ordered, and plaintiffs appeal. Affirmed.

Lewis & Hollis, for appellants. Spencers & Dunlap, for respondent.

WOODS, J. The above title is the same in 15 different suits instituted in a magistrate's court for the recovery of damages for furni-

ture lost and injured in the course of transportation and a statutory penalty of \$50. The plaintiff recovered judgments in the magistrate's court on each of the claims, aggregating in all \$75.15, and for the statutory penalty in each case, aggregating in all \$750. On appeal the circuit court set aside the judgments of the magistrate and ordered new trials. The legal questions in all the cases are the same, and one case will be discussed as decisive of all.

In the case to be considered, the action was commenced by the service on March 6, 1908, of a paper of which the following is a copy: "By T. C. Beckham, Esquire, Magistrate—To Any Lawful Constable: Complaint having been made to me by J. W. Hasten and J. O. Hallams, partners in trade doing business at Rock Hill, S. C., under the firm name of Hasten Furniture Company, against Southern Railway Company, a common carrier of freight and passengers in and through the county of York, and a corporation duly created by law for said purpose, that the said defendant is indebted to plaintiffs in the sum of \$3.00, with interest from October 24, 1907, besides the sum of \$50 penalty arising out of the following facts, to wit: That the defendant negligently broke and damaged and lost part of a certain lot of furniture while in transit from Nashville, Tenn., to Rock Hill, S. C., to plaintiffs' damage in the sum of \$3.00. That said plaintiffs duly filed a claim for said amount with the agent of defendant at destination on October 24, 1907. That said defendant has failed and neglected to adjust and pay said loss and damage to this date—you are therefore required to summon the said defendant to be and appear before me at my office at Rock Hill, S. C., at twelve o'clock m. on the 31st day of March, 1908, to answer said complaint, or judgment will be given against said defendant by default. Witness my hand and seal this March 5, A. D. 1908. T. C. Beckham, Magistrate. [Seal.]" When the case was called for trial on the return day, March 31, 1908, defendant's counsel moved before the magistrate "that the complaint as served on the defendant on the 6th of March, 1908, be made more definite and certain, in that it alleges 'that the defendant company negligently broke and damaged and lost part of a certain lot of furniture,' etc., and ask that the court require the plaintiffs to allege the articles broken, damaged, and lost." The motion was refused without consideration of its merits; the magistrate giving his reason in these words: "It appearing to the court that only a summons has been served on the defendant, and that the complaint is not yet filed, defendant's motion is premature and is overruled." As soon as the motion was refused, plaintiffs' counsel filed with the magistrate a complaint, setting out in detail the delivery at Nashville, Tenn., to the defendant railroad company of a lot of heaters to be car-

ried to the plaintiffs at Rock Hill, S. C., the breaking off of the legs of two of the heaters in transit, to the damage of the plaintiffs, \$3, the filing of the claim with the defendant's agent at Rock Hill, and the refusal of the defendant to pay and adjust the claim within 90 days, and the liability of the defendant for the statutory penalty of \$50. The record contains this statement of the proceedings which followed: "Thereupon the defendant, through counsel, made the following statement and motion in each of the 15 cases: Defendant appears and is ready for trial under complaint of March 6, 1908, but if plaintiffs demand trial under new complaint we ask the statutory period of 20 days under section 88, subd. 16, Code Civ. Proc. 1902. This motion was denied by the magistrate for the following reasons: The magistrate holds that only a summons has been served on defendant, and their complaint (plaintiffs') is now reduced to writing on day of trial. The motion is therefore overruled. Counsel for defendant, having stated that they appeared for the purpose of making the foregoing motions, and for no other purpose, then withdrew from the hearing of the cases, which proceeded to trial upon the complaints hereinbefore referred to and then filed for the first time, and resulted in judgment being rendered for the plaintiffs in all 15 cases for the amounts asked for, with interest and costs."

The concrete question presented by the exceptions is whether the defendant was entitled as a matter of right to 20 days within which to answer the complaint filed on March 31, 1908. The magistrate distinctly held that the paper served on March 6, 1908, was not a complaint, but merely a summons, and on that ground refused to require the plaintiff to make it more definite and certain as a complaint. This holding of the magistrate was binding on all parties to the cause until reversed by an appellate tribunal. The defendant could not justly be held bound by the adjudication that the first paper was only a summons and not a complaint, and have his motion to make it more definite and certain refused on that ground without consideration of its merits; and at the same time be required to answer it within 20 days of its service, as if it were a complaint. Under the holding of the magistrate, the only complaint before the court was a paper filed on March 31, 1908. Subdivision 16 of section 88 of Code of Civil Procedure provides: "When twenty-five or more dollars is demanded the complaint shall be served on the defendant not less than twenty days." It follows that the defendant was entitled to the 20 days from March 31, 1908, demanded by its counsel, within which to answer the complaint filed on that day.

The error of the magistrate was no doubt due to the obscurity of title 5, part 1, of the Code of Civil Procedure, relating to courts

of magistrates with respect to the summons and complaint in these courts. While there is an implication in subdivision 8 of section 88 and in section 156 of Code of Procedure that all actions must be commenced in a magistrate's court by the issuance of a summons, yet there is nowhere in the Code of Procedure an express requirement for a summons, except in section 71, which refers exclusively to actions of claim and delivery; and the distinctions between a summons and a complaint in a magistrate's court is not well marked. It is true that section 148, tit. 5, pt. 2, of the Code of Procedure requires that civil actions in the courts of record of this state shall be commenced by service of a summons; but the provision is limited to courts of record, and the magistrate court has been held not to be a court of record. *State v. Weeks*, 14 S. C. 400.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 456)

JONES et al. v. McCREARY LAND & INVESTMENT CO. et al.

(Supreme Court of South Carolina. April 14, 1909.)

1. PLEADING (§ 869*)—CAUSES OF ACTION—ELECTION.

Under Code Civ. Proc. 1902, § 186a, providing that a plaintiff shall not be required to state separately two or more wrongs relied on, or to elect on which he will proceed, but he shall be entitled to submit his whole case to the jury, a complaint, in an action by a tenant against his landlord for unlawful distress for rent, because no rent was due, and because the distress was excessive, shows a single act, giving rise to different elements of damages, and it is error to require him to elect on which cause he will proceed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1199; Dec. Dig. § 869.*]

2. LANDLORD AND TENANT (§ 274*)—WRONGFUL DISTRESS FOR RENT—DAMAGES—"ALL DAMAGES."

Civ. Code 1902, § 2434, providing that a landlord making excessive distress shall be liable for "all damages" sustained by the tenant, authorizes the recovery of punitive and compensatory damages for an excessive distress.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1163; Dec. Dig. § 274.*]

Appeal from Common Pleas Circuit Court, of Richland County.

Action by Clara Jones and husband against the McCreary Land & Investment Company and another. From a judgment for defendants, plaintiffs appeal. Reversed.

P. A. McMaster and D. W. Robinson, for appellants. Melton & Belser, for respondents.

GARY, A. J. This is an action for damages. The allegations of the complaint material to the questions involved are as follows: "That heretofore, on the 2d day of July, A. D. 1904, plaintiff Clara Jones rent-

ed from defendant a dwelling house situated in the city of Columbia, for which she agreed to pay as rental therefor \$7 per month, or \$3.50 every two weeks. That subsequent thereto said plaintiff Clara Jones paid the said rental regularly, according to her contract, to defendant McCreary Land & Investment Company, the principal owner of said company, sometimes paying the same to defendant G. T. Pressley, and sometimes to other employees of McCreary Land & Investment Company. That on the 20th day of March, 1906, the defendants herein unlawfully, willfully, wantonly, and in reckless disregard of the rights of plaintiff Clara Jones issued a distress warrant against all her goods and chattels, for the purpose of collecting the sum of \$1.75, which was illegally and wrongfully claimed to be due as rent in arrears for said dwelling house on March 17, 1906, and unlawfully, wrongfully, wantonly, and in reckless disregard of the plaintiff's rights caused the said distress warrant to be levied upon the following goods and chattels of the plaintiff Clara Jones, to wit, 2 rugs, 1 square, 1 trunk, 1 washstand and contents, 1 dresser and contents, 1 bedstead, 3 rocking chairs, 6 straight chairs, 1 bowl and pitcher, 1 table, 1 lamp, 1 clock, 2 pairs of pillows, 2 mattresses, 1 counterpane, 1 pair of rubber boots. That all of said property mentioned in paragraph 5 above was taken under said distress warrant by one J. A. H. Geiger, acting for the defendants, from the possession of Clara Jones on the 20th day of March, and was detained under said distress proceedings until March 21, 1906, at which time the said goods were replevied by plaintiff Clara Jones at a cost to her of \$6.75 for rent in arrears, distress, and storage charges. That there was nothing in fact due by said plaintiff for rent at the time said distress and levy was made. That the said distress so made by defendants was unreasonable and grossly excessive, in that the goods so distrained were reasonably worth \$78. That at the time said distress was made by the defendants as above mentioned it was a cold, rough day, and said goods were taken in the evening of March 20th, and plaintiffs were compelled to go to another house to obtain lodging during the night of the 20th and 21st in order to obtain a place to sleep, and were put to great inconvenience and annoyance and considerable expense, as shown above, by the unlawful, wrongful, willful, and wanton acts and disregard of their obligations on the part of the defendants."

His honor, the presiding judge, made the following order: "On the call of this cause on the calendar for trial defendants' attorneys moved before me to require the plaintiffs to elect upon which of the causes of action mingled in the complaint they would

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rely; that is to say, whether upon (1) the alleged cause of action for trespass based upon no rent being due, or upon (2) the alleged causes of action for an excessive distress. Being of the opinion that two causes of action as above stated were alleged and mingled together in the complaint, and that the said causes of action were inconsistent and could not stand together, I so held, and accordingly required the plaintiffs to elect. Thereupon the plaintiffs elected to rely upon the alleged cause of action for excessive distress. It is therefore ordered that the above-stated action stand upon the docket of this court for trial upon the cause of action for excessive distress alleged in the complaint therein." This is made the first ground of the exceptions. Section 186a of the Code of Civil Procedure of 1902 is as follows: "In all actions ex delicto in which vindictive, punitive or exemplary damages are named in the complaint, it shall be proper for the party to recover his actual damages sustained, and no party shall be required to make any separate statement in the complaint in such action, nor shall any party be required to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instructions of the court. In all cases where two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to injuries for which suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will proceed to trial, but shall be entitled to submit his whole case to the jury under the instructions of the court and to recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs alleged in the complaint." The allegations of the complaint show that a single act gave rise to the different elements of damages, and that the case comes within the provisions of the section of the Code just mentioned. His honor, the presiding judge, therefore, erred in requiring the plaintiff to elect upon which cause of action he would proceed.

The next question that will be considered is whether punitive damages can be recovered for an excessive distress for rent. Section 2434 of the Civil Code of 1902 is as follows: "Every distress for rent shall be reasonable and not too great, and any lessor or landlord who makes unreasonable and excessive distress shall be liable for all damages sustained by the tenant whose goods are distrained by reason of such excessive distress. Such damages may be recovered by action in any court of competent jurisdiction." The word "all" preceding the

word "damages" is comprehensive enough to include punitive, as well as compensatory, damages.

The last question made by the appellants is that punitive damages cannot be recovered in an action for the detention of personal property. This, however, is not an action for the detention of personal property.

It is the judgment of this court that the judgment of the circuit court be reversed.

(32 S. C. 410)

FARRELL v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 13, 1909.)

1. CARRIERS (§ 20*)—CARRIAGE OF GOODS—DELAY IN TRANSPORTATION—ACTIONS—PLEADING.

In an action against a carrier for the statutory penalty for delay in the transportation of goods, plaintiff alleged that he had consigned to him from a specified city in the state certain goods designated on the bill of lading, and that notice was given the carrier that prompt shipment was desired to his place of business in H., within the state aforesaid, "that about three weeks elapsed after the shipment before the goods aforesaid were located by the plaintiff, when it was discovered that the said goods had been negligently taken by the defendant to Holly Hill, Berkeley county, S. C., another station on defendant's said line of railroad, and in violation of the provisions of an act of the South Carolina Legislature of 1904 (24 St. at Large, at page 671), and allowed the said goods to remain at the said station for the time and period aforesaid, wherefore plaintiff demands judgment against the defendant company for the sum of \$90 penalty as provided for in the act of the Legislature of South Carolina of 1904, at page 671, and for the costs of this action." Code Civ. Proc. 1902, § 88, provides that pleadings in a magistrate court need not be in any particular form, but must be such as to enable a person of common understanding to know what is intended. *Held*, that the complaint sufficiently shows that plaintiff is suing for the per diem penalty for delay in the transportation of freight as provided in 24 St. at Large, p. 671.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 47; Dec. Dig. § 20.*]

2. JUSTICES OF THE PEACE (§ 190*)—APPEAL—REVERSAL—NEW TRIAL—DISCRETION OF COURT.

In an action against a carrier commenced before a magistrate for the penalty authorized by 24 St. at Large, p. 671, for delay in transportation of freight, it is within the discretion of the circuit court on appeal to grant a new trial, where, in view of the whole testimony, the court is uncertain whether the case-made falls within the statute rather than render judgment for defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 730, 734; Dec. Dig. § 190.*]

3. CONSTITUTIONAL LAW (§ 241*)—EQUAL PROTECTION OF THE LAWS—OPERATION OF RAILROADS—PENALTY FOR DELAY.

24 St. at Large, p. 671, authorizing the collection of a penalty from a railroad company for delay in the transportation of goods, does

not violate the equality clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 700; Dec. Dig. § 241.*]

4. COMMERCE (§ 13*)—POWER TO REGULATE—STATE COMMERCE.

The question whether 24 St. at Large, p. 671, authorizing the collection of a penalty for the delay by a carrier in the transportation of freight between two points within the state, violates the interstate commerce clause of the federal Constitution, does not arise in an action to recover the penalty for delay in the transportation of goods between two points within the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 7; Dec. Dig. § 13.*]

5. JUSTICES OF THE PEACE (§ 190*)—APPEAL—REVERSAL—ORDER SUBSTITUTING PARTIES.

It is not error in the circuit court in ordering a new trial in an action appealed from a magistrate's court to refuse to require the substitution of the trustee in bankruptcy of plaintiff for plaintiff in the action, where the circuit court held that, on the new trial, the trustees in bankruptcy should move the magistrate to be joined or substituted as plaintiff, and that the action should be continued by the trustee on behalf of the creditors of the bankrupt.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 734; Dec. Dig. § 190.*]

Appeal from Common Pleas Circuit Court of Dorchester County; R. W. Memminger, Judge.

Action by C. L. Farrell against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Legare Walker, for appellant. E. J. Dennis, for respondent.

JONES, J. In this action a magistrate court rendered judgment in favor of plaintiff against defendant for \$90 as penalty for delay in the transportation of freight under the act of March 25, 1904 (24 St. at Large, pp. 671, 672). On the appeal of defendant the circuit court, Judge Memminger, reversed the judgment of the magistrate, and remanded the case for a new trial. The defendant now appeals to this court upon numerous exceptions to the rulings of the circuit court and his failure to dismiss the action.

1. It is contended that the demurrer to the complaint for insufficiency should have been sustained. The complaint, after stating that defendant is a corporation under the laws of Virginia and is a common carrier owning and operating the railroad known as the Atlantic Coast Line Railroad, having its line and agents in Dorchester county, further alleged:

"Third. That on or about the 6th day of March, 1907, the plaintiff purchased and had consigned to him from the city of Charleston, in the county of Charleston, and the state aforesaid, 110 sacks of kainit, as designated upon the bill of lading, etc., the words 'Prompt shipment required' also appearing upon the said bill of lading, notice having been given that prompt shipment was de-

sired and required to his place of business in the town of Harleyville, county of Dorchester and state aforesaid.

"Fourth. That about three weeks elapsed after the shipment before the said goods as aforesaid were located by the plaintiff, at which time it was discovered that the said goods had been negligently and carelessly taken by the defendant, its agents and servants, to Holly Hill, Berkeley county, S. C., another station on defendant's said line of railroad, and in utter disregard of the rights, etc., of the plaintiff, and in violation of the provisions of the Acts of the South Carolina Legislature of 1904, at page 671, and allowed the said goods to remain at the said station for the time and period aforesaid.

"Wherefore plaintiff demands judgment against the defendant company for the sum of ninety (\$90) dollars penalty as provided for in the Acts of the Legislature of South Carolina of 1904, at page 671, and for the costs of this action."

It is charged that the complaint did not state a cause of action for failure to allege (a) that the shipment ever reached its destination and the date of its arrival; (b) the distance from the shipping point to destination; (c) the value of the shipment.

With respect to pleadings in a magistrate court, it is expressly provided in section 88, Code Proc. 1902, that "pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended." The complaint measures up to this requirement, as it plainly shows that plaintiff is suing for the per diem penalty for delay in the transportation of freight as provided in the act of March 25, 1904. *Riggs v. Wilson*, 30 S. C. 175, 8 S. E. 848.

2. Appellant contends under several exceptions that the circuit court should have sustained its exceptions to the refusal of the magistrate to grant a nonsuit and should have rendered judgment of dismissal in favor of defendant because there was a total lack of testimony to show a delay in transportation penalized by the statute, but that, on the contrary, plaintiff's own testimony showed a failure to deliver freight, or a lost shipment, not within the meaning of the statute, as declared in *Macon v. Southern Railway*, 81 S. C. 167, 62 S. E. 6, which held that the act (24 St. at Large, p. 671) does not apply to loss of freight. In reference to this matter, Judge Memminger held as follows: "Upon those grounds of the appeal which raise the question that the act under which the penalty was sought and recovered applies only to delayed shipments, and not to shipments which were never delivered at all, being inclined to the opinion that those grounds are well taken, but being unwilling to decide so important a question, except upon a clear

state of facts found as to whether or not the shipment in this case was only delayed or never received at all; and, the evidence here being somewhat doubtful on the point, I prefer sending the case back to the magistrate, in order that the testimony may be more definite and complete in that particular. So far as the testimony is reported here, the weight of it is that the shipment has never been delivered; but plaintiff's attorney insisted at the hearing that, as a matter of fact, it was delivered and received by the plaintiff after it was located at Holly Hill, but more than 18 days after it should have arrived at Harleyville, the true point of destination, and plaintiff does say at one place in his testimony that he was 'kept out' of the shipment for 18 days, implying that he received it after that time, and it seems probable that he would have received it after it was located. This would make a typical case of delay under the statute; but, if it be true, as the weight of the testimony, as reported, shows, that he never has received the shipment, it would be a case of lost shipment, and defendant's position as to the construction of the statute applying only to delayed, and not to lost, shipments, if sustained, would prevail. As before stated, I would be inclined to sustain defendant's position hereupon, but do not wish to have the cause go off on this point and sustain the appeal and reverse the magistrate's judgment on this ground, when it may be a fact that plaintiff did get the shipment and the case is not one where this question of the construction of the statute could obtain. It is this sort of thing which brings the administration of the law into disrepute; and as the matter is susceptible of definite ascertainment, I shall direct a new trial, and not render final judgment either way."

While the argument of appellant's counsel is very forceful on this point, we think it was within the discretion of Judge Memminger to grant a new trial instead of rendering final judgment for defendant, if he, in view of the whole testimony, was uncertain whether or not the case-made fell within the statute. To the extent that the court reversed the judgment of the magistrate the action was in favor of appellant and the granting of a new trial need not work injustice, as plaintiff will have to make out a case within the statutes before he can recover.

8. The penalty statute (24 St. at Large, p. 671) does not violate the equality clause of the federal Constitution. *Sanford v. Seaboard Air Line Railway*, 79 S. C. 519, 61 S. E. 74; *McCutcheon v. Atlantic Coast Line R. R. Co.*, 81 S. C. 71, 61 S. E. 1108. Whether it violates the interstate commerce clause of the federal Constitution does not properly arise as the shipment in question was not interstate. *McCutcheon v. Atlantic Coast Line R. R. Co.*, supra.

4. Error is assigned because the circuit court did not require the substitution of the trustee in bankruptcy of plaintiff alleged to have been adjudged a bankrupt after the rendition of the judgment by the magistrate. Judge Memminger held that, upon the new trial to be had herein, the trustees in bankruptcy should move the magistrate to be joined or substituted as plaintiff, and that the action should be continued by the said trustee on behalf of the creditors of said bankrupt. We see in this no ground for reversal. The foregoing views practically dispose of all the exceptions not withdrawn.

The judgment of the circuit court is affirmed.

(82 S. C. 215)

MAHONEY v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina. April 9, 1909.)

1. ADVERSE POSSESSION (§ 46*)—CONTINUITY OF POSSESSION OF LANDLORD.

A landlord's possession is not interrupted by his tenant's quitting the premises, if the landlord takes possession within a reasonable time, or puts in another tenant as soon as one can be procured.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 243; Dec. Dig. § 46.*]

2. ADVERSE POSSESSION (§ 116*)—EXTENT OF POSSESSION—INSTRUCTIONS.

Code Civ. Proc. 1902, § 102, provides that whenever the occupant enters into possession of premises under claim of title, founded upon a written instrument or decree, and there has been a continued occupation of the premises or some part thereof for 10 years, the premises so included are held adversely, except that where the premises consist of a tract divided into lots the possession of one lot shall not be possession of any other lot. Section 103 provides that, to constitute adverse possession under a written instrument or decree, land shall be considered as possessed and occupied where, though not inclosed, it has been used to supply fuel or fencing timber, for husbandry or the ordinary use of the occupant, or where a known farm or a single lot has been partly improved, the portion unimproved, according to the custom of the locality, shall be considered as occupied for the same time as the part improved. *Held*, that possession of any part under a written instrument or decree will be possession of the whole, so that a request to modify an instruction, in an action for damages for appropriating plaintiff's land, that "in making out a title by adverse possession there must be continuity in point of locality, for possession of a part of a tract of land cannot be joined to possession of another part so as to make up the period," by adding thereto that the instruction is true when the claimant holds color of title as well as when he is claiming without color of title, was properly refused.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 116.*]

3. LIMITATION OF ACTIONS (§ 1*)—LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS—RECOVERY OF REAL PROPERTY.

The statute of limitations is a statute of repose, and the provision which relieves one in possession of real property under a deed or judgment of the risk which pertains to the loss of links in the chain of title is intended to

give additional security to those who hold under paper title.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 1.*]

4. EMINENT DOMAIN (§ 307*)—REMEDIES OF OWNER OF PROPERTY—INSTRUCTIONS—SUPPORT IN EVIDENCE.

Act Dec. 19, 1838 (8 St. at Large, p. 484), granted to a railroad company such lots and parts of lots in the town of Columbia as belong to the state and may be required for constructing and keeping up the road, depositories and other buildings and works of the company, not to exceed 12 acres. In an action by a property owner for damages against the railroad to property inclosed by the railroad company, part of which was used for its tracks, defendant requested a charge that, if the jury believed that plaintiff was the owner of the land, then he was entitled to recover the value of the land actually taken and occupied by the tracks and other improvements of the railroad company and such damage as said improvements may have caused to the adjoining land, and that the fact that defendant inclosed all of the land belonging to plaintiff with a fence would not entitle plaintiff to recover for the unoccupied portion of the land inclosed, but only for the damage thereto. The court gave the requested instruction, but modified it by stating that the proposition of law was correct if defendant inclosed the land merely for the purpose of asserting title to it and not for the purpose of appropriating the land inclosed for railroad uses. *Held*, that in view of defendant's assertion of its right to inclose the land in question under Act Dec. 19, 1838, and the testimony of defendant's counsel that he had advised defendant to inclose the lot, and that it was actually inclosed "for the purpose of asserting positive possession and ownership in the open and vacant lands and was intended and so directed to be, not the taking of property under the right of condemnation but assertion of their title to the land as individual proprietors," the instruction as modified was correct.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 307.*]

5. EVIDENCE (§ 370*)—DOCUMENTARY EVIDENCE—COPY OF ORIGINAL PLAT—AUTHENTICATION.

There is no error in excluding a notation on a blue print copy of an original plat of ground, where there was no evidence of the date of the writing, or by whom it was made, or that it was on the original plat.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 370.*]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Action by James Mahoney against the Southern Railway, Carolina Division. Judgment for plaintiff, and a new trial was denied provided plaintiff remitted a part of the recovery, and defendant appeals. Affirmed.

Abney & Muller, for appellant. Nelson & Nelson and Melton & Belser, for respondent.

WOODS, J. This appeal involves the right of the plaintiff to hold a judgment recovered on a complaint claiming damages for the "taking, appropriation, and injury" by the defendant of a portion of a block of land in the city of Columbia, bounded by Wheat, Assembly, Rice, and Gates streets, claimed by the plaintiff to be his property. The defend-

ant being in possession, the plaintiff relied on adverse possession under color of title, explaining his failure to trace his title back to the state or to a common source by proving the destruction of all the records of Richland county by fire in 1865 at the burning of Columbia by Sherman's army. He proved color of title by introducing a deed of conveyance to himself from the sheriff of Richland county, dated December 14, 1871, made to him as the highest bidder at a judicial sale ordered by the court of common pleas for the partition of the lands of Gabriel R. Starling. The main issue as to plaintiff's title was on his claim of continuous adverse possession of the land in dispute for a full period of 10 years after his purchase in December, 1871, and before the defendant's adverse entry in 1896 or 1900. The entire block covered an area of four acres. At the time of plaintiff's purchase in 1871, there were already two railroad tracks running across the block, to which were attached rights of way. The right of the defendant to these tracks and rights of way was conceded by the plaintiff. The claim is for the damages resulting from the taking of all the remainder of the block, or at least of portions of the remainder. There was evidence tending to show that the plaintiff rented part of the block to successive tenants for cultivation or pasturage every year for 10 consecutive years, after November 25, 1873, when the statutory period was changed from 20 to 10 years.

The defendant, contending that the possession must be regarded broken by the interval of time between the departure of the tenant cultivating for one year and the entry of the tenant for the next year, excepts to this instruction of the circuit court: "I charge you that where the adverse occupant of land leaves it temporarily, with the intention of returning, his possession continues during such occasional absence, and so if the tenant quits the premises the landlord is to be regarded as still in possession if by taking possession himself, or putting in another tenant as soon as one can be procured, within a reasonable time, he gives evidence that he does not intend to abandon the land. An interval of two or three months, or from the harvesting of cultivated crops in the fall to the resumption of cultivation in the spring, does not of itself amount to abandonment or a break in the continuity of possession." Discussion of the numerous authorities cited in the arguments from other jurisdictions is unnecessary, as the point has been expressly decided in this state. Chancellor Johnston, in *Wilson v. McLenaghan*, McMul. Eq. 35, thus states the principle: "Where the occupant of land leaves it for a time, *animo revertendi*, his possession continues during such occasional absence; and so, I apprehend, if a tenant quits the premises, the landlord is

to be regarded as still in possession, if by taking possession within a reasonable time, or putting in another tenant as soon as one can be procured, he gives evidence that he does not intend to abandon the land. Here the tenant went out when the crop was gathered, and the landlord went in at that season of the year when planting operations usually begin. Possession is matter of fact, and therefore of evidence; and here was no greater evidence of abandoning possession than would exist where a planter withdraws his hands from one plantation to another, during the winter, and returns them in the spring—a thing that often occurs, without the slightest suspicion that the possession has been relinquished."

At defendant's request this instruction was given: "In making out a title by adverse possession, there must be continuity in point of locality, for possession of part of a tract of land cannot be joined to possession of another part so as to make up the period." The defendant excepts because the circuit judge refused to charge, as requested, that this proposition is true when the claimant holds color of title, as well as when he is claiming without color of title. The point is difficult, and strong argument has been made on both sides. The respondent's counsel have cited, in favor of the ruling of the circuit judge: *Cunningham v. Frandtzen and Others*, 26 Tex. 34; *Chandler v. Rushing*, 38 Tex. 596; *Roberson et al. v. Downing Co.*, 126 Ga. 176, 54 S. E. 1020; *Johnson v. Thomas*, 23 App. D. C. 141; *Ewing v. Burnet*, 11 Pet. 53, 9 L. Ed. 624; 1 Cyc. 986; *Tyler on Ejectment & Adverse Enjoyment*, 911. While against it the appellant's counsel have cited: *Hole v. Rittenhouse*, 25 Pa. 493; *Messer v. Regnitter*, 32 Iowa, 312; 1 Am. & Eng. Enc. pp. 834, 835, 865; *Sedgwick & Waite on Trial of Title to Land*, § 770; *Buswell on Limitations & Adverse Possession*, § 251; *Wood on Limitation of Actions*, § 267. They also cite *Stanley v. Shoolbred*, 25 S. C. 181, but, on examination of the opinion in that case, it will be found that the point was not decided. Perhaps something may be said against the convenience and justice of the rule laid down in the charge, as well as in its favor. Authority and reason, however, are valuable only in so far as they aid in ascertaining the meaning of our statute which purports to cover the subject. When the statute is carefully examined, it seems to decide the question. Section 102 of the Code of Civil Procedure of 1902, provides: "Whenever it shall appear that the occupant or those under whom he claims, entered into possession of the premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or

judgment, or of some part of such premises under such claim for ten years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract."

Taking this section alone, there is ground to doubt whether the continuous occupation "of some part of the premises" means a certain definite part of the land or any of several parts that the holder may happen to occupy at different times. The meaning of this section, however, seems clearer when read in connection with the following provision incorporated in the Code as section 103, and manifestly intended to explain and define the adverse possession mentioned in section 102: "For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: (1) Where it has been usually cultivated or improved. (2) Where it has been protected by a substantial inclosure. (3) Where although not inclosed, it has been used for the supply of fuel or of fencing timber, for the purpose of husbandry or the ordinary use of the occupant. (4) Where a known farm or a single lot has been partly improved, the portion of such farm or lot which may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Taking two sections together, the statute seems to contemplate that land included in a written instrument or a judgment or decree shall be regarded as an entirety—a single thing; and, while there must be continuity of possession of the land, the possession of any part will be in contemplation of law possession of the whole. When the land as a tract has been used for the purposes of husbandry or any of the other purposes mentioned in the statute, though the use be not of the whole land or continuously of any particular part, the use will be regarded an adverse possession of the entire tract covered by the written instrument, judgment, or decree. This seems to be a reasonable interpretation of the words of the statute; but, when consideration is given to its practical application it seems obvious the statute could not have contemplated the result which a different meaning would impart. The statute of limitations is a statute of repose, and that portion of it which makes a distinction between a mere naked possession and possession under a deed or judgment or decree is intended to give additional security to those who hold under paper title by relieving them after 10 years' possession of the hazard of the loss of

links in the chain of title. This design of the statute would be unreasonably restricted, if one who enters upon a distinct tract of land under a deed or decree of the court purporting to invest him with a title to that entire tract by metes and bounds should be required to cultivate or otherwise actively use the same portion of the land every year for the full period of ten years, thus losing the benefit of the statute if he should see fit to divide the land, cultivating one half, and leaving the other half fallow in alternate years. We conclude there was no error in the instruction of the circuit judge on this point.

The fifth request to charge was as follows: "If the jury is satisfied by the preponderance of the evidence that the plaintiff is the owner of the said square, then he is entitled to recover, but in no event can he recover any more than the value of the land actually taken and actually occupied by the tracks, embankments, and other improvements of the said South Carolina & Georgia Railroad Company and its successors, the Southern Railway, Carolina Division, the defendant, at the time it was so taken, with such damage, if any, as the construction of such improvements may have caused to his adjoining land. And the fact that the defendant, in the assertion of its claim to be the owner of the whole square, inclosed the same, or the unoccupied and vacant portion thereof, with a fence, if they find such fact from the evidence, will not entitle the plaintiff to recover for the whole square, or the unoccupied and vacant portion thereof, even if he has established his title thereto, but only for the part actually taken and occupied by tracks, embankments, and other improvements for railroad purposes and for the damage, if any, to the residue." The circuit judge gave the request to the jury as being a sound legal proposition, if the defendant inclosed the land merely for the purpose of asserting title to it, and not for the purpose of appropriating the land inclosed for railroad uses. The defendant's counsel insist the request should have been given to the jury without modification, contending that there was positive and direct evidence that the defendant inclosed the land merely for the purpose of asserting title, and that there was no evidence of an intention to appropriate it to railroad purposes. It is true there was no declaration of any witness on the subject, except that of Mr. Abney, who testified that, when the contention between the plaintiff and defendant with regard to the land was brought to his attention, he, as counsel for the defendant, advised that the lot be inclosed, and that it was actually inclosed "for the purpose of asserting positive possession and ownership in the open and vacant lands, and

was intended and so directed to be, not the taking of property under the right of condemnation, but assertion of their title to the land as individual proprietors." There is, of course, no doubt that Mr. Abney stated correctly his connection with the matter and his view of the purpose of fencing the land; but it is to be observed that the request under discussion was asked as a guide to the jury in case they found the plaintiff had established his title by adverse possession against the defendant; and further, that the defendant in asserting title by the inclosure and otherwise rested its claim on the statute of December 19, 1838 (8 St. at Large, p. 484), granting to the Louisville, Cincinnati & Charleston Railroad Company "such lots and parts of lots in the town of Columbia as belong to the state, and may be required for the purpose of constructing and keeping up the road depositories and other buildings and works" of that company, "provided that * * * the grounds required for the depositories and other works shall not exceed twelve acres." The assertion by the railroad company of its right to inclose and hold the land under this act was an assertion of its intention to use the land under the act "for the purpose of constructing and keeping up the said depositories and other buildings and works," and the evidence offered of this assertion was some evidence that the purpose was not only to assert title to the property, but to inclose the land and appropriate it for railroad purposes. The objection to the charge on this point therefore was not well founded.

Defendant's counsel did not argue the exception alleging error in excluding from the consideration of the jury the words "conceded as belonging to S. S. R. R. by city 1899," written over the representation of the land in dispute on a blue print which the defendant produced as a copy of an original plat made by its own engineer. Manifestly there is no foundation for the exception, for there was no evidence of the date of the writing or by whom it was made, or even that it was on the original plat.

On motion for a new trial, the circuit judge ordered a new trial nisi, providing for a reduction of the verdict from \$8,863.32 to \$5,680 on the same conditions as were considered by this court in *Hall v. N. W. R. R. Co.*, 81 S. C. 522, 62 S. E. 848. Upon that authority it is adjudged that there shall be a new trial unless the plaintiff shall within 30 days from the filing of the remittitur from this court remit on the record the difference between \$8,863.32 and \$5,680.

Upon such entry being so made, it is adjudged that the judgment of the circuit court be affirmed.

(33 S. C. 200)

HOLLIS v. STATE BOARD OF MEDICAL EXAMINERS.

(Supreme Court of South Carolina. April 9, 1900.)

PHYSICIANS AND SURGEONS (§ 5*)—REGISTRATION—AUTHORITY OF BOARD.

Under section 9 of "An act to regulate the practice of medicine in South Carolina, to provide for a State Board of Medical Examiners, and to define their duties and powers," approved February 27, 1904 (24 St. at Large, p. 516), providing that "the board shall be empowered, without examination, to indorse upon receipt of the license fee of five dollars the licenses issued by other state boards having an equal standard," provided that other state boards extend to the licenses of this state the same courtesy, the board is not bound to indorse or recognize licenses from other states, but the matter is left to their discretion.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 5.*]

Mandamus by Oliver C. Hollis against the State Board of Medical Examiners. Writ refused.

Blease & Dominick, for petitioner.

WOODS, J. The petitioner asks that the court by its writ of mandamus require the State Board of Medical Examiners to issue to him a license to practice medicine. The application rests on the allegations that the petitioner had stood the examinations required by the boards of medical examiners of the states of Georgia and Virginia, and had received from each of those boards a license to practice as a physician; that he presented these licenses to the board of medical examiners of this state, tendering at the same time the statutory fee of \$5, and demanded a license to practice medicine in this state, but the license was refused; that at the time of the demand, the board of medical examiners of this state recognized licenses granted by the boards of examiners of the states of Georgia and Virginia under a reciprocal arrangement existing by virtue of the following section of an act entitled "An act to regulate the practice of medicine in South Carolina, to provide for a State Board of Medical Examiners, and to define their duties and powers," approved 27th February, 1904 (24 St. at Large, p. 512):

"Sec. 9. The board shall be empowered without examination to indorse, upon receipt of the license fee of five dollars, the licenses issued by other state boards having an equal standard: Provided, said other state board accord to the licenses of the South Carolina state board the same courtesy; and said other state board licenses, when indorsed, shall entitle the holder to registry in this state, and to all the rights and privileges thereby granted."

The statute does not require the board of medical examiners of this state to indorse or recognize licenses from other states,

but merely empowers them to do so on the conditions mentioned in the statute. The matter was one placed by the statute entirely within the discretion of the board. The case of *State ex rel. Mauldin v. Matthews*, 81 S. C. 414, 62 S. E. 695, is relied on by the petitioner; but that case in its facts is the opposite of this. There the mandamus was issued against the board of pharmaceutical examiners, because the petitioner was a graduate of a reputable college of pharmacy, and the statute there under consideration provides: "No examination shall be required in case the applicant is a regular graduate in pharmacy from any reputable college; but such applicant shall be entitled to a license upon furnishing evidence of his graduation satisfactory to the said board and upon payment of the fee of five dollars." In that case the discretion to refuse a license to the graduate of a reputable college of pharmacy was expressly denied to the board, while in this case the statute contemplates that the granting or refusing of the license in this state to an applicant holding a license from the board of examiners of another state shall be entirely within the discretion of the board of medical examiners of South Carolina.

The petition for mandamus is refused.

(33 S. C. 465)

TENHET v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 15, 1900.)

1. EVIDENCE (§ 213*)—COMPROMISE OF PENDING LITIGATION—ADMISSIBILITY.

A proposition to pay a claim made with a view of compromising a pending litigation is inadmissible in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 745; Dec. Dig. § 213.*]

2. EVIDENCE (§ 213*) — ACTION FOR LOSS OF FREIGHT.

In an action against a carrier for loss of freight, the testimony of the shipper that pending the suit the carrier's freight claim agent had stated that the claim had been ordered paid, and that the shipper should go home and get his money, was not objectionable as proving a compromise pending litigation, but was evidence of the carrier's liability.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 746; Dec. Dig. § 213.*]

3. EVIDENCE (§ 241*)—ADMISSIONS OF AGENT—EFFECT.

Admissions of an agent made during the agency and within its scope as to a matter then depending are binding on the principal.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 887; Dec. Dig. § 241.*]

4. CARRIERS (§ 136*)—ACTION FOR LOSS OF GOODS—EVIDENCE—QUESTION FOR JURY.

Whether a freight claim agent of a carrier who passes on claims and either rejects them or orders them paid has authority to adjust a freight claim and communicate the decision to the claimant so as to make his statement to

the claimant binding on the carrier *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 136.*]

5. CARRIERS (§ 20*) — NONDELIVERY OF FREIGHT—PENALTY.

Where it appeared that the shipper had presented his claim in January, and that in August following the carrier's freight claim agent had stated that the claim had been ordered paid several days before, the liability of the carrier for the penalty for failing to adjust the claim within a specified time imposed by Act Feb. 23, 1903, 24 St. at Large, p. 81, was for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

Action by J. N. Tenhet against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Montgomery & Lide, for appellant. Jas. W. Johnson, for respondent.

JONES, J. The circuit court affirmed the judgment of the magistrate court in this action for damages for the alleged loss of one case of cigars valued at \$23.50 while in the possession of defendant carrier, and for the \$50 penalty under Act Feb. 23, 1903, 24 St. at Large, p. 81.

Appellant contends for a reversal on the ground that there was no testimony that the goods were lost while in the possession of the defendant. The complaint alleged that the goods had been delivered to the defendant, and was lost while in its possession. The plaintiff failed to offer any evidence on the subject unless it be inferable from the following testimony of the plaintiff: "I bought these cigars in Charlotte, and ordered them shipped to me in Marion. I never received them. I filed a claim for them with the Atlantic Coast Line Railroad Company with the agent of said road at Marion, S. C. Mr. Hand was the agent. The claim was handed to him January 16, 1907. He gave me a receipt which I now introduce in evidence [marked 'Exhibit B']. Mr. Hand was and now is agent at Marion railroad station. A. H. Shepard is freight claim agent of the A. C. L. Railroad Company. He passes upon claims, and either orders them paid or rejects them. I was in Mr. Shepard's office two weeks ago, on or about August 5th inst. He and I had a talk about the claim sued on. He called Mr. Barnes, one of his clerks, who produced a paper, and said to Mr. Shepard, in my presence: 'This claim has been ordered paid several days.' Mr. Shepard then said to me: 'Go home, and get your

money.' Some days later I saw Mr. Hand. He said the claim had been ordered paid. I had no other claim against the company at that time. No part of it has ever been paid." Cross-examination: "After I heard that the claim had been ordered paid, I never applied for the money. I think the goods were delivered to the Southern Railway Company at Charlotte, N. C. Mr. Shepard and Mr. Hand never said that the Coast Line Railroad Company had received the goods. I don't know of my own knowledge that any railroad received the goods. There is the bill of lading." This bill of lading was not admitted in evidence.

At the time of the alleged admissions the suit was pending in the circuit court. If this proposition to pay the claim of \$23.50 was made with a view to compromise the pending litigation, it was inadmissible, and should have no probative force, as it is the policy of the law to encourage compromises. *Chandler v. Geraty*, 10 S. C. 308; *Frick & Co. v. Wilson*, 36 S. C. 69, 15 S. E. 331; *Gibbes v. McCraw*, 45 S. C. 184, 22 S. E. 790; *Robertson v. Blair & Co.*, 56 S. C. 104, 34 S. E. 11, 76 Am. St. Rep. 543; *Norris v. Insurance Co.*, 57 S. C. 361, 35 S. E. 572. But it does not appear with certainty that this was a proposition made in the spirit and confidence of negotiation for a compromise, and we cannot assume so. It seems rather to be a statement of a fact that the claim as made had been ordered to be paid, and a direction to the claimant to go and get his money. If it was within the duty of Mr. Shepard to adjust freight claims and communicate with the claimant with reference thereto, his report of the claim as one ordered to be paid was some evidence to be submitted to the jury that the conditions for liability existed. The rule of law is that the admissions of an agent bind the principal if made during the agency and within its scope as to a matter then depending. *Melnhard v. Youngblood*, 41 S. C. 325, 19 S. E. 675; *Ragsdale v. Southern Railway*, 72 S. C. 124, 51 S. E. 540; *Crawford v. Railway*, 56 S. C. 144, 34 S. E. 80; *Stroud v. Railway*, 79 S. C. 452, 60 S. E. 968. See, also, *Lipscombs v. South Bound R. R. Co.*, 65 S. C. 156, 43 S. E. 388; *Southern Ry. v. Howell*, 79 S. C. 288, 60 S. E. 677. Whether this particular matter was within the scope of the agent's employment at the time of the admission was a question for the jury. If plaintiff was entitled to go to the jury on the matter discussed, it was not improper upon the testimony to submit to them also the question as to the penalty.

The judgment of the circuit court was affirmed.

(32 S. C. 376)

BULLOCK v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. CARRIERS (§ 133*)—LOSS OF FREIGHT—ACTION—EVIDENCE—ADMISSIBILITY.

In an action against a carrier for loss of freight alleged to have been consigned to "A. G. B.," the bill of lading issued to "W. R. B." is properly received in evidence on it appearing that the goods had been ordered and paid for by "A. G. B.," and that the seller had always addressed him as "W. R. B."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 583; Dec. Dig. § 133.*]

2. CARRIERS (§ 98*)—DELAY IN DELIVERY OF FREIGHT—OBLIGATIONS AND RIGHTS OF CONSIGNEE.

Though a carrier delays the delivery of freight for four months, the consignee must accept them when tendered and rely on his right to recover for negligent delay, notwithstanding Act Feb. 23, 1903 (24 St. at Large, p. 81), making a carrier liable for loss of or damage to goods and a penalty for failure to adjust the claim therefor within a time limited.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 396; Dec. Dig. § 98.*]

3. CARRIERS (§ 105*)—NEGLECT IN DELIVERY OF FREIGHT—LIABILITY.

At common law the measure of the carrier's liability for negligent delay in the transportation of goods is the depreciation in market value thereof at the time and place they should have been delivered and the market value according to their condition at the time and place of actual delivery or tender, together with any reasonable loss proximately caused by such delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 457; Dec. Dig. § 105.*]

4. CARRIERS (§ 20*)—INJURIES TO FREIGHT—STATUTORY LIABILITY.

Under Act Feb. 23, 1903 (24 St. at Large, p. 81), making a carrier liable for loss of or damage to freight, together with penalty for failure to adjust the claim therefor within a prescribed time, a claim may be filed for loss after the lapse of a reasonable time for the arrival of the goods, and recovery may be had for any loss or damage to goods; but no recovery of the penalty can be had unless there is a recovery for the full amount of damage claimed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Abbeville County; R. W. Memmenger, Judge.

Action by A. G. Bullock against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Wm. P. Greene, for appellant. Gary & Perryman, for respondent.

JONES, J. This action was commenced in a magistrate's court for the recovery of the value of two dozen steel traps, alleged to have been lost while in the possession of the defendant company, and also the recovery of the statutory penalty of \$50 under the act of February 23, 1903 (24 St. at Large, p. 81). The judgment of the magistrate for

the full amount and penalty was affirmed by the circuit court, overruling defendant's exceptions. These exceptions are renewed in this court.

The bill of lading introduced in evidence was issued to W. R. Bullock, and defendant objected to its introduction upon the ground that the complaint was for loss of a consignment to "A. G. Bullock." The plaintiff testified that he had ordered the goods in question shipped to him and paid for them, and that J. P. Jennings, partner of Gambrell Hardware Co., always addressed him as "W. R. Bullock." This was sufficient evidence of identification of plaintiff as the consignee to permit introduction of the bill of lading, without referring to the testimony of defendant's agent as to his tender of the goods to plaintiff.

It appears that the claim was filed with defendant's agent on February 28, 1907, for the value of two dozen steel traps as lost. The goods arrived at their destination and were tendered to plaintiff not later than June 15, 1907, but he declined on the ground that he had gone out of business. This action was begun August 15, 1907. There was no testimony that the goods had been damaged. One witness testified: "Traps worth same in June as in April. Only difference would be interest on money for one year." The magistrate charged the jury that, if 60 days expired after the filing of the claim before defendant notified plaintiff of the arrival of the goods, they should find for the plaintiff the amount claimed, \$7.25, and penalty, \$50, for failure to deliver the goods, provided the defendant had been negligent in tracing the goods within the time allowed by law. This charge was erroneous. Notwithstanding the delay, it was the duty of the plaintiff to accept the goods when tendered and rely upon his right to recover of the carrier damages for negligent delay in transportation. *Nettles v. Railroad*, 7 Rich. Law, 190, 62 Am. Dec. 409; *Moody v. Railway Co.*, 79 S. C. 300, 60 S. E. 711; *Cousar Mercantile Co. v. Southern Railway Co.* (manuscript decision) 64 S. E. —. In the last-cited case the tender was made before the expiration of the time allowed for adjustment of the claim. In this case the tender was made after the expiration of such time, but before action was brought. We do not construe the statute as abrogating the rule of law declared in the cases cited. The goods, though delayed in transportation, still belonged to the plaintiff, and he could not abandon them and throw upon the carrier liability as for their total loss or destruction. The measure of the carrier's liability at common law for negligent delay in the transportation of goods is the depreciation in market value of the goods at the time and place they should have been delivered and

the market value, according to their condition, at the time and place of actual delivery or tender, together with any reasonable loss or expense proximately caused by such delay. *McKerall v. Railroad*, 76 S. C. 341, 56 S. E. 965. The liability under the statute is "for loss of or damage to" the goods, together with penalty for failure to adjust or pay the claim therefor within the prescribed time. The claim may be filed for loss after the lapse of a reasonable time for the arrival of the goods, and in an action under the statute recovery may be had for any loss of or damage to goods that may be shown; but no recovery of the penalty can be had unless there be a recovery for the full amount of loss of or damage to goods claimed. There being no evidence of such loss or damage to the extent of \$7.25, the amount of the claim as filed, it was error to instruct the jury that recovery should be had for such sum and the penalty if the defendant had been negligent in tracing the goods.

The judgment of the circuit court and of the magistrate's court is reversed, and the case is remanded to the magistrate's court for a new trial.

(32 S. C. 461)

FASS et ux. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 15, 1909.)

1. PLEADING (§ 423*)—OBJECTIONS WAIVED.

A defendant who does not avail itself of the right to have allegations in a complaint stricken out cannot complain because the court admitted evidence in support of the allegations.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1433; Dec. Dig. § 423.*]

2. TRIAL (§ 208*)—EVIDENCE—INSTRUCTIONS.

Where evidence was admitted in support of the allegation of the complaint which should have been stricken out on motion, defendant may ask the court to instruct the jury not to consider the evidence in arriving at their verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 504; Dec. Dig. § 208.*]

3. TELEGRAPHS AND TELEPHONES (§ 68*) — NONDELIVERY OF MESSAGES—NOTICE TO COMPANY.

A telegram reciting, "I am feeling better. Don't come," sent to a wife in reply to her message to wire as to how he felt, and asking whether she should come, puts the telegraph company on notice that the wife will probably suffer mental anguish on her failure to receive a reply to her message, rendering the company liable for such mental anguish on failure to deliver the telegram.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 60, 70; Dec. Dig. § 68.*]

4. TELEGRAPHS AND TELEPHONES (§ 65*) — NONDELIVERY OF MESSAGES—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where the complaint in an action against a telegraph company for failure to deliver a telegram sent by a husband to his wife announcing that he was feeling better, and that

she should not come to him, did not allege notice to the company of the illness of the wife on it receiving the telegram for transmission to her, evidence that the husband notified the company's messenger of her illness when he gave him the telegram was inadmissible.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 65.*]

Appeal from Common Pleas Circuit Court of Marion County; Robt. Aldrich, Judge.

Action by Max Fass and wife against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Geo. H. Fearons, Willcox & Willcox, Henry E. Davis, and Millins & Hughes, for appellant. Livingston & Gibson, for respondents.

WOODS, J. The plaintiffs, Max Fass and his wife Theresa Fass, recovered judgment on a complaint alleging physical suffering and mental anguish of Theresa Fass owing to the defendant's negligence and willfulness in failing to deliver a telegram. Somewhere between 2 o'clock and 4 o'clock p. m., on 7th January, 1904, Theresa Fass sent over the defendant's line from Marion, S. C., to her husband, Max Fass, at Dillon, S. C., the following telegram: "Wire at once how feeling. Shall I return Friday morning." This message was received in due time, and Max Fass immediately delivered to the defendant the following reply, addressed to Mrs. Fass at Marion: "Am feeling better. Don't come. Am in store today." The message to Mrs. Fass was never delivered. When a reply to her telegram did not come in a reasonable time, Mrs. Fass became alarmed about her husband, took the train leaving Marion at 6:40 on Thursday evening, and arrived at her home at Dillon between 9 and 10 o'clock of the same day. The complaint alleges that at the time Mrs. Fass was sick and the weather very inclement; that her husband, presuming his telegram had been delivered, was not expecting her, and had made no arrangements to meet her at the station with a conveyance; that in her enfeebled condition she was thus compelled to walk to her home alone at night and in the cold; and that from the anxiety, exertion, and exposure in her weak condition she was made seriously ill. The answer was a general denial.

The exceptions are numerous, but the case is in a small compass; for the principles involved have been stated by the court in other cases. There is no allegation in the complaint that the defendant had notice of the sickness of Mrs. Fass when it failed to transmit the telegram to her. It was therefore the right of the defendant to have the statements as to her illness at that time stricken out of the complaint, but the defendant did not avail itself of that right, and hence cannot complain that the court

admitted evidence in support of the allegation. *Martin v. Seaboard Air Line Ry.*, 70 S. C. 8, 48 S. E. 616; *Blassingame v. Laurens*, 90 S. C. 88, 61 S. E. 96. Even after the admission of such testimony, the defendant could have asked the court to instruct the jury that the illness of the plaintiff at the time of defendant's breach of duty could not be taken into consideration in estimating her damages. But no such request was made, and there is no exception to the charge of the court on that point.

There is no foundation for the assignment of error to the circuit court in refusing to hold that there was nothing in the telegram to put the defendant on notice that Mrs. Fass would probably suffer mental anguish and endeavor to reach her husband as soon as practicable when she received no reply to her telegram for immediate information as to his health. The point is disposed of in *Hughes v. Telegraph Co.*, 72 S. C. 516, 52 S. E. 107, in this language: "When a message relates to the serious illness or death of a person, a telegraph company is bound to take notice that the addressee has an interest in the subject of the message, and that, in case of a near relative, the probability is that the addressee will follow the promptings of nature, and respond to the message, and, if possible, at once set out to attend the sick bedside or funeral as the case may be." *Willis v. Telegraph Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828; *Key v. Telegraph Co.*, 76 S. C. 301, 56 S. E. 962; *Cloy v. Telegraph Co.*, 78 S. C. 110, 58 S. E. 972. In the case of *Simmons v. Telegraph Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, it was held that a complaint alleging facts almost exactly like those here appearing stated a good cause of action for mental anguish.

The serious point in the appeal is the admission of the testimony of Max Fass that he notified defendant's messenger of the illness of Mrs. Fass when he gave him the telegram to be sent to her. The complaint contains no allegation of such notice, and therefore furnished no foundation for the recovery of special damages on that account. *Capers v. Telegraph Co.*, 71 S. C. 29, 50 S. E. 537; *Wesner v. A. O. L. R. R.*, 71 S. C. 211, 50 S. E. 789; *Rogers v. Telegraph Co.*, 72 S. C. 294, 51 S. E. 773; *Wehman v. So. Ry.*, 74 S. C. 286, 54 S. E. 360. Evidence of notice was therefore inadmissible. That the error was quite prejudicial is obvious, for the jury could not have failed to regard the fact that defendant had notice of Mrs. Fass' illness an aggravation of its negligence or wantonness in failing to transmit the telegram which would have relieved her anxiety. The exception on this point must be sustained.

The judgment of this court is that the

judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

(82 S. C. 247)

MIMS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. EVIDENCE (§ 178*)—BEST AND SECONDARY EVIDENCE.

A copy of a telegram is admissible in evidence only on proof of loss of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 580; Dec. Dig. § 178.*]

2. EVIDENCE (§ 357*) — DOCUMENTARY EVIDENCE—TELEGRAMS.

A writing not brought to the notice of a telegraph company is not admissible as the original of a message delivered to it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1492; Dec. Dig. § 357.*]

3. EVIDENCE (§ 357*) — DOCUMENTARY EVIDENCE—TELEGRAMS.

Where a telegram was dictated to a child, a girl about 15 years old, who wrote it in a memorandum book from which she read it to the telegraph company's receiving agent, who wrote it himself, instead of requiring her to write it on a message blank, the telegram as written in the book was admissible against the company as evidence of the message accepted for transmission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1492; Dec. Dig. § 357.*]

4. TELEGRAPHS AND TELEPHONES (§ 35*)—RECEIPT OF MESSAGES — STIPULATIONS IN BLANKS.

A stipulation in a telegraph company's message blanks that messages must be presented in writing at the transmitting office is binding on those who assent thereto by using the blank.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 25; Dec. Dig. § 35.*]

5. TELEGRAPHS AND TELEPHONES (§ 35*)—RECEIPT OF MESSAGES — STIPULATIONS IN BLANKS.

There is no presumption that the public dealing with a telegraph company has notice of stipulations on its message blanks with respect to the conduct of its business merely because they are printed thereon; and an operator, who receives a message for transmission in violation of a requirement that messages must be presented in writing, does not thereby become the agent of the sender, if the latter has no notice of the requirement.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 25; Dec. Dig. § 35.*]

6. EVIDENCE (§ 357*) — DOCUMENTARY EVIDENCE—TELEGRAMS.

A telegram having been read to the company's receiving agent who wrote it, the message as written by him was admissible against the company to prove that he made the mistake in the address, causing nondelivery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1492; Dec. Dig. § 357.*]

7. EVIDENCE (§ 237*) — ADMISSIONS — STATEMENTS BY THIRD PERSONS—AUTHORITY.

A conversation between a telegraph company's agent and a third person concerning an undelivered telegram, the agent being unable to identify the person, and there being nothing to

show that his statements would bind the addressee, is inadmissible against the latter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 883; Dec. Dig. § 237.*]

8. TELEGRAPHS AND TELEPHONES (§ 73*)—OPERATION—ACTIONS FOR DAMAGES—QUESTIONS FOR JURY.

Whether the failure of a telegraph company's receiving agent to make any effort to correct the address of an undelivered telegram showed wanton and reckless indifference to duty justifying punitive damages held under the evidence to be a question for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

Appeal from Common Pleas Circuit Court of Greenville County; J. O. Klugh, Judge.

Action by Paul Mims against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearons, John Gary Evans, and Jos. A. McCullough, for appellant. Cothran, Dean & Cothran, for respondent.

WOODS, J. This appeal is from a judgment in favor of the plaintiff for mental anguish arising from the failure to deliver a telegram. The complaint thus sets out the telegram and the relationship of the parties: "That on September 28, 1906, Harrison Mims, father of the plaintiff, delivered to the agent of the defendant company at Greenville, S. C., a certain telegram signed by him and addressed to the plaintiff, Paul Mims, care Columbia Hotel, Columbia, South Carolina, and reading in substance as follows: 'Your brother Frank died suddenly last night. Come at once.' The contention of the defendant under the general denial of the answer was that the telegram was not delivered because the sender made the mistake of having it addressed to the plaintiff, Columbia Hotel, Augusta, Ga., instead of Columbia Hotel, Columbia, S. C.

The question made by the numerous exceptions will be considered as presented in the argument of defendant's counsel. There was evidence that, when Frank Mims died, his father, Harrison Mims, desiring to telegraph the plaintiff, Frank's brother, to come, and being unable to write, dictated the telegram to his grandniece, Annie Early, a negro girl about 15 years old, who wrote it down in a memorandum book. Annie Early testified that, when she went to the telegraph office, she told the agent she wanted to send a message, and he wrote the telegram as she read it from the book; that the message, as read to the agent, was addressed to the Columbia Hotel, Columbia, S. C. The admission of this memorandum book as evidence is the first error assigned in the exceptions. It is true a copy of a telegram, like copies of other instruments, is admissible in evidence only on proof of loss of the original; and it is also true that a writ-

ing not brought to the notice of a telegraph company is not admissible as the original of a message delivered to it. But in this instance there was evidence that the girl held the book in her hand, and from it read the message to the receiving agent of the telegraph company; thus giving him express notice that she was reading a written message, and affording him full opportunity to examine it. The girl testified, further, that she did not know she was allowed to write the message on a telegraph blank and deliver it to the agent, but supposed it to be the business of the agent to write it. Certainly the age of the child was sufficient to put the agent on notice of her lack of familiarity with the business methods of the telegraph companies. Under the circumstances the act of the agent of the company in choosing not to require the message to be written by the child on one of its blanks, but to take it as read from the book was evidence of consent that the message, as written in the book and read to the agent, should be the telegram received by the company. In this view, the telegram, as written in the book, was properly received in evidence.

This conclusion would dispose of the position taken by defendant that there was no evidence that the defendant ever accepted for transmission a telegram directed to Columbia, S. C., but for the position taken by defendant that in receiving a message in this way the person who received it acted as agent of the sender, and not of the company, notwithstanding the fact that he was placed by defendant on its side of the desk for the purpose of receiving messages from the public. The reason given for this position is that the defendant's message blank contains the stipulation: "No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts for that purpose, as agent of the sender." This requirement is binding on every one who assents to it by writing his message on the blank, and perhaps as every one who is capable of complying with the requirement, and has notice of it, when dealing with the company, though, of course, the company may waive the requirement. The telegraph company may ordinarily require assent to this or any other reasonable regulation by requiring the sender, when capable of doing so, to write the message on its blank or by any other reasonable requirement. So if one with notice of a requirement that messages must be presented in writing at the company's office, for his own convenience, induces the agent to violate the regulation of the company, it may well be held that the company's agent

In violating its rules at the instance of the sender ceases to be the company's agent and becomes in the act of violation the sender's agent. It was on this principle that it was held in the case of *Carroll v. So. Exp. Co.*, 37 S. C. 452, 16 S. E. 128, that an express agent who violates the rules of the company by procurement of a consignee for the convenience of the consignee becomes the agent of the consignee. But there is no presumption that the public, dealing with the defendant as a public service corporation, has notice of stipulations and regulations with respect to the conduct of its business merely by reason of the fact that they are printed on defendant's message blanks. *Bowie v. Western Union Tel. Co.*, 78 S. C. 425, 59 S. E. 65. In this case there was no evidence that Harrison Mims, in whose name the message was sent, had any notice of the company's requirement here relied on to exempt it from liability; and there was direct and uncontradicted evidence that the girl who went to the telegraph office and communicated the message to the agent had no notice of the requirement. There was therefore, under the principles we have stated, no evidence warranting the court in holding that the agent of the defendant who received the message received it as the agent of the sender; and the exceptions on this subject, relating to the refusal to grant a nonsuit and to the charge, must be overruled.

There is no foundation for the assignment of error on account of the admission in evidence of the telegram, as taken down by the agent addressed to Augusta, Ga., for the reason that it was admitted as evidence of the mistake made by the agent, and not as the telegram delivered by the sender to be transmitted to plaintiff.

The defendant next complains that the circuit court should have allowed its agent Cason to testify to conversation concerning the telegram with a person described by him as a "colored man." The witness could not tell who the colored man was, and there was nothing whatever to indicate that his statements could affect the rights of the plaintiff or in any way bind him. For this reason there was no error in excluding the conversation.

The motion for nonsuit as to the cause of action for punitive damages was properly refused. The message was received by the defendant at 10:46 a. m., September 26, 1906. reached Augusta at 11:12, and a service message which left Augusta at 12:32 p. m. was received by the operator at Greenville, informing him there was no Columbia Hotel in Augusta, and asking him for a better address. The importance of the telegram was evident on its face, and Harrison Mims, the sender of the telegram, had been a resident of Greenville for many years, and at the time of this occurrence lived in his own house; yet there

is no evidence that the agent made any effort to find him and get the right address, or even to notify him that the telegram had not been delivered. If there was a city directory in the office, it was not consulted, and the agent could not remember that he had sent out a messenger, though he thought it probable he had. While the mistake in copying the telegram as dictated by the girl might be attributed to negligence or inadvertence, the evidence of failure to make any effort to correct the error was properly submitted to the jury for them to determine whether it showed wanton and reckless indifference to the duty which the defendant owed to the plaintiff.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 242)

MILLS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. CARRIERS (§ 2*)—CARRIAGE OF GOODS—DELAY—PENAL STATUTES—CONSTRUCTION.

Act March 26, 1904 (24 St. at Large, p. 671), fixing a penalty against railroad companies for delaying transportation of freight, being penal, must be strictly construed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 2.*]

2. STATUTES (§ 241*)—CONSTRUCTION.

The rule requiring penal statutes to be strictly construed is subject to the requirement that all statutes must be interpreted in view of the design of their enactment.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 241.*]

3. STATUTES (§ 188*)—CONSTRUCTION—LEGISLATIVE DESIGN.

The legislative design in statutory enactment should not be curtailed by narrow verbal distinctions, nor enlarged into oppression by giving to the words used too broad signification.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 188.*]

4. CARRIERS (§ 96*)—FREIGHT—NOTICE REQUIRING PROMPT SHIPMENT—TIME FOR GIVING.

Act March 26, 1904 (24 St. at Large, p. 671) § 1, requiring carriers to transport freight promptly on receiving notice that prompt shipment is required, requires notice to be given within such time before shipment that the carrier's agent, notwithstanding his other duties, by exercising reasonable diligence may keep the notice in mind, it not being necessary to give notice of the exact time of shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 96.*]

5. CARRIERS (§ 96*)—FREIGHT—NOTICE REQUIRING PROMPT TRANSPORTATION—UPON WHOM TO BE SERVED.

Under Act March 26, 1904 (24 St. at Large, p. 671) § 1, requiring carriers to transport freight promptly on receiving notice that prompt shipment is required, the notice must be given the shipping agent.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 96.*]

6. CARRIERS (§ 96*)—NOTICE REQUIRING PROMPT TRANSPORTATION—WHO MAY GIVE.

Since Act March 26, 1904 (24 St. at Large, p. 671) § 1, requiring carriers to transport

freight promptly on receiving notice requiring prompt shipment, prescribes no particular method of giving the notice, notice may be given by the consignee or holder of the bill of lading through another; direct notice by the consignee or the holder not being essential.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 98.*]

7. CARRIERS (§ 20*) — FREIGHT — DELAYED TRANSPORTATION—PENALTY—ESSENTIALS TO RECOVERY.

Proof of injury is not essential to recovery of the penalty prescribed by Act March 28, 1904 (24 St. at Large, p. 671), against carriers for delay in transporting freight.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Chester County; John S. Wilson, Judge.

Action by Patience A. Mills against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Abney & Miller and J. E. McDonald, for appellant. A. L. Gaston, for respondent.

WOODS, J. The complaint in this action alleges a delay of 13 days in the transportation of a car load of lumber from Westville, in Kershaw county, a station on defendant's railroad, to Smith's in York county, another station on defendant's railroad, not over 100 miles distant. Judgment was demanded on account of this delay for \$65 as the amount of the statutory penalty at \$5 a day for 13 days, and for \$200 special damages. At the trial plaintiff's counsel conceded that there was no evidence warranting the recovery of special damages, and the jury found a verdict for \$50 for the statutory penalty of \$5 a day for 10 days. The appeal involves the construction of these portions of the penalty act of March 28, 1904 (24 St. at Large, p. 671):

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, that from and after May 1st, 1904, all railroad companies doing business in this state shall transport to its destination all freight received by them for transportation within this state within a reasonable time after receipt thereof, not exceeding the following times after midnight of the day of the receipt thereof, to wit: Between points not over one hundred miles apart, seventy-two hours: * * * Provided, that notice be given to the receiving company that prompt shipment of such freight is required, and when requested, such company shall insert in the bill of lading the words, 'Prompt shipment required,' which shall be conclusive evidence of such notice, and each such company shall extend such notice to its connecting line or be liable for the consequences of its failure to do so.

"Sec. 2. That any such company failing to comply with the provisions of this act, except for good and sufficient cause, the burden of proof of which shall be on the com-

pany so failing, shall be subject in addition to the liabilities and remedies now existing for unreasonable delay in the transportation of freight, to a penalty of five dollars per day for every day of delay in excess of the time hereinbefore limited, to be recovered by any consignee who may be injured in any way by such delay, or by the owner or holder of the bill of lading, in any court of competent jurisdiction. * * *

The bill of lading shows the shipment of a car of lumber by Stevens Lumber Company at Westville, consigned to Stevens Lumber Company at Smith's. But the bill of lading was indorsed in blank by Stevens Lumber Company, and there was testimony that the lumber was ordered from Stevens Lumber Company by R. G. Mills as the agent for his mother, Patience A. Mills, and that the bill of lading indorsed in blank was turned over to Mills for his mother.

By the terms of the statute, the penalty for delay does not attach unless there is notice that prompt shipment is required; and the main issue made by defendant was under its denial that such notice as the statute requires was given. The evidence on this issue was to the effect that R. G. Mills, plaintiff's agent in the purchase of the lumber, who was in the employment of the Stevens Lumber Company at Kershaw, made arrangements with defendant's agent at that point for the shipment of the car of lumber from Westville to Smith's, urging him to make prompt shipment; that Pursley, a clerk in the defendant's office at Kershaw, in recognition of Mills' demand for prompt shipment, telephoned to the defendant's agent at Westville that Mills was in a hurry to get his car placed and moved out. Defendant's counsel by objections to the evidence and requests to charge asked the circuit court to hold that the notice was insufficient as a matter of law, (1) because it was given before the shipment; and (2) because it was not given directly by the shipper to the agent at the point of shipment. The act is penal and must be strictly construed, but this rule is quite consistent with the requirement that all statutes must be interpreted in view of the design of their enactment. The legislative design in statutory enactment ought not to be cut short by narrow verbal distinctions, nor enlarged into oppression by giving to the words used too broad a signification. This statute requires notice that prompt shipment is required without expressly fixing the time of such notice. But evidently the General Assembly did not mean that the notice might be given at any time, however remote before the shipment. A statute with that meaning would be oppressive, because the burden on the railroad company of keeping in the minds of its agents notices given in the remote past that prompt shipment would be required of

freight, afterwards to be shipped would be intolerable. On the other hand, the construction that the notice must be given at the very instant of shipment would be very narrow. The fair construction is that the statute requires the notice to be given within such time before shipment that the agent of the carrier, notwithstanding the other duties devolving on him, by the exercise of reasonable diligence may keep the requirement in mind. It follows that the position of the defendant that the notice must be given at the exact time of the shipment is not tenable. The statute makes it clear that the notice must be given to the shipping agent, and not to any agent of the defendant, for he is the agent who issues the bill of lading, and upon him, therefore, must devolve the duty to insert in the bill of lading on request the words, "Prompt shipment required." But it is not necessary, as defendant insists, that he must receive the notice direct from the consignee or the owner or holder of the bill of lading. The statute lays down no particular method of giving the notice, and therefore notice given by the consignee or owner or holder of the bill of lading through another is sufficient. In this view, the testimony that the notice was given by the agent of the owner and holder of the bill of lading to the agent of the defendant at Kershaw, and by him extended to the defendant's shipping agent at Westville, was competent; and it was not error for the circuit judge to refuse to instruct the jury that there was no evidence of the notice required by the statute. The court having decided in the case of Muckenfuss Manufacturing Co. v. C. & W. C. Ry. Co. (recently filed) 63 S. E. 747, that proof of injury is not necessary to sustain an action by the owner or holder of the bill of lading to recover the statutory penalty for delay in the transportation of goods, the exceptions on that point cannot be sustained.

The judgment of the circuit court is affirmed.

(82 S. C. 418)

CAUGHMAN et al., Railroad Com'rs, v. COLUMBIA, N. & L. R. CO.

(Supreme Court of South Carolina. April 13, 1908.)

1. CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS OF LAW.

Civ. Code 1902, § 2069, providing that when, in the judgment of the railroad commissioners, any enlargement of or improvement in stations, mode of operating a railroad, etc., is reasonable and expedient to promote the security, etc., of the public, they shall give information in writing to the railroad company, and, if the company fail within 60 days to adopt the suggestion, action may be brought, is not violative of Const. U. S. Amend. 14, and Const. S. C. art. 1, § 5, forbidding any person to be deprived of property without due process of law, because failing to expressly require a notice and hearing before the commissioners could require the changes, since the constitutional requirement

under which such a notice and hearing are necessary is part of the law governing the commissioners, and the presumption is, in view of the silence of the statute as to notice and hearing, that the Legislature intended the commissioners to comply with the Constitution, and not to violate it.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 297.*]

2. CONSTITUTIONAL LAW (§§ 60, 297*)—DELEGATION OF POWER—DUE PROCESS—CONTROL OF RAILROADS.

A state Legislature has the right to intrust to a board of commissioners such a supervision of railroads as is reasonable and expedient for the public welfare, and a statute providing for such a supervision does not take the management of the railroad property away from the owners.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89-93, 832-834; Dec. Dig. §§ 60, 297.*]

Mandamus by B. L. Caughman and others, as Railroad Commissioners, against the Columbia, Newberry & Laurens Railroad Company. Demurrer to petition overruled, with leave to answer.

Attorney General Lyon, for petitioners. Lyles & Lyles, for respondent.

WOODS, J. B. L. Caughman, J. H. Earle, and J. M. Sullivan, railroad commissioners, by their petition ask the Supreme Court to enforce by mandamus an order made by them as railroad commissioners, requiring that the Columbia, Newberry & Laurens Railroad Company "should provide additional side track room at Sligh's, S. C., so that side track room would accommodate, in a way so as to be convenient, patrons loading and unloading at least four cars, and that said side track be completed on or by August 1st, 1908; that a passenger shed be erected at Sligh's, S. C., sufficient in size for the convenience and the accommodation of the traveling public on or by September 1st, 1908." The application is made under section 2119, Civ. Code 1902, which provides the writ of mandamus as a remedy for neglect or refusal of a railroad company to comply with the rules and regulations of the railroad commissioners within the limits of their authority.

The petition alleges that the order was made because of complaint made to the railroad commissioners by citizens residing in the vicinity of Sligh's, alleging that the Columbia, Newberry & Laurens Railroad Company was furnishing insufficient accommodation at said point for passengers traveling on said road, and insufficient facilities for receiving and delivering freight at said point, in that there was no sufficient passenger or freight depot, and in that there were insufficient side track facilities for the handling, receiving, and delivery of freights received and delivered at said point, and asking that said railroad company be compelled to furnish a suitable passenger station and sufficient side tracks to accommodate not less than four cars." The petition

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

for mandamus further sets out that the order above recited was made after notice to the respondent and investigation of the complaint, including the hearing of the respondent; that after the order was made the commissioners, on the request of the respondent, granted to it a full rehearing of the whole matter; that, after such rehearing, the commissioners decided that the order should remain in force, and caused the same to be duly served on the respondent; and that, though more than 60 days have elapsed, the respondent has failed to comply with the order. The respondent demurred to the petition on the ground that "it does not state facts sufficient to constitute a cause of action, in that the statute or statutes of the state, under which the board of railroad commissioners purported to act, are, and always have been, null and void and of none effect upon the following grounds: (a) That the said statute or statutes violate and are repugnant to the fourteenth amendment to the Constitution of the United States, section 1, and article 1, § 5, of the Constitution of the state of South Carolina, in that it or they deprive your respondent of its liberty and property without due process of law, in that the said statute or statutes make no provision for notice to the railroads of the hearing before the railroad commissioners, from which the said orders of the commission are to result, and in no way require an opportunity to be heard to be given the railroads before or after the passage of the said orders. (b) That the said statute or statutes violate and are repugnant to the aforesaid section of the Constitution of the United States and of this state, in that it or they attempt to take the whole and entire management of the railroads of this state from the hands of their owners, and place it in the hands of the board of railroad commissioners; thus placing upon your respondent and the other railroads of this state burdens beyond the duties they owe the public, and depriving your respondent of its liberty and property without due process of law."

The Constitution of South Carolina provides: "A commission is hereby established to be known as 'the Railroad Commission,' which shall be composed of not less than three members, whose powers over all transporting and transmitting corporations, and duties, manner of election and term of office shall be regulated by law; and until otherwise provided by law the said Commissioners shall have the same powers and jurisdiction, perform the same duties and receive the same compensation as now conferred, prescribed and allowed by law to the existing Railroad Commissioners. * * * Article 9, § 14. By section 2067, Civ. Code 1892, the railroad commissioners are given general supervision of all railroads. By section 2068 they are required to apply for injunction or mandamus against any railroad

company which after notice continues to violate any law or neglects "in any respect, or particular to comply with the terms of its charter, or with the provisions of any of the laws of the state, especially in regard to the connections with other railroads, the rates of toll, and the time schedule." Section 2069 thus confers powers and imposes duties with more particularity: "Whenever in the judgment of the railroad commissioners, it shall appear that repairs are necessary upon any such railroad, or that in addition to the rolling stock, or any enlargement of, or improvement in, the stations or station houses, or any modification in the rates of fare for transporting freight or passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, they shall give information, in writing, to the corporation of the improvements and changes which they adjudge to be proper; and if the said company shall fail, within sixty days, to adopt the suggestions of said commissioners, they shall take such legal proceedings as they may deem expedient, and shall have authority to call upon the Attorney General to institute and conduct such proceedings." There is no express provision of the statute that the railroad commissioners shall give notice and an opportunity to a railroad company to be heard before having imposed upon it the burden of making the enlargements, improvements, or changes which the commissioners may deem reasonable and expedient; and it is contended by respondent that the absence from the statute of such express provision makes the statute unconstitutional, because it contemplates depriving the respondent of its liberty and property without due process of law. The statute providing for railroad commissioners has been before this court in a number of cases, but in none of them was this question made or decided. The leading case which seems to give some support to the position taken by the respondent is *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970. The question there arose on rates of freight fixed by the railroad commission. In declaring the act as construed by the Supreme Court of Minnesota to be unconstitutional the court said: "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declare what it is to declare, no opportunity provides for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear

what the character of the investigation was or how the result was arrived at." The courts of New York, Indiana, and Virginia in considering the same principles as applied to special taxes or assessments on property held that the statute must in terms provide for notice and opportunity to the property owner to be heard or it will be unconstitutional as imposing a special burden without a hearing, and therefore depriving a citizen of his property without due process of law. *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 657; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825. These decisions cannot be sustained either on principle or by authority. It cannot be doubted that the respondent was entitled, as a constitutional right, to notice and hearing before the railroad commissioners could impose upon it the burden of making the changes in its station and track at Sligh's, and it follows, if the statute purported to authorize the imposition of the burden without notice to the respondent and opportunity to be heard, it would be unconstitutional. But express statutory requirement for such notice and hearing is not essential, for the reason that the constitutional requirement that there shall be notice and opportunity to be heard is a part of the law governing the railroad commissioners. As the statute is silent on the subject, the presumption is that the Legislature intended for the commissioners to comply with the Constitution, not to violate it. The requirement that the burden imposed by them in regulating the business of the railroads should be reasonable and expedient in order to promote the security, convenience, and accommodation of the public implies that they shall make an investigation in order to ascertain what is reasonable, and that they shall, in pursuing the investigation, adopt, in their discretion, any suitable procedure not forbidden by law. The argument comes to this: The railroad commissioners are under two laws, namely, the statute law of the state, which confers upon them certain powers over railroads, and the constitutional law of the state and of the United States, which requires that they shall exercise the powers conferred by statute only by due process of law; that is, after giving the railroad company due notice and opportunity to be heard. A statute is invalid which requires something to be done which is forbidden by the Constitution, but it cannot be essential to the validity of a statute that it should enjoin obedience to the Constitution. The great weight of authority is to the effect that while notice of a special burden or duty which a board such as this proposes to impose must be extended, and an opportunity to be heard on the rightfulness of the ex-

tions must be given, it is not necessary that the statute under which the board acts should expressly provide notice. *Paulsen v. Portland*, 149 U. S. 30, 18 Sup. Ct. 750, 37 L. Ed. 637; *Chicago, B. & Q. R. R. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; *French v. Barber A. P. Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Naylor v. Harrisonville*, 207 Mo. 341, 105 S. W. 1074; *Shannon v. Portland*, 38 Or. 393, 62 Pac. 53; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; 8 Cyc. 1102.

The second ground of demurrer has no foundation. No attempt is made by the statute to take the management of the railroad property of the state away from the owners. The statute provides for nothing more than such supervision of railroads as is reasonable and expedient for the public welfare. It has long been settled that a state Legislature has the right to intrust such supervision to a board of commissioners. *Stone v. Farmers' L. & T. Co. (Railroad Commissioner Cases)* 116 U. S. 307, 6 Sup. Ct. 388, 1191, 29 L. Ed. 636.

The judgment of this court is that the demurrer be overruled, and that the respondent have 20 days from the filing of this decree to answer the petition.

(32 S. C. 321)

GOODWIN v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina. April 9, 1909.)

1. RAILROADS (§ 400*)—OPERATION—INJURIES TO PERSONS ON TRACKS—QUESTIONS FOR JURY.

Evidence in an action for injuries to one passing over defendant's railroad track within the private yard of a mill company having control of the premises held to justify the refusal of a motion for nonsuit on the ground that plaintiff was a trespasser, and that the injury was not wantonly inflicted.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 400.*]

2. NEGLIGENCE (§ 100*)—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is not a defense in a case of wanton or willful injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 85; Dec. Dig. § 100.*]

3. TRIAL (§ 194*)—CONDUCT—REMARKS OF JUDGE.

A statement by the court in ruling on a motion for a nonsuit that "the testimony clearly shows that the plaintiff was not a trespasser," which is responsive to the motion, is not a charge on the facts, in violation of Const. art. 5, § 26.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 194.*]

4. RAILROADS (§ 397*)—OPERATION—INJURIES TO PERSONS ON TRACKS—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to a person upon defendant's railroad track within the private yard of another having control of the premises, evidence that persons dealing with the owner of the yard were accustomed to cross the track

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with the knowledge of defendant, and that it failed to ring the bell or blow the whistle within the yard, is admissible against defendant to prove negligence, and evidence of failure to give such signals without the yard at a public crossing near the place of the accident is competent to prove that the injuries were wantonly inflicted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1345; Dec. Dig. § 397.*]

5. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The action of the court in approving plaintiff's and defendant's requests to charge, subject to such modifications as may be made in the general charge, is not objectionable as permitting the jury to determine which are correct, where the general charge is full and explicit as to the law applicable to the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

6. APPEAL AND ERROR (§ 273*)—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS—NECESSITY OF SPECIFIC EXCEPTION—INSTRUCTIONS.

An exception that the court erred in approving plaintiff's and defendant's requests to charge, subject to modification, because there were irreconcilable differences between the requests, and there were no modifications in the general charge, is too general, and cannot be considered by the reviewing court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273.*]

7. RAILROADS (§ 356*)—OPERATION—INJURIES TO PERSONS ON TRACKS—LICENSEES.

A person passing over a railroad track within the inclosed yard of his employer in the pursuit of lawful business connected with his employment, according to a custom of employees of the owner of the yard, is a licensee, and not a trespasser, though he stops for a few moments on the track, and the company, having knowledge of such use of its track, is bound to exercise ordinary care not to injure him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1223-1233; Dec. Dig. § 356.*]

8. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

A request to charge, declaring that a railroad company's failure to ring the bell or blow the whistle on entering a private yard of another, or crossing a known road is negligence per se, having been approved subject to the modifications of the general charge, must be construed with the general charge, declaring that such failure is negligence per se only when the train approaches a public highway or street, and is not objectionable as failing to express the qualification stated in general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

9. TRIAL (§ 295*)—INSTRUCTIONS—CHARGE ON FACTS—CONSTRUCTION AS A WHOLE.

A charge that evidence of failure to give the statutory signal for public crossings is competent to prove reckless negligence on the part of a railroad company causing injuries to a person upon its tracks within the private yard of another is not objectionable as a charge on the facts, the general charge stating that such failure is a circumstance to be considered by the jury in determining whether the injuries were wantonly inflicted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

10. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

A charge which was faulty in declaring that the plaintiff under the facts stated "had a

right to be on the track," of the defendant within the private yard of his employer was not prejudicial to defendant, where the testimony clearly showed that plaintiff was not a trespasser but a licensee.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1066.*]

11. TRIAL (§ 295*)—INSTRUCTIONS—REQUESTS.

The action of the court in approving requests to charge, subject to such modification as may be given in the general charge, is not objectionable as misleading and requiring the jury to reconcile inconsistencies, where the general charge covers all the law applicable to the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

12. RAILROADS (§ 401*)—OPERATION—INJURIES TO PERSONS ON TRACKS—INSTRUCTIONS.

Where the court could without error have declared that one injured upon defendant's tracks within the private yard of another was a licensee, a charge allowing the jury to determine whether he was a trespasser or a licensee was too favorable to the defendant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

13. RAILROADS (§ 385*)—OPERATION—INJURIES TO PERSONS ON TRACKS—CARE.

Where a railroad company operates a track within the private yard of another having control of the premises, those having a right to be in the yard and accustomed to use the track in their dealings with the owner have as much right to presume that the railroad company will exercise ordinary care in operating within the yard, as the company has to presume that persons therein will give them a clear track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1811-1813; Dec. Dig. § 385.*]

Appeal from Common Pleas Circuit Court of Marlboro County; R. C. Watts, Judge.

Action by R. C. Goodwin against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Willcox & Willcox, Livingston & Muller, and Townsend & Rogers, for appellants. Newton & Owens, for respondent.

JONES, J. The plaintiff recovered judgment against the defendant railroad company for \$787.50 as damages for personal injuries, loss of three fingers of the left hand, and accompanying suffering, caused by collision with defendant's engine and car operating within the yard of the Marlboro Cotton Mill near Bennettsville, S. C., on October 20, 1906.

The main question presented by the exceptions to said judgment is whether there was error in the court's refusal of the motion for nonsuit and the motion to direct a verdict for defendant. Appellant contends that the only inference of which the testimony is susceptible is that plaintiff was a trespasser upon defendant's track at the time of the collision, and that the injury was not wantonly inflicted; that, if the injury was a result of defendant's negligence, the testimony shows conclusively that plaintiff proximately contributed thereto by standing upon the track

in a position of obvious danger. There was testimony tending to show that plaintiff had for years been engaged in hauling wood and other material for the Marlboro Cotton Mill with his own team, and on this occasion had entered at the lower side of the millyard, which was inclosed, through a gate for wagons on a road leading through the inclosure partly along the wood piled next to the track and across the track at the upper side and extending out at another gate for wagons, and was going to the superintendent's office to procure payment for some service performed for the mill company; that he took the most direct route to the superintendent's office, which led across the spur track through an opening in the wood piled alongside the spur track within the inclosure, being used by the defendant company for the purpose of carrying in wood and coal for the mill company and in hauling out cars containing the products of the mill; that persons employed about the mill and yard were accustomed to cross said track and walk along it whenever it suited their convenience without objection by the railroad company, and with the knowledge and acquiescence of the mill company, whose orders only excluded children and loafers; that, on reaching the track at the opening in the woodpile alongside, plaintiff was accosted by a man loading his wagon with wood at or near the opening, and stopped on the edge of the track and engaged in conversation with the man, and standing with his side or back to the direction from which a train might approach; that while in this position neither he nor the person with whom he was conversing heard the approach of the cars nor any signals, and that while he saw Mr. Thrower, the engineer of the mill company, approaching from nearly the opposite direction he did not hear his calls of warning on account of the wind blowing in a contrary direction; that there was no ringing of bell or blowing of whistle or any other signal of warning given by the defendants of the train's approach and no lookout on the rear of the backing train, and that the train was backing "at a pretty rapid rate"; that plaintiff became aware of the approach of the backing train when it was within a few feet of him, raised his hand against the car, was thrown down, and, while endeavoring to get out of the way over the wood which had been placed along the track, was thrown back upon the track by the falling wood, and his left hand run over by the wheels of the car, the car being stopped so quickly that only two trucks had passed him.

There was testimony that the inclosure was controlled by the Marlboro Cotton Mill; that it had a gate for the entrance of the train cars which was closed at night; that the spur was about 325 feet in length from gate to coal chute at the end where the coal

was dumped; and that it was the custom for the Marlboro Cotton Mill to unload the cars of wood and pile the wood on either side of the track. The defendant's train was a freight train operating between Florence, S. C., and Fayetteville, N. C., passing by the cotton mill one day going and the next day returning, and it was of frequent occurrence for the train to stop at the mill and use the siding in carrying in material or carrying out the products of the mill. On this occasion, about schedule time, the train arrived, and plaintiff was aware of its approach on the main line, but he testified that he was not aware that the engine had moved onto the siding, although he was aware that there was a box car on the siding within the inclosure at the platform of the packing room, but whether the car was empty or loaded with mill products for transportation out was a matter as to which there was some conflict in the testimony. On the part of defendant there was testimony that the car was loaded for transportation out, that the engine switched from the main line, entered the inclosure, attached to the loaded car, and pushed on slowly at the rate of three miles per hour upgrade towards the coal chute to take out also an empty car there; that the bell was ringing all the while; that the engineer did not expect that any one would be on the track on this occasion, and did not discover the presence of any one on the track until he heard some one holler, and that he immediately put on brakes and stopped the train. The brakeman, however, testified that, after coupling with the car at the platform, he signed the engineer back to the coal chute for the empty and climbed on top of the car to give signals, and that as he climbed up, he saw a man standing on the edge of the railroad with his side towards him, in a position of danger talking to another man, that he called out to him, "Look out, we are coming back there after some cars!" that he did not see him any more until he heard him holler; that he then gave stop signal and the train stopped when only two trucks had passed him. It appears that the distance from the point where the brakeman was when he saw plaintiff to the place of collision was about 125 feet. We are of the opinion that it cannot be said that the testimony conclusively shows that plaintiff was a bald trespasser upon the track of the railroad company, as in *Hale v. Railroad Co.*, 84 S. C. 292, 13 S. E. 537, where the party injured was on the side track in the depot yard of the railroad company and within its exclusive control, and as in *Smalley v. Railway Co.*, 57 S. C. 243, 35 S. E. 489, where the injured party was on a trestle on the main line of the railroad company. Here the track was within the private inclosure of the Marlboro Cotton Mill and subject to its general control, and its use by the railroad company was not exclusive. The

plaintiff was in the yard on business with the mill company and under circumstances warranting him in supposing he could cross the track as others were accustomed to do with the knowledge and acquiescence of the owner and controller of the inclosure.

A possible theory of the case, then, is that plaintiff was crossing the track as a licensee and not as a trespasser, in which event the railroad company was bound to observe ordinary care not to injure him. *Jones v. Railroad*, 61 S. C. 559, 39 S. E. 758. The mere fact that plaintiff stopped upon the track for a few moments under circumstances tending to show constant use of the track by persons having business in the yard would not of itself be conclusive that plaintiff was a trespasser in being where he was. The testimony tended to show, not merely a case of inadvertent negligence, but a case of advertent negligence, a reckless and wanton disregard of plaintiff's safety by running against him in the yard of his employer without any attempt to stop when it could easily have been done in time, and without any warning after knowledge of plaintiff's dangerous situation. Under this view it is unnecessary to consider whether the testimony shows conclusively that the plaintiff by his own negligence contributed to his injury, as contributory negligence is not a defense in a case of wanton or willful injury. Hence there was no error in refusing the motion for nonsuit and to direct a verdict for defendant. In announcing his ruling upon the motion for nonsuit, Judge Watts said in the presence of the jury: "The testimony clearly shows that the plaintiff was not a trespasser." It is contended that this was an expression of an opinion to the jury on a question of fact contrary to article 5, § 26, Const. The statement was responsive to the motion, and was not a charge to the jury in respect to matters of fact. Usually what a judge says in ruling upon admissibility of testimony, motion for nonsuit, and to direct a verdict is not considered a violation of the provisions of the Constitution. *Glover v. Telegraph Co.*, 78 S. C. 505, 59 S. E. 526; *State v. Arnold*, 80 S. C. 386, 61 S. E. 891. There were no exceptional circumstances showing abuse of discretion to the prejudice of appellant, and the court was careful to impress upon the jury that they were the exclusive judges of the facts.

The exceptions to the admission of testimony cannot be sustained. Plaintiff's action was not for an injury done at a public crossing, and the testimony admitted was not to show that the place of injury was at a public crossing, but that many persons were accustomed to use and cross the track within the inclosure of the Marlboro Mill Company as a circumstance to show that under the common law it was the duty of the railroad company operating within the inclosure

with knowledge of the circumstances to exercise ordinary care. As we understand the testimony, there was a wagon road crossing used by the mill company and those dealing with it within the inclosure, but there was no public crossing or traveled place, in the sense of the statute, within the inclosure, but there was a public crossing near the inclosure outside. In so far, therefore, as the testimony admitted tended to show failure to ring the bell or blow the whistle within the inclosure, it related to defendant's alleged duty at common law, and, in so far as the admitted testimony tended to show a failure to give such signals without the inclosure at a public crossing near, the testimony was competent under the allegations of the complaint charging a wanton and reckless disregard of duty. *Mack v. Railway*, 52 S. C. 325, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Mason v. Southern Ry.*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826.

Counsel for plaintiff and for defendant presented requests to charge, and in response thereto Judge Watts, after reading them to the jury, said: "In a large measure the attorneys on both sides have been careful in their requests to charge, and it is all good law except when I change or modify it, and, when I change or modify it, I want you to accept the change or modification." It is contended that this was error (1) because it left it to the jury to determine which was the correct law applicable to the case; (2) because there was irreconcilable differences and contradictions between the requests submitted by the two sides, and there were no modifications in the general charge. The first specification cannot be sustained because the general charge was full and explicit as to the law applicable to the case. The second specification cannot be sustained because it is so general that it wholly fails to indicate what material differences or contradictions existed between the two sets of requests to charge, and as to what particular proposition or modification, or want of modification, was objectionable. The object of an exception is to specify some particular error in the trial court so that neither counsel nor court need speculate as to the proposition sought to be reviewed. The design of requests to charge is to have the court instruct the jury as to the law applicable to all the material issues in the case, and, if this is correctly done in the general charge, the use and office of requests to charge have been fully met. It cannot be prejudicial to appellant for the court to approve its requests subject to whatever modification may be made in the general charge, unless an erroneous modification has in fact been made; nor can it be prejudicial to appellant for the court to charge respondent's requests subject to modifications in the general charge unless it is shown that the request without

modification or with the modification given in the general charge is erroneous.

Appellant excepts to the following instructions given at the request of respondent:

"(1) If the jury believe from the evidence that the track upon which the plaintiff is alleged to have been injured was frequented by people passing to and fro along said railroad, which fact was well known to defendant or its agents, servants, and employes, and it had been so used for a long time, then the plaintiff in being found upon said tract with no knowledge of the approach of the train would be a licensee thereon, and it was the duty of the defendant to observe ordinary care in backing its cars into said yard and upon said track.

"(2) If the jury believe from the testimony that the plaintiff at the time of the said accident was in the employment of the mill and being found upon the track and without knowledge of the approach of the cars, and in the pursuit of lawful business, and it was the custom of the employes of the mill to cross said track and to go upon the said track at their pleasure and without warning to keep off of it, then the plaintiff had a right to be there, and defendant owed him the duty of ordinary care."

It is contended that this charge was erroneous because "(1) there is no allegation in the complaint that the place where plaintiff was injured was at a crossing by defendant's track of a street, highway, or traveled place; (2) that the passing to and fro by certain individuals gives the prescriptive right to use the alleged way, whereas such right can be obtained only where the public have used it; and (3) that, even assuming that the right to pass along or over said track existed, it did not give the right to stand and remain to talk upon the track as implied in said requests, and which was the position, the uncontradicted testimony shows, occupied by the plaintiff when he received the injuries complained of." If the facts hypothetically stated in the charge are accepted as established by the testimony, then we think it was correct to hold that plaintiff was not a bald trespasser, but a licensee to whom the defendant owed the duty of exercising ordinary care not to injure him. This is especially true when considered with respect to the undisputed fact that the track was within the inclosed yard of the Marlboro Mill Company.

Error is assigned in charging the following request by plaintiff: "(4) If the jury believe from the testimony that the agents of the defendant failed to ring the bell or blow the whistle or give other signals of approach of the train on entering the millyard and crossing a known road, then the defendant was guilty of negligence or gross negligence, according to the consciousness of said employes as to whether or not they were failing to discharge a known duty." The specifications of error are: (1) That a failure

to ring the bell or blow the whistle on entering the millyard or crossing a known road was declared to be negligence per se, whereas such failure is negligence per se only when the train approaches the crossing of a street, highway, or traveled place; (2) that such failure, when consciously done, is only a circumstance to show gross negligence; (3) that the charge was not responsive to the complaint. The request was charged subject to the modifications of the general charge, and must be construed with such general charge on the subject, which was as follows: "Now the law requires a railroad train when it comes to a public crossing or traveled place or street where the highway or traveled place crosses the railroad, or where the public has a right to cross, it requires them when within 500 yards of such street, highway, or traveled place to ring a bell or blow a whistle, and keep that up continuously within 500 yards of the crossing and be continued until the engine passes over it, and, if any one is injured at a public crossing by the failure of the railroad company, its agents, or servants to ring the bell or blow the whistle until the engine has passed over the crossing, the law says that that is negligence per se, but that only applies to a traveled place, a public highway, or street where it crosses the railroad, or at a place where the public has crossed and recrossed and used for passage notoriously and adversely for a period of twenty years, and, if they have used it in that way for that length of time, they have acquired a right to cross there." This modification of plaintiff's fourth request to charge brought it in harmony with defendant's view of the law as expressed in its requests to charge on that subject, all of which requests of defendant were given to the jury without modification.

It is excepted that the court erred in charging plaintiff's fifth request as follows: "If the jury believe from the testimony that the defendant's agents failed to give the signal required by statute for public crossings near the accident, then such evidence is competent to support the allegations of reckless negligence." We do not regard this as a charge on the facts as alleged in the exception, but as a statement of the rule of evidence in *Mack v. Railway* and *Mason v. Railway*, supra. This is clearly shown by the following from the general charge: "Where a case is brought and there is any allegation or proof that the party was injured at a crossing, and they allege wantonness or willfulness on the part of the agents and servants of the company in injuring him, the party injured would have the right to show as a circumstance to go to the jury that they did not ring the bell or blow the whistle within 500 yards of the crossing, and that goes to the jury as a circumstance to be considered by them as to whether there was a willful disregard of the law or invasion of the rights of the party injured."

It is further alleged that the court erred in charging plaintiff's thirteenth request as follows: "If the jury believe from the evidence that the track upon which plaintiff is alleged to have been injured is upon the property of the cotton mill and the plaintiff was an employé in and about said mill, then the plaintiff had a right to be on said track and the defendant owed him the duty of ordinary care, and, if defendant failed to observe such care, then it would be liable in this action." It is objected that this charge was faulty in declaring that plaintiff under the facts stated "had a right to be on the track," not to pass over or along the same, and that too regardless of any business there. As we are satisfied upon the undisputed facts of this case that plaintiff was not a bald trespasser upon defendant's track, and that defendant was in duty bound to exercise ordinary care not to injure plaintiff in his situation within the inclosed millyard of his employer, the Marlboro Mill Company, we are not disposed to be very critical in reference to the language of the charge, since no real prejudice could arise therefrom.

The remaining exception complains of error, in that, while the court approved defendant's request to charge set forth in the exception subject to such modification as may be given in the general charge, this method of treating the requests to charge tended to mislead and confuse the jurors, and to cast upon them the duty of reconciling inconsistencies and contradictions, and that defendant's requests specified should have been charged unqualifiedly. This point has been already considered to some extent. It is fully met by the fact that the general charge fairly covered all the law applicable to the case and sought to be brought to the attention of the court by the requests. Indeed, in some particulars the charge to the jury was too favorable to the defendant, as for example, (1) in leaving it to the jury to determine whether plaintiff was trespasser or licensee at the time of the collision, when he could without error have declared that plaintiff was entitled to the care due to a licensee; (2) in charging as applicable to the case that the railroad has a right to run its cars wherever its tracks go and its employes have the right if they see a man on the track to presume that he will get out of the way of the cars.

The fundamental error in appellant's case is in supposing that the rule in *Smalley v. Railway*, supra, as applied to a trespasser on the track of the railway company, is applicable in this case where the track was in the private yard of another. The doctrine that a railroad company has a right to presume that a mature person apparently in the use of his faculties and on the railroad track without license will get off the track on the approach of the train rests upon the railroad

company's right of exclusive ownership and control, and the trespasser's knowledge that he has no right to use the track. But the case is different when the railroad company is itself a licensee operating within the private yard of another having control of the premises. In such case those having a right to be in the yard and accustomed to use the track in their business dealings with the owner of the yard have as much right to presume that the railroad company will exercise ordinary care in operating within the yard as the railroad company has to presume that persons therein will give them a clear track.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(65 W. Va. 305)

HARVEY v. CITY OF ELKINS et al.

(Supreme Court of Appeals of West Virginia.
March 16, 1909.)

1. APPEAL AND ERROR (§ 41*) — DECISIONS REVIEWABLE—AFFECTING REAL PROPERTY—AMOUNT IN CONTROVERSY.

This court will entertain an appeal from a decree, rendered by a circuit court in an injunction proceeding, refusing to dissolve and perpetuating a temporary injunction affecting the use and enjoyment of real property, notwithstanding the value of the realty involved may be less than \$100.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 153; Dec. Dig. § 41.*]

2. MUNICIPAL CORPORATIONS (§ 601*)—PERMISSION TO ALTER BUILDING—UNREASONABLE REFUSAL.

Where a city council, acting under authority of the city charter (Acts 1901, p. 420, c. 151), and the general law (Code 1906, § 1868), which empowers it "to provide for the regular building of houses or other structures and to provide for the kind of material to be used in the construction thereof," and "to make regulations guarding against danger or damage by fire," passes an ordinance requiring permission to be obtained from such city council before a property owner can "alter, change or repair" a building already erected, and under such ordinance refuses permission to the owner of a house to make such minor alterations, changes, and repairs, as the replacing of windows and doors, the removing and relocation of partition walls on the inside of the house, the repapering of the walls, and the painting of the outside walls, such refusal is unwarranted and unreasonable, and the ordinance will not be construed as authorizing the city to withhold permission to make such minor and necessary repairs, and the municipal officers may be enjoined from preventing the making of such alterations, changes, and repairs.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 601.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by M. H. Harvey against the City of Elkins and others. Decree for complainant, and defendant City appeals. Affirmed.

Samuel T. Spears, for appellant. W. B. Maxwell, for appellee.

WILLIAMS, J. Mrs. M. H. Harvey is the owner of a one-story wooden building in the city of Elkins. It had been occupied by the sheriff as an office, and in March, 1907, the front door, one window, and a part of the wall were taken out in order to remove a large safe used by the sheriff. Immediately thereafter G. B. Harvey, the husband of plaintiff, proceeded to replace the front of the building so removed, putting in a larger window in the front. He was notified by the chief of police that, if he persisted in making such repairs without permission from the city council, he would be arrested. On the 21st day of March, 1907, and after he was threatened with arrest, he applied to the city council for permission, stating in his application such repairs as he desired to make, which were the repair of the front of the house as above stated, the changing of a partition inside of the building, the repapering of the wall inside, the changing of his electric lights, and the painting of the building on the outside. Permission to do this was refused. He again, on April 4, 1907, applied to the council for permission to replace the front of the building in the same manner in which it was just before the part of the front had been torn away, and to replace the door and window which had been removed, and also asked permission to relocate a partition on the inside, to paper the walls, to rearrange the electric lights, and to paint the building on the outside. Permission to do these things was also denied. Mrs. Harvey thereupon applied to the circuit court of Randolph county, then in session, on the 26th day of April, 1907, for an injunction to restrain and inhibit the city of Elkins, and its officers, from interfering with her having such repairs made, and on this bill, verified and further supported by affidavits, a temporary injunction was granted. On the same day the city of Elkins appeared and demurred to and answered the bill, and gave notice that it would move to dissolve the injunction. Motion to dissolve was made, and by agreement the case was heard upon the bill and exhibits, answer and general replication thereto, and affidavits filed with the bill, and on the hearing the court perpetuated the injunction. From that decree the city of Elkins has appealed to this court.

The record presents two questions only: First, whether or not this court has jurisdiction to entertain the appeal; second, whether or not the city of Elkins had the right under its charter to deny plaintiff the right to make the repairs above mentioned.

In regard to the first question, it is contended by counsel for appellee that, as the pecuniary value of the property in question is not shown, this court has not jurisdiction of the appeal; but the question concerns the free use and enjoyment of real estate, and the whole matter is disposed of by the decree perpetuating the injunction. It adjud-

cates the principle of the cause. A decree refusing to dissolve an injunction, in such a case, is appealable without regard to the pecuniary amount involved. We therefore entertain the appeal. Chapter 135, § 1, cl. 7, Code (section 4038, Code 1906); *Robrecht v. Wharton*, 29 W. Va. 746, 2 S. E. 793. The case of *Carskadon v. Board of Education*, 61 W. Va. 468, 56 S. E. 834, on which appellee relies to show want of jurisdiction, is not similar to this one, and does not govern. In that case the board had let, by contract, a certain schoolhouse to one Radcliff for the purpose of delivering lectures during six nights at the price of \$10 per night. Carskadon, suing on behalf of himself and other taxpayers of the district, obtained an injunction which was later perpetuated, and the board of education appealed. All the rent that the board was to get for the use of the schoolhouse was \$60. The court held that it involved only a pecuniary question, and, the amount being less than \$100, the appeal had been improvidently granted. In the present case the question is not a pecuniary one. As the matter concerns appellant, it is a question of its right to pass and enforce a city ordinance, which it insists is lawful and reasonable, and from the view point of the appellee it concerns her right to make certain repairs on and in her house, free from interference by the city authorities, without which repairs she cannot enjoy the use of her property. As the statute now allows an appeal from an order refusing to dissolve, as well as from an order dissolving, an injunction, the right to an appeal in a case where the whole matter is disposed of on the merits by a decree disposing of the temporary injunction would seem to be mutual; and no one, we think, would question Mrs. Harvey's right to appeal from the decree if it had dissolved the injunction, because such a decree would, in effect, have denied her the beneficial use of her property.

Second. Is the ordinance complained of susceptible of the construction which the council has given it? Acts 1901, p. 430, c. 151, § 28, amending the charter of the city of Elkins, among other things, empowers the council "to provide for the regular building of houses or other structures and to provide for the kind of material to be used in the construction thereof; * * * and generally to have power to take such measures as are deemed necessary or advisable to protect persons and property, public or private within the city." Section 42 of said act further preserves to the city "all the rights, powers and responsibilities" which it had prior to this act; that is, such rights and powers as were granted to it under chapter 47 of the Code of 1906. By section 28 of chapter 47 (Code 1906, § 1868), the council of cities is empowered "to make regulations guarding against danger or damage by fire." Pursuant to authority thus granted, the council

passed the following ordinance (No. 12): "Any person desiring to erect a new building of any kind, or to alter, change or repair any building of any kind heretofore erected shall submit to the council the general plan of such new building and the purposes for which it is proposed to use the same, or if it is proposed to change, alter or repair an old building the specifications shall state the nature of such proposed change, the purposes for which the old building was used and the purpose to which it is intended to use it after such change is made and in either event shall designate the street, alley, road, lot or land on which it is proposed to erect such new building or upon which the old building stands and shall do no work whatever upon any such building until a permit has been obtained from the city council."

In the case of *Christie v. Malden*, 23 W. Va. 667, the law on this subject is thus stated: "A municipal corporation possesses and can exercise the following powers, and no other: (1) Those granted in express words by its charter or the general statutes under which it is incorporated; (2) those necessarily or fairly implied in or incident to the powers thus expressly granted; and (3) those essential to the declared purposes of the corporation—not simply convenient, but indispensable." See, also, *City of Newton v. Belger*, 143 Mass. 598, 10 N. E. 494; *First National Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N. E. 484, 13 L. R. A. 481, 28 Am. St. Rep. 185. "The courts will review the question as to the reasonableness of ordinances passed under a grant of power general in its nature or under incidental or implied municipal powers, and if any given ordinance is found unreasonable will declare it void as a matter of law." *McQuillin on Munic. Ord.* § 182, and authorities there cited; *Christie v. Malden*, supra. The same rules which govern in the construction and interpretation of an act of the Legislature will apply and govern in the determination of the true intent and meaning of a city ordinance, and this court has said that: "Whenever an act of the Legislature can be so construed and applied as to avoid conflict with a constitutional provision, and give it the force of law, such construction will be adopted." *Typewriter Co. v. Piggott*, 60 W. Va. 533, 55 S. E. 664.

So, by analogy, whenever a city ordinance can be so construed and applied as to avoid a conflict with natural, fundamental, and necessary rights of property, and thus give it the force of law, such construction will be adopted. Applying this rule of construction to the ordinance in question, and comparing it with the law authorizing the city "to provide for the regular building of houses or other structures and to provide for the kind of material to be used in the con-

struction thereof; * * * and generally to have power to take such measures as are deemed necessary or advisable to protect persons and property, public or private within the city"—we would not undertake to say that the city of Elkins has not the power to pass such an ordinance. But our conclusion is that upon the facts presented in the present case the city has made an unreasonable application of it. It would be both unjust and unreasonable to permit a city, by virtue of such an ordinance, to deny to one of its citizens the right to make the repairs above enumerated. Such repairs are not only necessary to the preservation of the property itself, but the health and comfort of the occupants as well.

We find no error in the decree appealed from, and affirm it, with costs and damages to appellee.

(65 W. Va. 310)

HOWELL v. HARVEY.

(Supreme Court of Appeals of West Virginia.
March 16, 1909.)

1. FRAUDS, STATUTE OF (§ 156*)—PLEADING—NECESSITY.

The statute of frauds may be relied on as a defense under the plea of non assumpsit.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 371; Dec. Dig. § 156.*]

2. FRAUDS, STATUTE OF (§ 23*)—ORIGINAL OR COLLATERAL PROMISE.

If a person make an oral promise to pay the debt of another in order to derive some benefit to himself thereby, which he did not otherwise have, such promise is an original undertaking and not within the statute of frauds; and in such case it matters not if the original promisor be not released.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 23.*]

3. FRAUDS, STATUTE OF (§ 23*)—ORIGINAL OR COLLATERAL PROMISE.

P. contracted to build a house for Harvey, and sublet a part of the job to Howell, who did a portion of it and quit because P. failed to pay him. Harvey told Howell to go on and finish the work and he would pay him. Howell completed the job, and Harvey refused to pay him. In an action on the oral promise, *held*, that the promise is an original one, and therefore not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 23.*]

4. DECISION DISAPPROVED.

The case of *Noyes' Ex'r v. Humphreys*, 11 Grat. (Va.) 636, considered and disapproved.

(Syllabus by the Court.)

Error from Circuit Court, Cabell County. Assumpsit by A. C. Howell against H. C. Harvey, executor. Judgment for plaintiff, and defendant brings error. Affirmed.

Brown, Jackson & Knight, T. W. Peyton, and Thos. H. Harvey, for plaintiff in error. George I. Neall and Holt & Duncan, for defendant in error.

WILLIAMS, J. W. W. Peyton contracted with H. C. Harvey in May, 1899, to build a

house for him on the corner of Third avenue and Tenth street, in the city of Huntington, W. Va. Peyton sublet a part of the work to A. C. Howell, who proceeded with his part of the work until June 22, 1899, when his men quit work because Peyton had not paid him. Peyton failed. Harvey was away from home when the men ceased work. Howell says that on Harvey's return to Huntington he asked Howell why the work was not going on, and he replied that Peyton had not paid him, and he could not pay his men, and they had quit. He further says that Harvey told him: "For God's sake, go on with this work. Finish this post office building. If you don't do it, it will ruin us." Three others testified to substantially the same conversation, and that Harvey told Howell he would pay him; one of them, that he said "he would pay him every cent." Harvey denied making any such statement. At this time Peyton owed Howell on the subcontract something over \$600. On the 24th day of June, 1899, the day of this alleged conversation, Harvey paid Howell \$600, but says he did so on a written order from Peyton, which order was identified and filed as evidence. Howell completed the work about the 10th of August, 1899; and, Harvey refusing to pay him, he sued him in assumpsit in the circuit court of Cabell county upon his oral promise, on the 22d day of January, 1902. One W. M. Mertens, who had furnished material to Peyton to be used in the construction of the house, filed his bill in the circuit court of Cabell county on the 26th day of December, 1899, to enforce his mechanic's, or materialman's, lien, and made Harvey, Peyton, Howell, and others defendants to the bill. Howell answered and averred his contract with Peyton, filed a statement of his account against Peyton showing a balance due him of \$788.12, sought to enforce his mechanic's lien against Harvey's property, and prayed for a personal decree against Peyton. The itemized account, verified by Howell's affidavit, was exhibited with his bill. He also served notice of his lien upon Harvey. This suit was referred to a commissioner, who reported that Harvey was not indebted to Peyton, but that, after allowing Harvey the "liquidated and unliquidated damages" to which he was entitled against him, Peyton was indebted to Harvey in the sum of \$18.71. Howell was surety on Peyton's bond to Harvey for the faithful performance of his contract. The circuit court held Howell's claim to be invalid as a lien, but some other mechanics' liens were decreed to be good. From the final decree in the case, H. C. Harvey and another appealed, and on review of the cause by this court the decree of the lower court was reversed, and the plaintiff's bill dismissed for want of equity, but without prejudice to the rights of the parties claiming to hold mechanics' liens to sue Peyton at law. See *Mertens v. Cassini Mosaic & Tile Co.*, 53 W. Va. 192, 44 S. E. 241. The present action was brought in

January, 1902, but the trial was delayed pending the determination of the appeal in the Mertens suit, which was decided by this court in April, 1903. Trial of this action was had, and on the 5th day of July, 1905, judgment was rendered in favor of plaintiff for \$847.37, with interest and cost, upon defendant's demurrer to the evidence. It is now before us upon writ of error awarded to defendant.

Defendant relies upon the statute of frauds, although he has not pleaded it specially. In some jurisdictions it must be specially pleaded; but in this state and in Virginia it is not necessary, when the defendant has by plea, or answer, denied the contract declared on. This is an action of assumpsit, and the defendant has pleaded to the general issue. The plea of non assumpsit is broader in its scope than most other pleas, and under it defendant may invoke the statute of frauds. *Hogg's Pl. & Forms*, § 220; *Rowton v. Rowton*, 1 H. & M. 92; *Fleming v. Holt*, 12 W. Va. 143; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220, s. c. 35 W. Va. 103, 12 S. E. 1108. The case having been decided upon a demurrer to evidence, the testimony of plaintiff and his other witnesses in regard to the oral contract, made between him and defendant after the work had been partly performed, must be taken as true. This, then, proves the contract declared on in the special count.

The question then arises: Is the force of this evidence destroyed by the fact that, after the work had been fully performed, plaintiff sought to enforce his claim as a mechanic's lien in the Mertens chancery suit? We think not. We do not think his unsuccessful efforts, in that suit, are inconsistent with his present action. It was a circumstance to be considered by the jury in determining whether or not plaintiff had actually released this defendant from his oral promise; but, if there was a consideration to support the promise, there certainly was none supporting a release from it. If this defendant was bound on his oral promise to plaintiff, it was upon a new consideration moving from plaintiff to him, and such promise need not, necessarily, have released the original contractor, Peyton, from his obligation to him. If the defendant was bound, then they were both bound to plaintiff, until he is paid. In the case of *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719, which is a case almost identical with this one, the Supreme Court of Michigan, said: "It is possible for one to make a valid oral promise to pay a debt of another without releasing the original debtor, though it is not where the consideration moves to the original debtor alone."

* * * The fact that his claim of lien contained the sworn statement that he furnished material and labor in pursuance of a contract with Jones was proper evidence to be considered by the jury in determining whether the work was done in reliance upon a new undertaking with the defendant, but

is not conclusive that it was not so done." See, also, the following additional authorities: *Mallory v. Gillett*, 21 N. Y. 412; *Leonard v. Vrendenburgh*, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318; *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148. This fact was a matter of evidence for the jury on the question of plaintiff's intention to release defendant, and they must have resolved that question in favor of plaintiff.

Counsel for plaintiff in error also insist that the fact that plaintiff was surety on Peyton's bond to defendant is a matter entitled to great weight to show that plaintiff was not induced to complete the work because of defendant's promise, but that he did it to relieve himself from a liability greater than his loss of pay for services. This, also, was only an evidential fact to be considered by the jury on the question of intention, and, if this liability still existed at the time of this action, defendant had a right to recoup damages against this plaintiff resulting from his insolvent principal's failure to carry out his contract; but this he did not do. The jury has found by its verdict that defendant made the promise declared on, and that plaintiff, by his subsequent unsuccessful effort to enforce his claim as a lien, did not release defendant from his promise; and, this finding being supported by the evidence, we think the court did right in refusing to set aside the verdict, unless as a matter of law the defendant is not bound by his oral promise to plaintiff. This question depends upon whether or not the promise was to answer for the debt of another, and is therefore not actionable. The statute of frauds is one noted for its brevity and the terseness of its language, yet it has claimed the attention of the courts of last resort, both in this country and in England, more often perhaps than any other law. It is practically the same in all the states. It was enacted to relieve persons and their estates against false and fictitious claims, by requiring the highest order of proof to establish liability in cases where it is sought to recover against a person as the mere voluntary surety or guarantor of another; but it has been perhaps as frequently invoked to avoid just liability as it has been relied upon to protect against injustice. The courts have said that it shall not be perverted and made the instrument of accomplishing a wrong, and have therefore in the vast majority of cases construed it to have no application in those cases where there is a consideration supporting the oral promise to answer for the debt or obligation of another, other than the release of the original obligor, or the extinguishment of the old debt, or promise. If the promisor derives a benefit from his oral promise which he did not otherwise have, his promise becomes a new and original one, and falls not within the purview of the statute. The rule by which to determine whether a prom-

ise is original, or collateral and without consideration, is thus stated in 29 Am. & Eng. Ency. Law (2d Ed.) 929. "An absolute promise to pay the debt of another is not within the statute, though the liability of the original debtor still subsists, where the leading object of the promisor is to subserve some pecuniary interest or business purpose of his own, and he receives a benefit which he did not before enjoy, and would not have possessed but for the promise."

In support of the text a large number of authorities are cited, among them, the case of *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360, which seems to be a leading case upon the subject. That case is so very similar to the one now under consideration that we think it well to state it. The plaintiff, Emerson, had been employed by a railroad company to build certain bridges. The company failed to make payments according to agreement, and Emerson refused to proceed with the work. The defendant was a large stockholder in the road and had leased to it large quantities of railroad iron and held an assignment of the earnings of the road to secure payments on his lease. The road could not operate, and there could be no earnings, until the bridges were completed. Under these circumstances, the defendant orally promised to pay plaintiff, if he would go on and complete the bridges, which he did. Defendant refused to comply with his oral promise, and plaintiff brought assumpsit. The court held his oral promise to be binding, and stated the law to be that: "Whenever the main purpose and object of the promisor is, not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." The opinion further says: "Nothing is better settled than the rule that if there is a benefit to the defendant, and a loss to the plaintiff consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation."

The case of *Myers v. Dorman*, 34 Hun (N. Y.) 115, is even stronger in support of the rule, if any difference, than the one last above referred to. There Myers, the plaintiff, Stephen Dorman, the defendant, and one Taylor had each recovered several judgments against one J. L. Dorman, which aggregated \$1,839.87, on which executions were issued. The sheriff had levied upon the goods of J. L. Dorman under prior executions amounting to \$2,432.55. On the day of sale it was agreed among these three judgment creditors of J. L. Dorman that if Myers

and Taylor should refrain from bidding and permit Stephen Dorman, the defendant, to purchase the stock of goods, he would pay them the amount of their judgments against J. L. Dorman. The defendant did purchase the goods at \$2,440, and thereafter refused to pay the judgments of the other two men, whereupon Myers sued him. The jury found that this agreement was not made with any fraudulent intent, and the court held that the agreement was not within the statute of frauds because: "(1) He had not pleaded it as a defense to the agreement which was set out in the complaint. (2) His agreement was founded upon a new consideration, viz., the promise of the plaintiff and Taylor not to bid at a sale." The court in its opinion says: "The case is not within the statute, for the reason that the defendant's promise to pay the debt of the judgment debtor was founded upon a new consideration, to wit, the promise of the plaintiff and Taylor above stated."

The case of *Wills v. Outler et al.*, 61 N. H. 405, is also very much in point. In that case it appears that Otterson & Co., who were carrying on a foundry business, became embarrassed for want of funds, and made a sale and transfer of their business to the defendants. At the time of this sale, there were back wages due a large number of men employed in the foundry. Learning of the sale, they refused to go on with the work unless provision was made for their pay, whereupon one Mr. Reed, a member of the defendant firm, met a number of the men who had collected at the foundry and told them that: "If they would go to work again as before, the defendants would pay them the same wages that they had been receiving, payments to be made at the end of each week, and also the amount of the arrears due them for November on the 15th of January and one half of the amount of the arrears for December on the 15th of February, and the other half on the 15th of March, following." On a suit brought by one of the workmen for the money due from the old firm, the court held the new firm liable, holding that the defendants' liability was on an original contract founded on a new consideration, and was not within the statute of frauds. The same principle had been declared in the case of *Britton v. Angier*, 49 N. H. 420, following the case of *Emerson v. Slater*, *supra*, to which the court refers as a leading case.

Elkin v. Timlin, 151 Pa. 491, 25 Atl. 139, is a case in which the defendant had agreed to sell his own interest and the interest of his co-tenant in a tract of land to plaintiff, and when he presented the deed of his co-tenant for his interest plaintiff refused to accept it, fearing there might be judgments against such co-tenant; and the defendant, to induce him to take the deed, agreed orally to pay all the judgments of his co-tenant. The judgments did exist, and he refused to

pay them, and plaintiff sued. The court held that this promise was not within the statute of frauds, but was a new promise supported by a consideration which moved directly to the promisor.

It could hardly be supposed, in this case, that the oral promise of the defendant had the effect to release the judgment debtor. In *Hale v. Stewart*, 76 Mo. 20, Stewart held a note against one Ide for \$650 secured by a deed of trust upon Ide's property. Stewart afterwards assigned this note without recourse to Hale. Hale objected to the manner of assignment, whereupon Stewart agreed orally that, if the note was not paid at maturity, he would pay it. There was a prior incumbrance upon the same land for which it was later sold. Stewart wanted to buy the land, but did not want to bid at the public sale, and promised Hale that, if he would attend the sale and buy it in for him, he would pay off the aforesaid note. Hale attended the sale and bought the land at the price of \$600 and had the trustee to make a deed to Stewart, and Stewart took possession of the land. The \$600, at which price Hale bid in the land, was credited on the note of Ide to Stewart which he had indorsed without recourse to Hale. Stewart refusing to pay the note, Hale brought suit, and defendant relied upon the statute of frauds. The court held that the promise was not within the statute of frauds, and that it was Stewart's new and original promise based on the consideration that Hale should attend the sale and buy the land for him.

The facts in the case of *Oldenburg et al. v. Dorsey*, 102 Md. 172, 62 Atl. 576 (5 Am. & Eng. Ann. Cas. 841, and note), are very similar to the case under review, and the decision in that case supports our opinion on the following propositions, viz.: (1) Harvey's oral promise is an original and binding one; (2) both Harvey and Peyton were bound to Howell as original promisors; and (3) that Harvey had a right to recoup damages in this action, if he had suffered any, on account of Peyton's failure to comply with his contract on which Howell was his surety. However, Harvey made no effort to recoup damages.

The case of *Crawford v. Edison*, 45 Ohio St. 239, 18 N. E. 80, is another case very much in point. The second point of the syllabus, which seems to combine both the law and the facts of the case, is as follows: "S. agreed with C. to furnish the material and build him a house for a specified amount. S. employed E. to put on the roof, eave troughs, and conductor pipes, for a stipulated sum, to be paid when the work should be completed. When E. had done about two-thirds of the work, S. abandoned the job and left the county, without having paid E., or provided for his payment. E. then informed C. that he would not do any more work unless he was to be paid. Thereupon C. told E. to go on with his part of the work, and complete

it, and he would pay him. E., accordingly, completed his job, and charged the amount to C. Held, C.'s promise was not collateral, to answer for the debt of another, but was an original one, for his own benefit, and unaffected by the statute of frauds." The opinion refers to the case of *Emerson v. Slater*, supra. A similar case also is the case of *Clifford v. Lühring*, 69 Ill. 401.

The case of *Hooper v. Hooper*, 82 W. Va. 526, 9 S. E. 987, is very much in point. In that case it appears that Chas. E. Hooper owed one Hamilton \$1,000. Said Hooper sold a stock of goods to one Casteel for \$1,000 and took in payment a lot in the town of Grafton which, at said Hooper's request, was conveyed by Casteel to Hooper's father, who, in consideration of the conveyance, promised to pay his son's debt to Hamilton. The father's promise was held to be original and binding; but, notwithstanding the father's binding promise, the son was not thereby discharged of his obligation to Hamilton. See the opinion prepared by Brannon, J., pages 534 to 538 of 82 W. Va., pages 940, 942, of 9 S. E. See, also, *Young v. French*, 85 Wis. 111; *Swayne v. Hill*, 59 Neb. 652, 81 N. W. 855; *Garvey v. Crouch* (Ky.) 85 S. W. 273; *Kutzmeyer v. Ennis*, 27 N. J. Law, 371; *Bailey v. Marshall*, 174 Pa. 602, 34 Atl. 326; *Borchsenius v. Canutuson*, 100 Ill. 82; *Patterson v. Mills*, 21 Kan. 163; *Carragher v. Allen*, 112 Iowa, 168, 83 N. W. 902; *Board of Com'rs v. Steam Heating Co.*, 128 Ind. 247, 27 N. E. 612, 12 L. R. A. 502. The Indiana court in its opinion in the case last cited relies on the case of *Emerson v. Slater*, supra.

Counsel for defendant relies upon the case of *Noyes' Ex'x v. Humphreys*, 11 Grat. (Va.) 636, which is, indeed, very similar to the case under review. Noyes was the owner of certain salt property and leased the same to one Thompson for 10 years, reserving a large rent. Thompson undertook to make extensive improvements upon the property and employed one Humphreys to do the work. Humphreys did a great deal of the work, and Thompson failed to pay him, and he said he would quit if he was not paid. Noyes, desiring that the work should proceed, said to Humphreys: "Go on and finish it. I will pay you for it." Humphreys then completed the work; Noyes attending and giving directions during its progress through several months. Thompson and Humphreys thereupon had a settlement, and it was ascertained that there was a balance due Humphreys of \$454.78, for which Thompson executed his bond to Humphreys payable in nine months. Humphreys sued Noyes on his oral promise. Judge Allen, in discussing the case, says: "Original undertakings need not be in writing, not being within the statute. The difficulty is in determining under which head the undertaking in any particular case is to be classed. Where the party undertaken for is under no original liability, the promise is an original

promise, and binding though not in writing. The promisor is the party immediately liable, and the undertaking is to pay or answer for his own debt or default, and not for another's." In view of the facts, as they appear from the opinion in *Noyes' Ex'x v. Humphreys*, and in view of the many decisions hereinbefore referred to, we fail to see why the court did not decide the case otherwise than it did, because, tested by the great weight of authorities, there was a new consideration moving from Humphreys to Noyes which ought to have made Noyes' promise an original one. We do not controvert the principle of law announced by the court in that case and in other Virginia decisions therein referred to; but we think the principle was incorrectly applied to the facts in that case, as we understand them from reading the opinion, and we do not feel inclined to follow that decision in opposition to so many other reputable authorities.

The case of *Radliff v. Poundstone*, 23 W. Va. 724, is also cited by counsel for plaintiff in error as authority on the question of Harvey's nonliability on his oral promise; but the facts in that case are very different from the facts in the present case, and it does not govern. The material facts in that case, briefly stated, are these: Radliff owed Poundstone and his wife \$3,350, for which he had executed his note payable to them jointly; but the proof showed, and the court held, that the wife of Poundstone was the beneficial owner of the entire debt, so that in applying the law the debt must be viewed as if the note had been executed to the wife alone. Some time after this note was given, Radliff and Poundstone formed a partnership for the purpose of buying and selling coal, and each was to furnish an equal amount of money. Radliff was to advance the money necessary to commence the business, and, as the bill alleges, did advance \$8,600. Radliff says that there was an agreement between them that one-half the money so advanced was to be charged against said note, and that the wife of Poundstone orally assented to this arrangement. The wife denied the alleged agreement on her part, or that she had any knowledge of it, and set up her title to the entire amount of the note. This statement shows clearly that there could have been no consideration for the wife's promise, assuming that she made it. The promise was not an inducement to the partnership, for it had already been formed. There had been no release of the husband from his promise, as one of the partners, to bear one-half the expense, for the bill sought recovery from both Poundstone and his wife. The court, on page 732 of 23 W. Va., says: "Her promise therefore was not only without consideration, but it was collateral, and her husband continued bound."

When there is no new consideration for the promise, it follows, as a matter of course,

that the only other consideration for the promise to pay the debt of another would be his release from the debt; otherwise the promise would be nudum pactum and void, even if it were in writing and signed by the promisor. Hence, it will be seen, in those cases where the courts have held that the release of the original promisor is essential to the validity of the new promise, that there was no consideration whatever for the promise. *Gerow v. Riffe*, 29 W. Va. 462, 2 S. E. 104; *Mankins v. Jones*, 63 W. Va. 373, 60 S. E. 248, 15 L. R. A. (N. S.) 214. But if the consideration is a benefit to the promisor, which accrued to him by virtue of the promise, it is an original undertaking, and not within the statute, whether the original promisor be released, or not. This is the test applied by the United States Supreme Court in *Emerson v. Slater*, supra, and also by this court in *Hooper v. Hooper*, supra.

It remains only to apply the test, or correct principle of law, to the facts in the present case. Is defendant's oral statement to plaintiff, to go on and finish the job and he would pay him, collateral, and therefore void; or is it original, and therefore binding? What was the new consideration? Plaintiff was a subcontractor with Peyton, who had failed on the job. There was no privity of contract between plaintiff and defendant on account of the original contract between Peyton and defendant. Plaintiff was bound to Peyton only to do the work which he had originally agreed to do, and when Peyton failed to pay him he had a right to quit, and did so; but defendant was anxious to have the building completed in order that he might have the use of his building, and by reason of his promise to plaintiff he was enabled to have his building completed. Here, then, was a benefit moving directly from the promisee to the promisor by virtue of his promise, which he did not have without such promise, and the new consideration was sufficient to support the promise to pay what was then due, as well as to pay for services to be thereafter rendered.

Finding no error in the judgment of the lower court, we affirm it.

BRANNON, J. (concurring). I have no objection to the judgment given by this court. I desire to say that, as I understand the intricate question of direct and collateral promise, where there is no benefit accruing to the promisor, the fact that the main debtor still is bound is a test, showing the promise of the new man to be collateral and not good without a writing; but, where a benefit goes to that new man, his promise is direct and binding without a writing, though the original debtor still remains bound. 29 Amer. & Eng. Ency. Law, 929; *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248, 15 L. R. A. (N. S.) 214.

(65 W. Va. 366)

DANIELS v. GILLESPIE.

(Supreme Court of Appeals of West Virginia.
March 23, 1909.)

1. EQUITY (§ 44*)—JURISDICTION—CONCURRENCE.

Generally courts of law and equity have concurrent jurisdiction of causes of action arising out of fraud, accident, or mistake.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 141; Dec. Dig. § 44.*]

2. PARTNERSHIP (§ 313*)—SETTLEMENT OF ACCOUNTS—JURISDICTION—EQUITY.

Settlement of partnership accounts is within the exclusive jurisdiction of courts of equity.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 729; Dec. Dig. § 313.*]

3. PARTNERSHIP (§ 311*)—JURISDICTION—FRAUD.

Though the law affords a remedy by action for fraud and deceit, perpetrated in effecting a settlement of partnership affairs, the jurisdiction of the law courts in such cases is not exclusive, and resort may be had to a court of equity to correct the settlement by surcharging and falsifying it as to certain items, or to set it aside wholly, and judicially settle the accounts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. § 311.*]

4. PARTNERSHIP (§ 311*)—JURISDICTION—FRAUD.

The establishment of fraud on the part of one of the parties in stating an account between partners entitles the other to have it wholly set aside and restated in a court of equity.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. § 311.*]

5. PARTNERSHIP (§ 311*)—PRIVATE SETTLEMENT OF ACCOUNTS—FRAUD—RELIEF—RESTORATION.

If, in a private settlement of partnership accounts, fraud has been committed by one of the parties to the injury of the other, the latter may have relief in equity without restoring to the former what he received in the settlement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. § 311.*]

(Syllabus by the Court.)

Appeal from Circuit Court, McDowell County.

Bill by W. C. Daniels against Gratton Gillespie. Decree for defendant, and complainant appeals. Reversed.

T. L. Henritze and Lawson Worrell, for appellant. D. J. F. Strother, D. E. French, and W. L. Taylor, for appellee.

POFFENBARGER, J. W. C. Daniels brought this suit in the circuit court of McDowell county to set aside his purchase of his copartner's interest in a store, cancel his negotiable promissory notes given therefor, and settle and wind up the partnership business. The court on final hearing dismissed his bill, and he has appealed.

Prior to January 1, 1904, he owned a retail store at North Fork, in said county, and on that day sold an interest in it to the defendant Gratton (Grat) Gillespie. He put in his merchandise at a valuation of \$11,148.

95. Within a year thereafter he paid into the business in some form \$3,836.01 additional and Gillespie \$2,028.13. Neither was to have any salary, and Daniels was to own three-fourths of the business and Gillespie the remaining fourth. The firm seems to have lost considerable money during the year; for in the following February the stock invoiced \$8,163.16, there were accounts due the store amounting to \$1,444.76, and debts due from it amounting to \$10,513.60. On February 1, 1905, Daniels bought Gillespie's interest for the sum of \$2,185, executing his three negotiable promissory notes therefor. On April 24, 1905, he brought this suit for the purpose above stated. His bill admits knowledge of firm losses at the time he bought and the clamor of creditors for payment of pastdue bills, and avers the purchase was made for the purpose of obtaining possession of the business, to the end that its exact condition might be ascertained and a settlement made without incurring the expense of a receivership. It says the plaintiff, on conferring with the defendant about the state of the business and attempting to purchase his interest, found the latter unwilling to agree to any equitable and just settlement. The latter threatened to bring a suit to dissolve the partnership and have a receiver appointed, and, rather than have this done, the plaintiff executed to him notes covering the amount he had put into the business, and so obtained possession. It charges the firm losses to alleged dishonesty and neglect of business on the part of the defendant, specifying numerous instances of such misconduct. The answer denies all these allegations, and evidence was adduced in support of both parties. The commissioner, after considering all of it, came to the conclusion that the defendant had clandestinely withdrawn from the business more than \$1,200 in money, depositing it in his own name in two banks distant from the one in which the firm kept its deposits. He further finds the defendant was extravagant in his expenditures and habits, and negligent in business, but is unable to ascertain what sums were squandered by him. Being of the opinion, in view of these facts, that the contract of sale should be set aside, he stated and reported an account between the parties, showing that Daniels had sustained a loss of \$554.34 in excess of the amount which he should bear. Twelve exceptions to this report were filed, and it was recommitted to give the defendant an opportunity to take further evidence to prove the money deposited by him as aforesaid had been derived from sources other than the social business. Additional evidence was taken, but the commissioner held it insufficient to justify a different conclusion from that at which he had previously arrived. But, perceiving a slight error in his calculations, he restated the account, and found that Daniels' loss,

in excess of what he should have borne, was \$561.84. Nineteen exceptions to this report were filed. On the hearing the court differed from the commissioner in respect to the weight of the evidence, and, sustaining exception No. 2 to the last report, based on insufficiency of evidence, as well as a number of others, subsidiary in character, dismissed the bill.

A cross-assignment of error, based on the overruling of the demurrer to the bill, raises the question of equity jurisdiction; adequacy of legal remedy by an action for damages being assigned as the reason for lack thereof. The authorities invoked for this proposition do not sustain it. In *Childers v. Neeley*, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777, the partnership had been dissolved and a settlement made. The only matter alleged against the defendant was his failure to execute a bond of indemnity to the plaintiff. It appearing to the court that the partnership business had been settled, this was held conclusive in the absence of allegation and proof of any ground for setting it aside, such as accident, mistake, or fraud. The case of *Mahnke v. Neale*, 23 W. Va. 57, is very similar. Jurisdiction in equity to set aside a settlement for fraud is acknowledged in both cases. Relief was denied, not because the plaintiffs had invoked an inappropriate remedy, but because the allegations and proof were insufficient to justify the relief prayed. *Crockett v. Burleson*, 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263, merely declares jurisdiction at law to recover damages for fraud and deceit on the part of the defendant in the execution of a contract of dissolution and settlement. It does not deny jurisdiction in equity for rescission of a voidable contract and a settlement of the partnership business in equity. *McAuley v. Cooley*, 45 Neb. 583, 63 N. W. 871, is to the same effect. It is hardly necessary to remark that generally courts of law and equity have concurrent jurisdiction of causes predicated on fraud, accident, and mistake, nor that equity is the proper forum in which to obtain an accounting, dissolution, and settlement respecting a partnership. 15 Enc. Pl. & Pr. 1054; 30 Cyc. 715. Such jurisdiction is not denied in the briefs of counsel as we read them. It is only insisted that the settlement effected between the parties by the purchase of the interest of one by the other gives an adequate remedy at law, and therefore precludes jurisdiction in equity. The authorities do not sustain this position. There is jurisdiction in equity to correct errors in accounts stated between partners by surcharging and falsifying the statement, and, when the plaintiff is entitled to wholly set aside the settlement made, he has the further right to a settlement in the same suit under the rules and principles prescribed by law and equity. Matters of account are

per se within the scope of equity jurisdiction. 2 Story's Eq. Jur. § 441. In respect thereto courts of law and courts of equity have concurrent jurisdiction. *Id.* § 442; *Tillar v. Cook*, 77 Va. 477.

If the object of the suit were merely to prevent collection of the notes by establishing fraud in the procurement thereof or failure of consideration, in whole or in part, it seems clear that these matters of defense might be set up in a court of law, and there might be no jurisdiction in equity; but the relief sought by the bill does not stop with this. It goes entirely beyond the mere matter of defense, and includes a settlement of the partnership affairs. When a stated account between partners is vitiated by fraud or involves a mistake affecting the whole thereof, it is set aside and a new settlement and statement made; but, if the mistake does not go to the entire account and is limited to certain items, correction is made by surcharging or falsifying or both, according to the nature of the errors, all items except the erroneous one being allowed to stand. The establishment of fraud in respect to any item or part of the account, unlike mistake as to an item or items, impeaches the entire settlement. *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Williamson v. Barbour*, 9 Ch. D. 529; *Gething v. Keighley*, 9 Ch. D. 547, 550; *Lindley*, Part. 969, bottom p. 1256; *Collyer*, Part. § 298.

We do not stop to discuss so plain a proposition as that the purchase or settlement, whichever it may be termed, may be set aside on allegation and proof of fraud on the part of the defendant; but a matter worthy of consideration is whether the plaintiff, having obtained possession of the property by this purchase, and desiring to set aside the contract for fraud, must restore the property to the possession of the defendant or admit him to joint possession and control thereof as a condition precedent to relief, and the authorities answer this proposition in the negative. *Oliver v. House*, 125 Ga. 637, 54 S. E. 732; *Wallace v. Sisson* (Cal.) 33 Pac. 496; *Elfelt v. Hart* (C. C.) 1 Fed. 264; *Abrahams v. Hunt*, 26 Pa. 49. "A partner who has been defrauded into a private settlement may institute a suit for a judicial accounting without rescinding the settlement and putting the defrauding partner in statu quo." 30 Cyc. 713. The reason for differentiating such a case from one of rescission of a contract of purchase between strangers is apparent. Before the sale each had right of possession, and the possession of each was the possession of the other. By giving notice of election to rescind the purchaser virtually puts the seller in statu quo, except that he expects to retain the assets at their real value, with assent of the other party, without relinquishing his right to a just and fair settlement of the accounts. *Abrahams v. Hunt*, cited, allows a partner

to set aside a release executed to his co-partner by showing that the latter coerced the execution thereof by unjustly withholding the books and acting unfairly in other respects, and does not require him to restore what he obtained in the private settlement as a condition precedent. As has been stated, the bill charges the defendant with dishonesty and neglect of duty, specifying a number of instances, including the secret withdrawal and depositing of the firm's money in his own name, and avers the plaintiff's ignorance of such conduct at the time of his purchase. Plaintiff avers that since the dissolution he has learned that the "defendant was regularly systematically robbing him, not only during the period of said partnership, but prior thereto, while the said defendant was employed as a clerk or salesman in his business." A further averment of ignorance of the fraud reads as follows: "The amount paid by the plaintiff to the defendant (and for which notes were given) was paid without knowledge of the conduct of the said defendant." We do not doubt the sufficiency of these allegations. They charge the fraud and the plaintiff's ignorance thereof at the time of the dissolution and the settlement, specifically setting forth certain instances, and thus show the plaintiff was imposed upon in the settlement.

Enough has been stated to indicate that the vital questions in the case are (1) whether the evidence adduced by the plaintiff, considered alone, sustains the allegations of the bill; and (2), if it does, whether the evidence adduced by the defendant is sufficient to relieve him from the imputations of fraud thus cast upon him. Numerous witnesses testify to the reckless and dissolute conduct of the defendant. His habitual and persistent association with lewd women and reckless expenditures of money upon them and in other ways are abundantly shewn. Many specific instances of misconduct are related, but the one most clearly indicating fraudulent intent, and therefore the gravest and most serious as regards this case, is his conversion of money into a check in the name of a third party, and causing the check to be assigned to him, and then depositing it in his own name in a bank other than the one in which the firm money was kept. This is hardly reconcilable with any intent or purpose other than that of defrauding his partner. J. A. Jackson says Gillespie gave him \$50 and asked him to go up to Mr. Toney's office and obtain the latter's check for that amount in his own name and bring it back to him, which was done. Toney says Jackson brought him the money and he gave the check, as requested, which came back to him, bearing the indorsements of Jackson and Gillespie, and showing it had passed through the Tazewell National Bank in which Gillespie made individual deposits. Gillespie offers no explanation of this. He

merely says he does not remember anything about it. J. A. Lay testifies to having deposited \$33 in the bank of Keystone for Gillespie, and to Gillespie's having requested him to make another deposit for him on another occasion. He further says he was in the store on one occasion when Gillespie told him he must send a check to the bank and sat down to write, saying he was writing to the bank, and, observing Daniels coming into the store, he arose and tore up the letter. The check he proposed to send away was a railroad check, amounting to ninety-odd dollars. C. B. Harman says Gillespie had \$40 deposited with his wife for safe-keeping for a short period of time. Gillespie bought from T. P. Mason a locket in December, 1904, for the sum of \$15 or \$18, telling Mason not to let Daniels see it. He admitted having spent \$75 on one trip to Bluefield. Witness after witness testifies to his having frequented houses of ill fame, having had lewd women in the store, and the loitering of that class of women in and about it. As he was a man of practically no means or property other than what he had invested in the store, it is perfectly manifest that he could not maintain himself in that sort of life, and at the same time accumulate deposits, without withdrawing money from the firm business. That he did this clandestinely and in a manner indicating fraudulent intent is disclosed by his having made the deposits in banks other than the one in which the firm deposits were made, his having failed to charge himself with the money on the books of the firm, and his having cautioned persons with whom he had financial transactions not to disclose them to his partner. The circumstances, viewed as a whole, are, we think, sufficient to establish the charge of fraud. After the report was recommitted to allow him to exculpate himself, he attempted to indicate the sources from which he derived some of the money deposited, but his attempted explanation relates only to deposits made prior to the formation of the partnership, and, as to these, is not very satisfactory. As to a deposit of \$71 a check of W. C. Daniels, he says: "I don't remember what that was for." As to another check of Lester G. Toney, he said: "I don't remember what this other one was, \$50." In fact, this is the check he procured by Jackson with money furnished him. There are several other items that he does not explain. As to a check of Aaron Catzen for \$40, one of W. M. Kinsey for \$35, and another of Lester G. Toney, he says nothing. Another check for \$50, drawn by Aaron Catzen, he accounts for by saying he cashed it for Catzen, but does not say where he got the money with which to cash it and others he says he cashed. No explanation whatever is offered by him as to numerous and considerable deposits made after the 1st day of

January, 1904, amounting to several hundred dollars. During all this time he charged himself on the books with only \$32. This he explains by saying he had no occasion to buy much and had money for things he could not obtain in the store. A deposit of \$108 in his name in the Keystone Bank was found. This, he says, was money belonging to Charles Harman and James Crawford, which he had collected as rent from their tenants. It appears that he did collect considerable money for them, but Harman says he had accounted for all of it except \$60 which he claimed had been paid into the business of W. C. Daniels & Co. This statement of Harman's is not denied by him. This is sufficient to indicate the character of his testimony. Of it the commissioner said: "The defendant denies that he had misappropriated any of the partnership funds, and in general terms says that none of the money deposited in the bank by him as shown by the evidence of W. T. Gillespie belonged to the partnership or to the plaintiff. He is asked by his counsel to explain the different items set out in the statement filed with Gillespie's deposition as deposits made by him, and he explains and accounts for the various amounts deposited prior to the formation of the partnership, but he fails to explain a single item embraced within the partnership period. The commissioner in his former report charged the defendant with those deposits only, which were made during the continuance of the partnership, and he was not charged with a single item deposited prior to that date. His failure to explain a single item and to account for a single deposit made during the continuance of the partnership, and with which he was charged in the settlement adopted by the commissioner in his former report, is, in the mind of your commissioner, significant to say the least, and has the effect to confirm the commissioner's opinion as embodied in his former report, and he therefore adopts the theory of settlement heretofore adopted and reported, and asks that said former report be considered as part of this report, with the exceptions hereinafter noted. Some evidence was given by the defendant tending to show that he had some income other than that from the partnership business, but in the opinion of your commissioner he fails to show that he actually had such income from January 1, 1904, to February 1, 1905, the period of the partnership, but all the evidences of sales of cattle, farm products, etc., shows that these sales were made before or after this period. Your commissioner therefore finds that the evidence is insufficient to overcome the case heretofore made out, and upon which his former report was based."

After a careful examination of the evidence in question, we fully concur in the commissioner's estimate of it, from which

it results that in our opinion the circuit court erred in sustaining the exceptions to his report. We have examined the report of the commissioner and the appellee's exceptions thereto, finding no errors therein to his prejudice. The account is not stated on correct principles, but the result is to the prejudice of Daniels, who does not complain of the commissioner's report, and asks a decree in conformity therewith. Therefore the decree complained of will be reversed, and a decree will be entered here, ordering the surrender and cancellation of the notes mentioned and described in the bill and proceedings, confirming the commissioner's report, and requiring the appellee, Gillespie, to pay to the appellant, Daniels, the sum of \$561.84, with interest thereon from the 29th day of May, 1907, until paid, and costs in this court and the court below.

Reversed.

(65 W. Va. 240)

DENT v. PICKENS et al.

(Supreme Court of Appeals of West Virginia. Jan. 28, 1907. On Rehearing, March 23, 1908.)

1. APPEAL AND ERROR (§ 1198*)—REMAND—PROCEDURE BELOW.

When the appellate court has remanded a cause to the circuit court with directions as to the collection and application of certain funds, it is error for the circuit court to decree any of such funds to be applied otherwise than as so directed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4668; Dec. Dig. § 1198.*]

2. APPEAL AND ERROR (§ 747*)—CROSS-ASSIGNMENT OF ERRORS.

When, on petition for an appeal from and supersedeas to a decree, a partial appeal only is allowed involving certain several sums required to be paid by the defendant to the plaintiff, and the court has erroneously allowed to and permitted the defendant to retain and apply to his own use another sum of the same fund, such error cannot be corrected on cross-assignment of error by the plaintiff claiming such sum, on the hearing of such partial appeal, but will only be corrected upon an independent appeal taken by the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 747.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by Susan C. Dent against Dever Pickens and others. Decree for defendants, and plaintiff appeals. Reversed.

See, also, 59 W. Va. 274, 53 S. E. 154.

J. Hop Woods, for appellant. Fred O. Blue, for appellees.

McWHORTER, J. This is an appeal from so much of the decree of the circuit court of Barbour county entered in the cause of Dent v. Pickens on the 23d day of February, 1905, as confirmed and allowed to be retained by A. G. Dayton the sum of \$376.97, being the residue of a sum of \$1,721.21 which had

been paid into the hands of said Dayton on the 22d day of April, 1892, by Commissioner Peck. In an opinion written in said cause, found in 46 W. Va. 378, 393, 33 S. E. 308, in remanding the cause to the circuit court, said court was directed "to refer the cause to a commissioner to ascertain and report what moneys due on the claims assigned by Dever Pickens from the parties mentioned in the amended bills as debtors to him, if any, have been paid since the filing of the first amended bill, by whom and to whom paid, and whether the \$1,000 of the debt secured by the trust deed made by M. W. and Ledrue Coburn of October 21, 1885, secured to Dever Pickens, and mentioned in the said marriage contract as having been assigned to Mollie Pickens, has been paid to her since the filing of the first amended bill, and whether any or all of such moneys have been paid or not; that the court take proceedings to collect all such money as may not be shown, upon proper and sufficient evidence, to have been paid prior to the filing of the said first amended bill, to be collected from the persons who have since received it, or from the debtors who may not yet have paid what they owe; and that the same, as fast as collected, be applied to the judgment of appellant, until the same is satisfied"—the said sum of \$1,721.21 being a part of the moneys referred to in the matters so to be referred to the commissioner and to be applied to plaintiff's judgment as fast as collected. After the case went back, the circuit court entered a decree therein on the 23d of February, 1905, wherein is contained, among other things, the following: "And it further appearing to the court from the pleadings and proofs herein, and from said decree of February 23, 1900, and from said report, that of the sum of \$1,721.21, paid to the defendant Alston G. Dayton, attorney, on the 22d day of April, 1892, by Melville Peck, special commissioner, as recited in said decree, the said Dayton paid to the defendant Mollie Pickens (now Mollie Pickens-Martin) on the 12th day of May, 1892, the sum of \$1,000 and on the 6th day of June, 1892, the further sum of \$69.24, to the defendant John J. Davis on the 21st day of May, 1892, as counsel fees against the defendant Dever Pickens, the sum of \$125; to the defendant John Bassel on the 26th day of May, 1892, as counsel fees * * * against said defendant Dever Pickens, the sum of \$150, and the residue, to wit, \$376.97, he retained for himself as counsel fees against said defendant Dever Pickens, and that all of said payments of said sum of \$1,721.21, and the amount thereof so retained by said defendant A. G. Dayton were severally paid and retained after the filing of the plaintiff's first amended bill herein at the September rules of this court, 1889, upon which process issued upon the 31st day of August, 1889, whereby and by reason of plaintiff's execution, as determined

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by said affirmed decree of February 23, 1900, liens were created upon said sum of \$1,721.21 in behalf of plaintiff's demand herein in the hands of said defendant A. G. Dayton, who paid out the same to the persons aforesaid, except the amount thereof retained by himself de son tort, with respect to which so retained by himself it appears that an attorney's lien in his behalf existed previously by reason of his relation as attorney to the original debt in favor of the defendant Dever Pickens, of which said sum of \$1,721.21 is parcel, secured by the deed of trust dated December 21, 1885, to himself and said James Pickens as trustees, executed by the defendants M. W. Coburn and Ledrue Coburn, in said antenuptial contract mentioned. It is further adjudged, ordered, and decreed that said A. G. Dayton and said Mollie Pickens do pay to the plaintiff the said sum of \$1,000, with interest thereon from said 12th day of May, 1892, and the said sum of \$69.24, with interest thereon from said 6th day of June, 1892; that said A. G. Dayton and John J. Davis do pay to the plaintiff the said sum of \$125, with interest thereon from said 21st day of May, 1892; that said A. G. Dayton and John Bassel do pay to the plaintiff said sum of \$150, with interest thereon from said 26th day of May, 1892, and that leave be given the plaintiff to sue out several executions therefor, and that when the same, or either of them, are so paid, the same shall be credited upon the plaintiff's decree herein, and the right of substitution to the said payments as to said debts, as between the said defendants herein decreed to pay the same, shall exist as between themselves according to their rights and equity in respect thereto, and as to said sum of \$376.97, residue of said sum of \$1,721.21, retained by said Dayton as aforesaid, the same is confirmed and allowed to him, as and for his attorney's lien upon said original debt, of which said sum of \$1,721.21 is parcel as aforesaid." From this decree of February 23, 1905, the defendants John D. Pickens, executor of James Pickens, deceased, John D. Pickens, Mollie Pickens Martin, Dever Pickens, and Minnie Coburn Pickens filed their petition in this court for an appeal.

A partial appeal only, therefrom and supersedeas thereto were allowed, as follows: "State of West Virginia: An appeal and supersedeas upon the foregoing petition was allowed as to so much of the decree pronounced on the 23d day of February, 1905, as requires that A. G. Dayton and Mollie Pickens pay to the plaintiff the sum of \$1,000, with interest thereon from the 12th day of May, 1892, and the sum of \$69.24, with interest thereon from the 6th day of June, 1892, and that said A. G. Dayton and John J. Davis pay to the plaintiff the sum of \$125, with interest thereon from the 21st day of May, 1892, and that said A. G. Dayton and John Bassel pay to the plaintiff the sum of \$150, with interest thereon from the 26th day of May, 1892, in court, at Charleston, on the 12th day of May,

1905." Said appeal was decided, as will appear in 59 W. Va. 274, 53 S. E. 154, where it is said at page 161 of 53 S. E.: "From the principles and conclusions above stated, it results that A. G. Dayton was liable to the plaintiff for said sums of \$69.24, \$125, and \$150, paid by him to Mollie Pickens, John J. Davis, and John Bassel, respectively, and that, as said parties received it from him with knowledge of the source from which it was derived, and all the circumstances above referred to, so much of the decree as relates to said sums will be affirmed. As said Dayton received said sum of \$1,000, and paid it to Mollie Pickens before the filing of said second amended bill, he stands in a different situation as to it. It cannot be said that there was any pending suit with reference thereto at the time he received the money, and he, therefore, violated no duty. For this reason, the decree should have required Mollie Pickens alone to pay said sum, and, in so far as it requires A. G. Dayton and Mollie Pickens to pay to Susan C. Dent \$1,000 with interest thereon from the 12th day of May, 1892, until paid, the same must be reversed, and a decree entered here requiring said Mollie Pickens to pay said sum, with interest thereon as aforesaid, to said Susan C. Dent." It is further said at same page: "A cross-assignment of error is predicated on the refusal of the court to require the defendant A. G. Dayton to pay over to the plaintiff a balance of the Coburn debt, amounting to \$376.97, part of which he retained on account of his fees as attorney for Dever Pickens, and the residue of which he applied on costs due from his client. That matter is not now before this court, for the reasons assigned in disposing of other assignments of error as to matters not brought up by the appeal." Susan C. Dent then filed her petition for an appeal from so much of said decree of February 23, 1905, as permitted and authorized the defendant Dayton to retain as and for his attorney's lien on said original debt, the \$376.97, residue of said sum of \$1,721.21. The sum here involved, the item of \$376.97, for the reasons given in Dent v. Pickens, 59 W. Va. 274, 53 S. E. 154, fixing liability of said A. G. Dayton for the said sums of \$69.24, \$125, and \$150, being governed by the same principles, should have been required by said decree to be paid by the said Dayton to the plaintiff Dent, and, as shown by said report of the case in 53 S. E. 154, the said decree of February 23, 1905, as to said sum of \$376.97, could not be reversed on cross-assignment of error in that case because the same was not before the court therein on said appeal.

For the reasons stated, the said decree of February 23, 1905, disposing of the said sum of \$376.97, is reversed and annulled, and, this court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that the said A. G. Dayton do pay to the plaintiff the sum of \$376.97, the residue of said sum of \$1,721.21,

with interest thereon from the 21st day of May, 1892, until paid.

ROBINSON, J., absent (related to parties).

On Rehearing.

WILLIAMS, J. The money retained by appellee on account of his services as attorney for Dever Pickens stands on no higher footing in respect to the claim of Susan Dent-Roy than any other portion of the M. W. & Ledrue Coburn debt; and in the former appeals in this suit the disbursements of all the rest of said Coburn debt have been held to be in fraud of Susan Dent's claim. What right has appellee to his fee as attorney for Dever Pickens payable out of said fund superior to the right of his associate counsel? Pickens and his wife assigned \$1,000 of this Coburn debt for the joint benefit of all three of the attorneys.

Counsel for appellee contends, in his brief, that this Coburn fund was subject to an attorney's lien in favor of appellee for services rendered by him in respect to the collection of said fund before Susan Dent acquired any right to any part of it. If this is true, his lien ought to be protected and saved to him, provided the amount of it can be ascertained; but, by reference to his answer, we find that he does not assert any such lien. He therein expressly claims title to the fund because of an agreement between himself and Dever Pickens that he, Bassel, and Davis were to be paid their fees out of it for their services in defending the Dent v. Pickens law action. In his deposition he says: "When the original law cause of Dent v. Pickens was instituted, and, if I remember rightly, in less than a week after the summons issued in it, Dever Pickens employed John J. Davis, John Bassel and myself to defend him in it, and in the conversation which I had with him at that time we verbally assigned or agreed that I should hold to the extent of \$1,000 this debt—this Coburn debt—when collected by me, to secure to Davis, Bassel and myself our fees incurred in the defense of this action at law against him." And later he took a written assignment, dated August 20, 1889, from Dever Pickens and Minnie Pickens his wife, which reads as follows: "For the purpose of securing to John J. Davis, John Bassel, and Alston G. Dayton their fees as attorneys for Dever Pickens in the cases of Susan C. Dent v. Dever Pickens both in law and chancery in the circuit court of Barbour county, W. Va., we hereby assign the residue of about \$1,000 of a debt due from M. W. & Ledrue Coburn to Mrs. Minnie B. Pickens assignee of said Dever Pickens, after deducting offset and amount heretofore assigned thereout by said Dever Pickens to Miss Mollie Pickens. In case the law cause of Dent v. Pickens is gained by said Pickens in the end said Davis, Bassel, and Dayton are to have

a fee of \$1,000, otherwise such fee as may be hereafter agreed upon August 20, 1889."

By acceptance of this assignment he recognized the right of Minnie Pickens (née Coburn) to dispose of said Coburn debt under the settlement made upon her by Dever Pickens which was decreed to be fraudulent as to Susan Dent. All of said M. W. & Ledrue Coburn fund, except the \$376.97 in the hands of appellee, has been applied on Susan Dent's judgment. The amount now held by him is a part of the \$1,000 assigned for fees of himself and associate counsel in the Dent-Pickens suits and the same liability attaches to it. Even if the court were satisfied that appellee has an attorney's lien on said Coburn fund, the record furnishes no information as to the extent of it. Appellee does not attempt to show what per cent. of the debt he is entitled to, nor what was the value of his services in respect to said fund. We do not think he has proven that he has an attorney's lien; neither has he shown how much he claims under such lien, whether \$10 or \$500.

For these additional reasons, we think the former decree rendered by this court on this appeal on the 26th day of January, 1907, is right, and we refuse to reverse or change it.

(65 W. Va. 375)

LAMBERT v. ARMENTROUT et al.

(Supreme Court of Appeals of West Virginia.
March 23, 1909.)

1. WITNESSES (§ 325*)—CROSS-EXAMINATION—IMPEACHING ONE'S OWN WITNESS.

Cross-examination is confined to matters of the examination in chief. If a party wishes by his adversary's witness to prove other matters, he must wait his turn, or, in the court's discretion, may without waiting his turn interrogate the witness; but in either case he makes the witness his own as to such other matters.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1098; Dec. Dig. § 325.*]

2. WITNESSES (§ 400*)—IMPEACHING OWN WITNESS—CONTRADICTORY STATEMENTS.

A party may not impeach his own witness either by attacking his reputation for veracity or by proving by others previous contradictory statements. But, if the witness is a party in interest, so that such statements would be admissible as admissions against his interest, the party may prove such prior admissions, though they may contradict the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1269; Dec. Dig. § 400.*]

3. SALES (§ 266*)—IMPLIED WARRANTY.

There is no implied warranty of quality or soundness of chattels sold. There must be either fraudulent representation or express warranty of quality, soundness, or fitness.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 754; Dec. Dig. § 266.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Action by L. D. Lambert against C. L. Armentrout and others. Judgment for plaintiff, and defendants appeal. Reversed.

L. Hansford and Cunningham & Stallings, for plaintiffs in error. J. Wm. Harmon, for defendant in error.

BRANNON, J. C. L. Armentrout and C. S. Armentrout made a promissory note to R. E. Lee Armentrout, which R. E. Lee Armentrout assigned to L. D. Lambert, and Lambert sued on it before a justice, making C. L. Armentrout, C. S. Armentrout, and R. E. Lee Armentrout defendants. The case went to the circuit court of Randolph county by appeal, and there the court directed a verdict for the plaintiff, and from judgment against the three Armentrouths C. L. and C. S. Armentrout have come to this court.

The defense was that the note had been given for a horse and wagon, and that the horse had been warranted as sound, but, in fact, was unsound. On the trial the plaintiff introduced R. E. Lee Armentrout as a witness, who gave evidence in chief that the note had been given for a horse and wagon, and that \$40, the price of the wagon, had been paid, and no more, and gave no evidence at all touching the warranty or soundness of the horse. On cross-examination the defense asked him if he had not warranted the soundness of the horse, and he denied having done so. The defense also asked whether he had not made statements out of court that he knew the horse was unsound, and had warranted him as sound, and he denied having made such statements. Then the defense offered to prove by other witnesses that Armentrout had made such contradictory statements, but the court would not allow evidence of such statements. The great weight of authority is that a party has no right to cross-examine a witness beyond facts elicited on his examination in chief. He cannot prove his own case by his adversary's witness without making him his own witness as to such new independent matter. If he wishes to prove other matters by him, he must call him in the subsequent progress of the case, and if, without waiting his turn, which the court to avoid confusion and promote method and regularity should require, he at once interrogates, he makes the witness his own. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626; *State v. Carr* (decided February, 1909), 63 S. E. 766; 3 Jones on Ev. § 820, note 6; 2 Elliott on Ev. §§ 917, 922. So the defense in this case made Armentrout its own witness touching contradictory, out of court statements as to warranty of the horse. This being so, then comes the question whether the defendants could impeach Armentrout by proof from other witnesses of what he denied; that is, that he made statements that he knew the horse was unsound, and had stated he was sound when he sold him. I do not know that this court has passed on this question. A party cannot impeach his own witness by evidence of other witnesses either as to general repu-

tation for veracity or of previous inconsistent statements. *McKelvey* on Ev. 400; 2 Elliott on Ev. § 985; 30 Am. & Eng. Ency. L. 1128; 3 Jones on Ev. § 857; *Underhill* on Ev. § 347. And it makes no difference that the adverse party first called the witness, since by cross-examination on matters other than those included in his chief examination the party makes the witness his own as to such new matters, and the same rule applies "with reference to impeaching his testimony as though he had been called in the first instance by such party." *McKelvey* on Ev. 404; *Starkie* on Ev. 250 (10th Ed.). This rule seems unreasonable. It is founded on the unsubstantial reason that the party by presenting the witness represents him as credible. Hardly so where the adverse party presents him first. But such is the rule so firmly set that in England, and many of our states it has been changed by statutes allowing the party to prove inconsistent statements, as in Virginia in the case of the unfortunate *McCue* (108 Va. 870, 49 S. E. 623), where the old rule is seemingly criticised, and the subject discussed. It is ridiculed in that great work, *Wigmore on Evidence*.

I must not be taken as saying that a party is bound by what his witness says. He cannot impeach his general reputation for veracity or prove contradictory statements; but he may by other witnesses prove that the facts are otherwise than as stated, and it is no objection to any relevant evidence of material facts on which he relies to sustain his case that it may operate to contradict and thus discredit his own witness. *Stout v. Sands*, 56 W. Va. 663, 49 S. E. 428; 30 Am. & Eng. Ency. Law, 1129; *Id.* (1st Ed.) 812; *Wharton* on Ev. § 549; 3 Jones on Ev. § 860; 2 *Wigmore* on Ev. §§ 907, 1051; *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; *McKelvey* on Ev. 400; 2 Elliott on Ev. § 985; *Mississippi Glass Co. v. Franzen*, 143 Fed. 501, 74 C. C. A. 135, 6 Am. & Eng. Ann. Cas. 707. The rule which denies right to prove contradictory statements of one's own witness is not infallible. 2 *Wigmore on Evidence*, § 906, says: "So far as impeachment by prior self-contradiction is under any of the foregoing doctrines prohibited, the prohibition does not apply to a party's admission, which is receivable as such, even though it be also a self-contradiction of himself as a witness." *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170, says that the rule does not apply to a party. We find in that reliable work, 30 Am. & Eng. Ency. Law, 1130, that where one's witness denies a contradictory statement the party cannot disprove it by other witnesses "where it would not be admissible as independent evidence, and can therefore have no effect but to impeach the credit of the witness." Likewise Elliott on Ev. § 972. Thus it is seen that, if one calls a witness, he may prove by another witness the for-

mer's contradictory statement if that statement would be admissible if he had not called the witness, as, for instance, an admission against interest. If that former statement would come in as independent evidence, it can be proven, though the witness has denied it when called by the suitor. In this case *R. E. Lee Armentrout* was a party defendant; but what is here meant by "party" is one in interest, one whose admission is admissible. We all know that you can prove an admission of a party without laying any foundation which is required to impeach a witness not interested so as to make his admission evidence. *R. E. Lee Armentrout* made the sale of the horse, and was payee of the note. His admission of unsoundness or warranty would be admissible if he had not been used as a witness by the defendants. It was thus error to refuse to allow his admissions to go in evidence.

The court refused evidence to prove that the horse for which in part the note sued on was given was unsound. Notwithstanding the rule against one impeaching his own evidence, this evidence, under law above stated, would have been admissible if the fact sought to be proven were a good defense; but it is not, and therefore there was no error in its refusal. There is an implied warranty of title in sales of chattels, but not of quality. There must be fraudulent representation or express warranty of quality, soundness, or fitness as a general rule. The rule of caveat emptor here applies. *Mason v. Chappell*, 15 Grat. 572; *Byrnside v. Burdett*, 15 W. Va. 702; *Jarret v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321.

These principles call upon us to set aside and reverse verdict and judgment and remand for another trial, according to those principles; and it will be so ordered.

(132 Ga. 413)

SHELTON v. STATE.

(Supreme Court of Georgia. April 14, 1909.)

1. INSTRUCTIONS — NEGATIVE AND POSITIVE TESTIMONY.

There was sufficient evidence to authorize a charge on the subject of positive and negative testimony, and the charge given on that subject was not misleading or illegal.

2. CRIMINAL LAW (§§ 941, 942*)—NEW TRIAL — CUMULATIVE AND IMPEACHING EVIDENCE.

The newly discovered evidence was merely cumulative and impeaching, and was not such as to require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2323, 2331; Dec. Dig. §§ 941, 942.*]

3. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for new trial on any of the grounds therein taken.

(Syllabus by the Court.)

Error from Superior Court, Chattahoochee County; Z. A. Littlejohn, Judge.

Tilt Shelton was convicted of crime, and brings error. Affirmed.

S. T. Pinkston and S. B. Hatcher, for plaintiff in error. Geo. C. Palmer, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 358)

COX v. GRADY.

(Supreme Court of Georgia. April 14, 1909.)

APPEAL AND ERROR (§ 867*)—REVIEW—GRANT OF NEW TRIAL.

"If the verdict was not demanded by the law and the evidence, the Supreme Court will not disturb the first grant of a new trial, though it was put upon a single ground; nor will it determine whether the trial court was right in granting the motion on the special ground."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3477; Dec. Dig. § 867.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by A. H. Cox against G. G. Grady. Verdict for plaintiff. From an order denying a new trial, he brings error. Affirmed.

B. F. Abbott, for plaintiff in error. Rosser & Brandon, for defendant in error.

EVANS, P. J. This is a suit by an attorney at law against his client for professional services. There was a sharp conflict in the evidence relative to the amount of compensation to be paid under the contract of employment. The jury returned a verdict for the plaintiff. The defendant moved for a new trial, which the court granted in the following order: "Upon hearing the within motion, it is ordered that the same be granted on the ninth and tenth grounds of the amended motion for new trial, and on those grounds alone." The plaintiff excepted to the grant of a new trial.

1. The preliminary question to be determined is the scope of an assignment of error which complains of the first grant of a new trial upon special grounds. There seems to be a divergence of opinion in the reported cases, prior to the adoption of the Code of 1895, as to the exact point or points for decision presented by an assignment of error of this character. In *Everett v. Southern Express Co.*, 46 Ga. 303, it was ruled that when a motion for a new trial contains several grounds, and the court grants a new trial on one of the grounds, overruling the others, and the bill of exceptions is filed to his judgment, the Supreme Court will inquire if the judgment be right in granting a new trial, and, if that be right on any of the grounds taken in the motion, this court will affirm the judgment, notwithstanding the court may have erred in the ground

on which he placed the judgment. To the same effect are *Reid v. Whitfield*, 48 Ga. 187, and *Whitaker v. Groover*, 54 Ga. 174. In cases of which the foregoing are typical, the reviewing court refused to be limited to the merit of the special ground upon which the trial judge rested his action in deciding whether the first grant of a new trial should be disturbed.

A few years afterwards it was held, in *Long v. Bullard*, 69 Ga. 678, that the grant of a new trial upon one of the various grounds of the motion was in legal effect a denial of the motion on all the other grounds, and such a judgment as from which the defendants might have taken a bill of exceptions directly to this court and had all the law points settled. Following this decision it was ruled that, where a new trial was granted on one ground of the motion, the only question before the Supreme Court is whether the court erred in granting the motion on that ground. *Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574; *Ga. R. Co. v. Letchworth*, 78 Ga. 88; *Krogg v. A. & W. P. R.*, 77 Ga. 202, 4 Am. St. Rep. 77; *Nixon v. Christie*, 84 Ga. 469, 10 S. E. 1087. In these two latter cases a judgment granting a new trial upon a special ground was reversed, because such special ground was without merit. At the time of these decisions the statute law on the subject of the grant of a new trial was as follows: "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding." Code 1882, § 3717. "In all applications for new trials on grounds not provided for in this Code, the presiding judge may exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts." Code 1882, § 3718.

In many of the earlier decisions no distinction is made between the first and subsequent grants of a new trial. It was frequently declared that since the abolition of appeals in the superior court from one jury to another, the first grant of a new trial was to be favored, and the discretion of the trial judge would not be interfered with, except where manifestly abused. So the rule was formulated that "the first grant of a new trial will not be reversed by this court, unless the plaintiff in error makes it appear from the record that the judge abused his discretion in granting it, and that the law and facts require the verdict, notwithstanding the judgment of the presiding judge." *Sparks v. Noyes*, 64 Ga. 437. The headnote of this decision was incorporated as section 5585 of the Civil Code of 1895. This section was construed in *Johnson v. Ga. R. Co.*, 102 Ga. 577, 27 S. E. 681, where it was held that

the first grant of a new trial by a trial judge, whether upon general or special grounds, will not be disturbed, unless upon looking through the record of the entire case it can be judicially determined, not only that the judge abused his discretion, but that upon the record as a whole the verdict as to each material issue involved in the case was demanded by the law and the evidence. There has been a uniform adherence to this construction in all of the decisions pronounced by this court since the decision in that case. *Weinkle v. Railroad Co.*, 107 Ga. 367, 33 S. E. 471; *Watson v. Equitable Mortgage Co.*, 112 Ga. 258, 37 S. E. 363; *Harvey v. Bowles*, 112 Ga. 363, 37 S. E. 363; *McCain v. College Park*, 112 Ga. 701, 37 S. E. 971; *Brantley v. Bank of Waycross*, 112 Ga. 532, 37 S. E. 737; *Carter v. Dunson*, 113 Ga. 374, 38 S. E. 830; *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99; *Cordray v. Savannah R. Co.*, 117 Ga. 464, 43 S. E. 755; *Johnson v. Winkles*, 119 Ga. 262, 46 S. E. 99; *Fugazzi v. Tomlinson*, 119 Ga. 622, 46 S. E. 831; *Walker v. Hughes*, 120 Ga. 1079, 48 S. E. 387; *Solomons v. Merchants', etc., Co.*, 121 Ga. 88, 48 S. E. 687; *Elliott v. McCalla*, 123 Ga. 26, 50 S. E. 960; *Smith v. Hightower*, 123 Ga. 110, 51 S. E. 28; *Thompson v. Hays*, 123 Ga. 110, 51 S. E. 33; *A. & B. Ry. Co. v. Cobb*, 125 Ga. 121, 53 S. E. 591; *Ogletree v. Livingston*, 125 Ga. 549, 54 S. E. 625; *W. & A. R. Co. v. Callaway*, 127 Ga. 125, 56 S. E. 105; *Livingston v. Ogletree*, 127 Ga. 205, 56 S. E. 283; *Phoenix Duster, etc., Co. v. Allen-Holmes Co.*, 127 Ga. 458, 56 S. E. 513; *Malcom v. Dobbs*, 127 Ga. 487, 56 S. E. 622; *Bagley v. Shumate*, 128 Ga. 78, 57 S. E. 99; *Armour v. Burkhalter*, 130 Ga. 370, 60 S. E. 850.

The rule has been even more strongly stated. For instance, it was said in *Mock v. Savannah & Statesboro R. Co.*, 122 Ga. 385, 50 S. E. 121, if the verdict was not demanded by the law and the evidence, the Supreme Court will not disturb the first grant of a new trial, though it was put upon a special ground; nor will it determine whether the court was right or not in granting a motion on a special ground. Again, it was announced in *Macon Con. St. R. Co. v. Jones*, 118 Ga. 351, 42 S. E. 468, unless the verdict rendered was absolutely demanded by the evidence, this court will not undertake to decide whether or not the trial judge abused his discretion in granting a first new trial, even though the grant thereof was based solely upon a single question of law determining which it was unnecessary to consider the evidence in the case.

2. It is urged by counsel for the plaintiff in error that it does not appear from the record that this is the first grant of a new trial, and therefore the court cannot assume the existence of a fact not disclosed by the record. The reply to this contention is obvious. Looking to the record, it does not

appear that there were former trials of the case, and this court cannot assume that such was the fact. So far as we are informed by the record, there was only one trial of the case. If there had been former trials, and verdicts set aside on motions for new trials, it was incumbent upon the plaintiff in error to make such appear in the preparation of his record. We are therefore bound to assume that this is the first grant of a new trial.

The evidence was conflicting, and following the plain mandate of section 5585, and the decisions of this court since its incorporation in the Civil Code of 1895, we will refuse to set aside a judgment granting a new trial for the first time, upon conflicting evidence, although the court may have based his judgment granting a new trial solely upon an alleged error of law, which in point of fact may not have been a substantial error.

Judgment affirmed. All the Justices concur.

(132 Ga. 412)

MOORE v. STATE.

(Supreme Court of Georgia. April 14, 1909.)
MANSLAUGHTER—INSTRUCTIONS.

There was no evidence authorizing a charge on the subject of voluntary manslaughter, there was ample evidence to support the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Dooley County; U. V. Whipple, Judge.

Jeff Moore was convicted of crime, and brings error. Affirmed.

W. V. Howard and J. M. Busbee, for plaintiff in error. W. F. George, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(132 Ga. 495)

SOUTHERN MUT. LIFE INS. ASS'N v. DURDIN.

(Supreme Court of Georgia. April 19, 1909.)

1. ASSIGNMENTS (§ 41*)—FORM OF.

No special form of words is necessary to make an assignment of a chose in action. Any language, however informal, if it shows the intention of the owner of the chose in action to at once transfer it, so that it will be the property of the transferee, will be sufficient to vest the title in the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 76; Dec. Dig. § 41.*]

2. INSURANCE (§ 209*)—LIFE POLICY—ASSIGNMENT—SUFFICIENCY.

Where a policy of life insurance was made payable to the estate of the insured, and he made a written statement that he had that day made application to the company to change the beneficiary from his estate to a person named, stating that, if the change was not made during his life, he wanted the money paid to such per-

son, who had rendered to him services as a cook during a number of years, for which he owed such person, and where he delivered the policy, together with this written statement, to the person named, he intending it, and she accepting it, as an assignment of the policy, and where on the same day he wrote to the company, inclosing the amount which it charged for assenting to a change of beneficiary, and informing it of the desired change, and that he owed the person mentioned, and wished such person "to have something as a gift after I am gone," held, that this operated as a transfer of the policy, and authorized the assignee to bring suit on it after the death of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 479; Dec. Dig. § 209.*]

3. INSURANCE (§ 637*)—LIFE POLICY—ACTIONS—PETITION—SUFFICIENCY.

None of the grounds of demurrer was meritorious.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1581; Dec. Dig. § 637.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by G. A. Durdin against the Southern Mutual Life Insurance Association. Judgment for plaintiff, and defendant brings error. Affirmed.

Anna Durdin brought suit against the Southern Mutual Life Insurance Association on a policy issued by it to William D. Durdin. The only portion of the policy necessary to be set out is the following: "The Southern Mutual Life Insurance Association, upon satisfactory proof of the death of the said William D. Durdin, the assured, and the surrender of this policy, will pay to estate, the beneficiary named in the application of the said assured, as many dollars as there are members of the branch above named, in good standing, on the day of the death of the said assured." The petition alleged, in brief, as follows: Defendant is indebted to petitioner in the sum of \$1,500. On February 18, 1908, it issued the policy of insurance, to which reference has been made above, to William D. Durdin, insuring his life. Durdin paid the admission fee and all dues and assessments of which he had notice to the time of his death. On the 1st day of March, 1908, he transferred and assigned the policy to the plaintiff. The assignment was in writing, a copy being attached to the petition. He died on March 9, 1908. Proof of his death has been furnished to the defendant as provided in the policy, but it fails and refuses to pay the amount due thereon. On the day of his death there were 1,500 members in good standing in the branch of the company mentioned in the policy. Attached to the petition as exhibits were copies of the policy and of the instrument claimed to be an assignment. The latter was as follows: "This is to certify that I, W. D. Durdin, has this day made application for change in his life insurance policy from estate to

Georgia Ann Durdin, and in case the change is not made during my lifetime I want the money paid to her for her services as cook for me during the last 35 years. I owe her for her services, and want it paid before anything done with my estate. I have this day signed this affidavit in presence of Chas. T. Pitts, agent for Southern Life Ins. Co., Atlanta, Ga." This was signed by Durdin and attested by two witnesses.

The plaintiff amended her petition by alleging as follows: The policy to which reference was made in the instrument attached to the original petition as an assignment was the policy on which suit was brought, and this was the only policy held by Durdin at that time. On March 1, 1908, Durdin, in writing, notified the defendant company of the assignment of the policy to plaintiff; a copy of the letter containing such notice being attached to the amendment as an exhibit. The defendant consented to the assignment and accepted the sum of 60 cents, which was its charge for so consenting, and that amount was paid by Durdin and accepted by the company for that purpose. It was the intention of Durdin to assign the policy to the plaintiff. He executed the instrument attached to the original petition, and delivered it, together with the policy, to the plaintiff, and it was accepted by her as a transfer; and on the same day Durdin notified the defendant of the transfer of the policy, as above stated. The letter, of which a copy was attached to the amendment as an exhibit, was as follows:

"March 1st, 1908. Newborn, Ga.

"Mr. Thos. C. Candler, Atlanta, Ga.—
Dear Sir: Inclosed find 50 [60?] cents for change in my policy from estate to Georgia Anna Durdin. My policy No. 61,051, class (4). The woman spoken of as beneficiary is my cook, and I want to leave her one policy. I also want four more policies in your company. Can I get them by standing medical examination? Georgia Durdin has cooked for me for 35 years, and I want her to have something as a gift after I am gone. Please attend to same for me. Respectfully, W. D. Durdin.

"Please let me hear from you in regard to it. Respectfully, W. D. D."

Defendant demurred to the petition, and after the amendment was made the demurrer was overruled. Defendant excepted.

Candless, Thomson & Hirsch and R. L. D. McAllister, for plaintiff in error. Moore & Branch, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The only question made and argued in this case was whether the allegations of the petition showed an assignment of the insurance policy on the life of Durdin to the plaintiff. At common law choses in action were not assignable. Courts of equity did not recognize transfers of mere litigious

rights, but did recognize assignments of choses in action, and looked upon the assignee as the true beneficial owner. In this state choses in action arising in contract are assignable in writing. Civ. Code 1895, § 3077, declares: "All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable." No special form of words is necessary to make an assignment. Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property in the assignee. 4 Cyc. 42; 2 Am. & Eng. Enc. Law (2d Ed.) 1055.

In *Dugas v. Mathews*, 9 Ga. 510, 54 Am. Dec. 361, the sufficiency of an instrument to operate as an assignment of a judgment was under consideration. It was "held that a formal deed of assignment is not necessary, but that evidence in writing, which shows that the plaintiff has conveyed the interest in the judgment or execution to the person claiming to be assignee, will be sufficient to enable him to sue out process of garnishment thereon." The paper there relied on as an assignment of the judgment had at its head a statement of the parties to the case and the court and term from which the *fi. fa.* issued. It was addressed to the attorney at law who represented the plaintiff, was signed by the plaintiff, and contained the following statement: "Having assigned the above judgment and execution to Lewis A. Dugas, you are authorized to use my name in any proceeding yourself or the said Lewis A. may deem necessary to the collection of said debt, and you are authorized to act as my attorney in any court proceeding instituted for the collection of the same, should you deem the use of my name necessary." It was held that this was a sufficient written assignment of judgment. In the opinion, Nisbet, J., said: "We cannot believe that the ends of justice can be subverted by requiring, under the act of 1829, a technically formal deed of assignment. What we do require is that there be intelligible written evidence that the judgment is the property of him who claims to be its assignee. Such we consider this order to be."

In *Stanford v. Connery*, 84 Ga. 731, 11 S. E. 507, it was held that a letter from the usee of an execution to his attorney, stating that it was the property of a named person, "and is subject to his control and direction, and you are hereby authorized to pay the amount over to him when collected, or assign him the execution if he requires it," was an assignment to the person so named, and that the usee could not afterwards transfer the execution to another.

In *Loudermilk v. Loudermilk*, 93 Ga. 443, 21 S. E. 77, where the payee of a nonnego-

tible promissory note indorsed it to a third person by name, without any words of limitation or exception, it was held that there was a written assignment of the note to the indorsee, and that under Code, § 3077, the latter could maintain an action upon it in his own name against the maker.

In *First National Bank v. Hartman Steel Co.*, 87 Ga. 485, 13 S. E. 586, one company which had done work for another drew a draft on the debtor for the amount of the balance due, payable 15 days after date, "as advised," indorsed it to the bank, received credit for the amount, and checked out the amount on the same day. The words "as advised" referred to a letter which the drawer on the same day wrote to the company for which the work was done, and in which it was said: "We have to-day made draft on you at 15 days, for balance of contract on standpipe at Columbus, \$2,783.00. This draft, of course, we would like for you to accept; but it is not absolutely necessary if, for any reason, you prefer not doing so. We make the draft, however, inasmuch as we have gotten some money from the First National Bank here on this work, and simply want to transfer this balance to them. In other words, we wish the draft paid whenever the amount is due, either by taking up the draft, or remitting to the First National Bank here, as you see fit. * * * It would be quite an accommodation to us if you would transfer this amount in the manner indicated." At the time the draft was received by the bank, it was agreed between it and the treasurer of the drawer that the latter would notify the drawee of the transfer to the bank of the balance due on the contract. The letter was received by the drawee; but it refused to accept the draft, notifying the drawer that it would not do so till the work was satisfactory to its representative. It was held that this constituted an assignment of the chose in action to the bank, and it was entitled to the fund over garnishing creditors of the assignor.

See, also, *Western Union Tel. Co. v. Ryan*, 126 Ga. 191, 55 S. E. 21; *Walton v. Horkan*, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77.

Applying these principles to the case now before us, the allegations of the petition were sufficient to show an assignment of the policy of insurance to the plaintiff. It was payable to the estate of the assured, and he had a right to assign it without the consent of the company, so far as anything in this record appears to the contrary. *Civ. Code 1895*, § 2116; *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1082, 6 L. R. A. (N. S.) 126. The writing which he executed stated that it was to certify that he had that day made application for change in his life insurance policy from his estate to the present plaintiff, "and in case the change is not made during my lifetime I want the money paid

to her for her services as cook for me during the last 35 years. I owe her for her services, and I want it paid before anything done with my estate." It was alleged that this instrument, together with the policy of insurance to which it referred (being that on which suit was brought), was delivered to the plaintiff, and accepted by her as a transfer, and that it was the intention of the insured to assign the policy to her. It was also alleged that on the same day he sent to the company the letter inclosing 50 (or 60) cents for a change in his policy, that being the correct amount, and stating that he wanted her to have something "as a gift after I am gone," and that the company consented to the change and accepted the amount sent to it, which was its charge for consenting thereto. These allegations were sufficient to show an assignment of the policy, and on demurrer they are to be taken as true.

The writing sufficiently describes the policy to be capable of being applied to its subject-matter. It states that the insured has applied for a change in his life insurance policy from his estate, and that he has signed the paper in the presence of the agent of "the Southern Life Ins. Co." of Atlanta, Ga. The policy was issued by the Southern Mutual Life Insurance Association of Atlanta, Ga., and was payable to his estate. It was alleged that he had no other policy of life insurance than this, and that on the same day he wrote to that company the letter to which reference has already been made.

It was argued on behalf of the plaintiff in error that the alleged assignment was testamentary in character. If a present transfer of the policy was made, it was valid, although payment would not be made on it until it matured by the death of the insured. An assignment of a nonnegotiable note may be good in the present, although it may not be due until a future day. So a policy itself is assignable before the death of the insured, and the assignment is not testamentary because payment is not to be received by the assignee until after the death of the insured. There is nothing about this instrument to indicate a testamentary intention; but the surroundings, so far as they appear from the record, indicated an opposite intention. If the purpose of the maker had been to execute a will, it would have been entirely unnecessary to apply to the insurance company and make a required payment for that purpose.

It was also made a ground of demurrer that the purported consideration of the assignment was the services of the plaintiff as cook during 35 years, but that it does not set out what such services were worth, or whether any payment had been made therefor. This ground is not well taken.

In the brief of counsel for plaintiff in er-

ror there is some discussion as to the propriety of the allowance of the amendment to the petition; but there is no assignment of error which raises any point on that subject.

Judgment affirmed. All the Justices concur.

(132 Ga. 384)

CITY OF LA GRANGE v. TROUP COUNTY.

(Supreme Court of Georgia. April 14, 1909.)

1. MUNICIPAL CORPORATIONS (§ 426*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—PROPERTY LIABLE—PUBLIC PROPERTY.

Where an act of the General Assembly gives a general power to municipal authorities to assess against the property abutting on streets improved a specified percentage of the cost of such improvements, providing for the collection of such assessment by a levy and sale of the property assessed, and there is no provision clearly authorizing such assessment against public property, there is an implied exemption of the property of the county from such assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1035-1037; Dec. Dig. § 426.*]

2. MUNICIPAL CORPORATIONS (§ 426*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—PROPERTY LIABLE—PUBLIC PROPERTY.

The act of the General Assembly approved August 17, 1906 (Acts 1906, p. 119), has no application to this case.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 426.*]

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by the City of La Grange against Troup County. Judgment for defendant, and plaintiff brings error. Affirmed.

E. R. Bradfield, Jr., for plaintiff in error. W. T. Tuggle, for defendant in error.

HOLDEN, J. The city of La Grange, a municipal corporation, brought suit against the county of Troup, alleging that, by virtue of the authority conferred upon the city by its charter and ordinances passed in pursuance thereof, it caused to be paved certain streets within the corporate limits of the city abutting on the public square whereon the courthouse stood, and that the county is indebted to the city in the sum of \$4,448.88 for its pro rata part of the assessment levied to pay the cost of such improvement. The provisions in the charter under which the paving of the streets was done and the assessment against the county levied give the city authority to assess against the abutting owners on each side of the street one-third of the cost of paving or otherwise improving the street, and create a lien on such property for the amount of such assessment. To the petition special and general demurrers were filed, and to the order of the court sustaining the general demurrer and dismissing the petition the plaintiff excepted.

1. There is no express provision in the charter of the city that public property shall be subject to the assessment provided for, nor is there any provision in the charter excepting public property from the operation of such assessment. When a city is given authority to assess abutting property for a part of the cost of street improvements, and nothing is said as to whether or not public property is or is not excepted, there is much conflict in the authorities of other jurisdictions as to whether or not such public property can be lawfully assessed for a pro rata part of the cost of such improvements. 28 Cyc. 1117; 25 Am. & Eng. Enc. Law, 1187; 1 Page & Jones on Taxation by Assessment, § 582; Elliott on Roads and Streets, § 550. We think the better view is that where general power is given a municipality to levy local assessments upon the property benefited by street improvements, and there is no provision clearly showing that public property shall be subject to such assessment, there is an implied exception in favor of its exemption. The municipality cannot assess abutting public property unless the power to levy such assessment is clearly given. This view is supported by many authorities cited in connection with the text employed by the authorities above referred to. While the question may not have heretofore been directly before this court for decision, in the case of *City of Atlanta v. First Methodist Church*, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852, it was recognized in the discussion of the subject found on page 736 et seq. of 86 Ga., and the view which we entertain as constituting the true rule of law is there expressed by Chief Justice Bleckley. In Elliott on Roads and Streets, § 550, the following language is used: "Public property held for governmental purposes, as a courthouse, cannot be sold to pay an assessment levied for the improvement of a street unless a sale is expressly authorized by the statute, nor will such property ordinarily be deemed within the general words of a statute delegating, in general terms, the authority to levy local assessments. Statutes conferring a general authority to assess are usually construed as operating upon property subject to legal process, and not upon property held for governmental purposes by the state or any of the local instrumentalities of government."

In view of the provisions of the act creating a charter for the city of La Grange (Acts 1901, p. 477), giving power to make assessments against abutting property for street improvements, we think public property is not under such act liable to assessment. The only provision for the collection of such assessment is the sale at public outcry of the property assessed. It is provided in the act referred to that such sale shall vest absolute title in the purchaser, and that the city marshal "shall have authority to eject occupants

and to put purchasers in possession." We do not think it was intended that such provision should apply to the property on which is situated the courthouse and jail of the county. If the property on which the courthouse and jail are located be subject to such local assessments, to strictly enforce the only provisions of the act providing for the collection thereof would require a levy on and sale of the public property and an eviction of the occupants thereof, and would deprive the county of the instrumentalities by means of which, through its officers, it is enabled to perform the functions of government. To levy upon and sell the courthouse and jail would be to allow the municipality to invade the power and authority of the county, and seriously interfere with its governmental operations and the administration of justice. We think a power of such far-reaching consequences is not to be inferred from a general act; but, to entitle a municipality to its exercise, it would have to be clearly granted by the Legislature, if it could be granted at all by it, and we do not think that the charter of La Grange, giving power generally to assess abutting property for local street improvements, gives it the power to collect from the county any part of the costs of such improvements.

2. It is contended by counsel for the plaintiff in error that the act of 1906 (Acts 1906, p. 119) construed in connection with the act creating a charter for the city of La Grange, gives the city the power to collect such assessment. We do not think the act of 1906 has any application to a case of this kind. This act gives authority to the Governor where the state is the owner, to the ordinary or chairman of the board of county commissioners where the county is the owner, and to the mayor where the municipality is the owner, of property fronting on a street in a municipality, to sign an application for such street to be improved, but has no application except "whenever the abutting owners of any street or sidewalk in this state petition to have the same improved." Under the allegations of the petition this act has no application to the case in hand.

The court committed no error in sustaining the general demurrer; and the judgment dismissing the petition is affirmed. All the Justices concur.

(132 Ga. 366)

PETERSON v. LOTT et al.

(Supreme Court of Georgia. April 14, 1909.)

1. DECISION IN FORMER ACTION.

In *Wadley Lumber Co. v. Lott*, 130 Ga. 185, 60 S. E. 836, the deed made by Peterson to Lott in 1882, upon the construction of which their respective rights in the present case depend, was construed. It was there held that this instrument conveyed the fee in the land therein described to Lott, subject, however, to

the right of Peterson to have it reconveyed to him when Lott died, or offered the land for sale, upon his paying the original purchase money and the value of all improvements placed by him upon the land, estimated in the manner provided for in the deed, and that, as neither of these events had happened when the *Wadley Lumber Company* cut the sawmill timber from the land, the title conveyed by Peterson to Lott was then as completely in Lott as it was on the date of the execution of the deed, and he therefore had the right to recover from the lumber company for the cutting of such timber, although such company cut the timber under a conveyance of the timber which it received from Peterson in January, 1904, and the judgment of the trial court to this effect was affirmed.

2. JUDGMENT (§ 405*)—EQUITABLE RELIEF—GROUNDS.

It follows that, although Lott, since he recovered this judgment against the lumber company, may have offered the land for sale, and may thereafter have refused to accept from Peterson the amount of the original purchase money for the land, together with the value of the improvements placed by Lott thereon, and to thereupon reconvey the land to Peterson, the latter is not, under a cross-petition seeking specific performance, but making no case for equitable set-off against an insolvent, filed by him in a suit brought against him by the former to recover damages for the cutting and using of the timber by the lumber company, entitled to have Lott, by injunction, prevented from collecting the amount of his judgment against such company, although, if he does so, Peterson may be liable to the lumber company for a breach of the warranty of title to the timber, contained in the deed which he made to that company.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 405.*]

(Syllabus by the Court.)

Error from Superior Court, Coffee County; *T. A. Parker*, Judge.

Action by *J. S. Lott* and others against *B. Peterson*. Judgment for plaintiffs, and defendant brings error. Affirmed.

O. T. Roan and *F. Willis Dart*, for plaintiff in error. *J. W. Quincey*, *E. D. Graham*, *Levi O'Steen*, and *Lankford & Dickerson*, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(132 Ga. 477)

FLETCHER v. McMILLAN.

(Supreme Court of Georgia. April 19, 1909.)

1. CONTRACTS (§ 171*)—ENTIRE OR SEVERABLE.

If a person entered into a written agreement with another to obtain for the latter a body of timber, including several tracts, to be paid for in an entire amount, received \$1,000, and agreed to repay it if he should fail to procure the timber from the owner of it, this was an entire contract, and was not performed by procuring only a portion of the timber described in it from the owner, unless there was a waiver of complete performance by the other party, or a modification of it by the parties thereto.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 754, 757; Dec. Dig. § 171.*]

2. CHARGE NOT ERRONEOUS.

The charge of the court was in substance in accord with the ruling in the preceding head-

note, and was not erroneous for any reason assigned in the motion for a new trial.

8. APPEAL AND ERROR (§ 216*)—GROUNDS—FAILURE TO CHARGE.

In the absence of any request to charge duly made, the omission to charge certain propositions of law, of which complaint was made in the motion for a new trial, furnishes no ground for a reversal. The court charged in regard to the theory of the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

4. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

Where the plaintiff alleged that he had paid to the defendant a stated sum of money under a written contract, by which the defendant agreed to return the money upon failure to procure certain timber for the plaintiff, and that the defendant failed to procure the timber, but refused to return the money, and where the defendant denied all the substantial allegations of the petition, though in an amendment he impliedly admitted the contract, and set up certain affirmative grounds of defense, but did not withdraw the general denial, or make admissions which would make out a prima facie case for the plaintiff, the latter was entitled to the opening and conclusion of the argument. *Mitchem v. Allen & Barrow*, 128 Ga. 407, 57 S. E. 721.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

5. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence. (Syllabus by the Court.)

Error from Superior Court, Irwin County; U. V. Whipple, Judge.

Action between E. G. Fletcher and T. A. McMillan. From the judgment, Fletcher brings error. Affirmed.

McDonald & Quincey, for plaintiff in error. Graham & Graham, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(131 Ga. 820)

EAVES v. FEARS et al.

(Supreme Court of Georgia. Dec. 19, 1908. Rehearing Denied Jan. 21, 1909.)

1. PARENT AND CHILD (§ 2*)—EMANCIPATION—“VOLUNTARY CONTRACT.”

Civ. Code 1895, § 2502, providing that parental power over a child is lost “by voluntary contract releasing the right to a third person,” does not relate to a contract of a parent apprenticing his child to a third person, and such “voluntary contract” of a father may be valid and binding on the father, although he does not therein apprentice his child.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 2.*]

2. PARENT AND CHILD (§ 2*)—PERSONS IN LOCO PARENTIS—GRANDPARENTS—GIFT OF CHILD.

Where a father makes an absolute and unconditional gift of his child to its grandparents, who accept it and take it into their home as one of the family, and there is no express agreement, or facts and circumstances connected with the transaction from which an agreement could be implied, that any one other than such grandparents is to receive the proceeds of the

labor of such child, or is to maintain or care for it, *held*:

(a) The grandparents stand in loco parentis to such child, and are entitled to the proceeds of its labor, and are bound for its care, maintenance and support.

(b) Such contract is not without consideration.

(c) Such contract is sufficiently definite and clear in its terms to be valid and binding on the father.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.*]

8. NO ERROR.

In this case the court did not err in awarding the custody of the child to the defendants.

(Syllabus by the Court.)

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Habeas corpus by F. B. Eaves against J. P. Fears and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. R. Arnold, J. L. Mayson, Cobb & Erwin, and Slaton & Phillips, for plaintiff in error. H. S. West, and Tye, Peeples, Bryan & Jordan, for defendants in error.

HOLDEN, J. The plaintiff sued out a writ of habeas corpus to recover the possession of his child from its maternal grandparents, and to the order of the court awarding the custody of the child to the defendants the plaintiff excepted. On November 6, 1902, the plaintiff married the daughter of the defendants. The child was born on October 20, 1903, and the mother died seven days thereafter. The defendants have had possession of the child since the death of its mother. There was evidence offered by the defendants that the father gave them the child. The father denied that he had ever made any contract whereby he had lost his parental control over the child.

1. Civ. Code 1895, § 2502, provides: “Until majority, the child remains under the control of the father, who is entitled to his services and the proceeds of his labor. This parental power is lost—(1) By voluntary contract releasing the right to a third person.” Counsel for the plaintiff contends that the meaning of the provision that the parental power is lost by voluntary contract releasing the right to a third person relates only to apprenticing the child by the father. This provision was in the Code of 1863, and in 1865 the Legislature passed an act providing that the father might apprentice his child (Acts 1865-66, p. 6), which is now embodied in section 2604 of the Civil Code of 1895. This section provides as follows: “All minors may, by whichever parent has the legal control of them, be bound out as apprentices to any respectable person until they attain the age of twenty-one years, or for a shorter period.” Both of the sections above referred to were placed in the Codes of 1863, 1873, and 1882, as well as the Code of 1895. We do not think that the words “voluntary con-

tract," in section 2502, mean a contract of apprenticeship. We think the Legislature, in passing the act of 1865 giving the father the right to apprentice his child, intended to legislate upon a separate and distinct matter from that embraced in section 2502. By the passage of this act after the Code of 1863, embracing the provisions of section 2502 of the present Code, and by retaining these two distinct provisions in all the Codes since its passage, it was evidently the intention that the loss of parental power, as provided in section 2502, meant something other than apprenticing. This section has been construed in several decisions of this court, and it has nowhere been held that a contract releasing the parental power to a third person, referred to in that section, merely related to the apprenticing of a child by its parents. In this connection, see *Looney v. Martin*, 123 Ga. 209, 51 S. E. 304; *Carter v. Brett*, 116 Ga. 114, 42 S. E. 348; *Lamar v. Harris*, 117 Ga. 993, 44 S. E. 866, and other authorities cited in these cases.

We agree with learned counsel for plaintiff that the law never intended that a child should be the subject of bargain and sales, as is property. It was never contemplated that all of the laws governing a contract of bargain and sale of property should apply to a contract whereby a father released control of his child. The law presumes all men honest in their dealings, and likewise presumes that a parent, in disposing of his child, would be actuated by motives that are proper, and that his chief concern would be the welfare of his child. It would be an inhuman, and, indeed, a monstrous act, for a father to dispose of his child as he would a piece of property, solely to relieve himself of his child's care and support, or for any pecuniary considerations. The law, in providing that he could lose his parental power by a voluntary contract, never contemplated that the father would dispose of his child solely for the purposes above stated, nor would it look with favor on any such contract. The state is vitally interested in the existence, and the proper moral, intellectual, and physical training of its children, who are to become its men and women; and in looking to the welfare and well-being of the child itself, when it provided that the father could release his parental power over his child to another, it presumed that the parent would, in making such contracts, always have in mind the interests of his child. We do not think that the Legislature, in the two sections above quoted, meant to provide that the parental power could be lost only by a contract of apprenticeship. Under section 2604 the parent can apprentice his child, and under section 2502 he can lose his parental power by contract which does not involve all the incidents of the contract of apprenticeship, though, as above stated, it did not contemplate a contract with all the in-

cidents of a bargain and sale of property. Moreover, the law provides that in the trial of habeas corpus cases the court shall have the power to give custody of the child to a third person. The law would not permit a person to whom a parent has released his parental control over a child to have its custody, if such person was unfit. One of the main concerns of the court in awarding the custody of the child is the welfare of the child itself, and no parent could make such an absolute disposition of his child that the court could in no event disregard the contract of the parent.

2. Counsel for the plaintiff contends that, if any contract was made by the plaintiff releasing his parental control over his child, it was without consideration, and its terms were not definite and certain. The evidence of Mrs. Fears was to the effect that on the day of the death of the mother of the child the plaintiff gave the child to her, and she agreed to take it and try to raise it, and did then take it. Nothing was said as to the time during which she was to have the child. She took the child, and a few weeks thereafter the father told her that he had given her the child for her life. There were several other witnesses, who testified that thereafter the father made the statement to them that he had given the child to Mrs. Fears. There is testimony by Mr. Fears, one of the defendants, relating to a conversation had with the plaintiff, several weeks after the death of the mother, wherein the plaintiff used the expression, "I have given you my baby, and I am surprised to think you all think I am such a boy, to think I would come in and take the baby away from you." In answer to an inquiry by the court as to what length of time the child was given him by the plaintiff, Mr. Fears answered, "Unlimited. unreservedly," and he further testified concerning this conversation: "I said my wife and I would rather have a contract. * * * I said the baby is a tie that you have given us, and binds you to our hearts as any child we have got." This witness further testified that during the conversation the plaintiff said: "Unreservedly, it is yours; don't you and your wife worry no more about this child." Mr. Fears further testified: "After Eaves told me the baby was ours, I and my wife talked the matter over. My daughter was keeping a boarding house. We decided it was no place to raise a child in a boarding house. I then went and had a home built beyond that, for the purpose of raising this little child, where it could be properly treated and properly trained, without having boarders around it."

Both defendants filed an answer wherein they claimed that the father had made a contract whereby he released his control and rights "to these defendants." It does not appear from any of the testimony in the case that anything was ever agreed upon between

the parties as to who should have the proceeds of the labor of the child, or who should maintain and support it; but an absolute, definite, and unconditional gift of a child to another, who takes it with the statement that he would try to raise it, would put such other person in loco parentis to the child, with all the duties and rights of a parent. We do not mean to say that if the facts and circumstances connected with the contract were such as to leave it in serious doubt as to who was to receive the proceeds of the labor of the child, or provide for its maintenance and support, the contract would be sufficiently definite and clear in its terms. But where there are no facts or circumstances from which it might be inferred that the parent, or any one other than the person accepting the child as a gift, is to receive such proceeds or provide such maintenance, the person receiving from the parent the child as a gift would have all of the rights, and would have imposed on him all of the duties of a parent.

In the case of *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301, it was ruled: "Persons standing in loco parentis are entitled to the rights and subject to the liabilities of an actual parent, though not legally compelled to assume that relation." In 21 Am. & Eng. Enc. Law, 1050, the doctrine is laid down that "persons standing in loco parentis to minor children are also bound to support them." In the case of *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497, 498, the court says: "The case made by Bateman was substantially this: That his wife was the grandmother of Thorp's daughter, and the latter was taken into Bateman's family when she was a very young child, where she remained and was supported by Bateman for several years under an agreement that she should live there until she became of legal age; that, Mrs. Bateman having died, Thorp came and took his daughter away against the will of Bateman, and without making any compensation, thereby depriving the latter of the benefit he might have derived from the labor of the daughter afterwards. The action was grounded on an implied assumpsit, and the plaintiff in the court below was allowed to recover. It can hardly be pretended that in the absence of an express arrangement Thorp would have been liable to pay for his daughter's board and support. The presumption always is, when a child is thus taken into a family, that neither support nor services are expected to be compensated, except as the one compensates the other; in other words, that the child comes in as a member of the family, and for the time being occupies substantially the same position as would a member of the family by nature." In 29 Cyc. 1671, it is stated: "A person standing in loco parentis is bound for the maintenance, care, and education of the child, and liable for necessities furnished to it, and he cannot be allowed to assert a claim for

the support of the child to whom he stands in such relation, in the absence of an express or implied understanding that he is to be compensated therefor."

In this case there was no express or implied understanding that the defendants were to be compensated for the care and support of the child of the plaintiff, or that they were not entitled to the proceeds of its labor. The law imposes on the father the duty of maintaining and supporting his child; and, while he may release his parental control and contract for this support and maintenance to be furnished by others, we do not mean to hold that he could relieve himself of this legal obligation, were the support not properly furnished by the person with whom he contracted. In 21 Am. & Eng. Enc. Law, 1050, this text is employed: "A husband is not bound in law to provide for a child of his wife by a former husband; but if he receives such child into his home, and holds him out to the world as a member of his family, he stands to him in loco parentis, and incurs the same liability for his support as in the case of his children. In such case there is no implied contract on the part of the child to pay for its support, and the stepfather cannot, as against the child, charge or recover compensation therefor." In the case of *Bentley v. Terry*, 59 Ga. 555, 27 Am. Rep. 399, it was held that a contract, though made with the wife by the child's father, will be enforced, if acquiesced in by the husband. On page 557 of 59 Ga. (27 Am. Rep. 399) the court says: "Nor do we think that she could not make such a contract under the circumstances of this case. Her husband acquiesces in it. He joins her in defense of this suit. He received the child at his house, and supports his wife throughout in the transaction. The contract is binding both upon the wife and himself. Besides, this is a sort of matter that the wife will always manage, and the husband must object in time if he does not wish to be bound by her acts. In the case of *James v. Cleghorn*, 54 Ga. 10, the contract there enforced was with a married woman. But it is clear, in this case, that the husband has ratified all that his wife did." We think the court was authorized, under all the evidence in the present case, to find that the plaintiff had made a contract, sufficiently definite and clear in its terms, releasing his parental control over his child to the defendants, and that there was a sufficient consideration to support the same.

3. The evidence shows that the plaintiff and the defendants are all able to maintain and rear the child, and there was no question made in the evidence as to the fitness of the father, or the grandparents, to raise her. She has been with the grandparents since she was a few days old, and has known no other home. They were boarding when they received her; but, thinking it would be better for the child to raise her in a home of

their own, rather than in a boarding house, they ceased boarding and built a home, to which they moved. The evidence shows them to be greatly attached to the child, that they treat her with loving kindness, and evince for her the deep affection which grandparents usually feel for their grandchildren. There were no errors committed on the trial of which complaint is made which require the grant of a new trial.

Judgment affirmed. All the Justices concur.

(182 Ga. 257)

SCOTT v. STATE

(Supreme Court of Georgia. April 14, 1909.)

1. HOMICIDE (§ 236*)—INTENT—INSTRUCTIONS.

Under the evidence disclosed in the record, a charge of the court that "if you should find in this case that the defendant used a weapon, a shotgun, and that was a weapon in its nature likely to produce death, and that he, in shooting that gun, shot and killed the party alleged in the bill of indictment, intending to shoot her, that if there were no circumstances which would justify or mitigate the shooting, he would none the less be guilty of murder, although at the time he so shot he might not have intended to take the life of the party whom he shot," was not open to the criticism that it was injurious to the defendant, in "that it relieved the state from the legal duty upon it to show a specific intention to kill at the moment the fatal shot was fired, and left the jury to infer from the court's charge that the defendant would be guilty of murder if he shot his wife without an intention to kill her, and that the shooting was not accidental."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 586; Dec. Dig. § 236.*]

2. CRIMINAL LAW (§ 922*) — NEW TRIAL — GROUNDS—FAILURE TO INSTRUCT.

In the absence of a timely written request, failure to give instructions upon the subject of impeachment of witnesses is not cause for the reversal of a judgment refusing a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2216; Dec. Dig. § 922.*]

3. CRIMINAL LAW (§ 956*)—NEW TRIAL—DISQUALIFICATION OF JUROR—MOTION—AFFIDAVITS—SUFFICIENCY.

Where a defendant, after conviction, seeks a new trial on the ground of partiality of one of the jurors, shown by certain declarations of the juror made before his acceptance, it is incumbent on the defendant, on the hearing of the motion for new trial, to prove affirmatively that neither he nor his counsel had knowledge of the alleged disqualification of the juror before the rendition of the verdict.

Testimony of the witness by whom the alleged disqualification was sought to be proved, merely to the effect that, after hearing the juror make the disqualifying declarations, he, the witness, had not communicated them either to defendant or his counsel before the rendition of the verdict, was not sufficient to show want of such knowledge by defendant or his counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2385, 2386; Dec. Dig. § 956.*]

4. ASSIGNMENT OF ERROR ABANDONED.

In the brief of counsel for plaintiff in error before this court the ground of the motion for new trial which related to newly discover-

ed evidence was expressly abandoned. The evidence was sufficient to support the verdict.

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Luke Scott was convicted of murder, and he brings error. Affirmed.

F. W. Copeland and C. D. Rivers, for plaintiff in error. W. H. Ennis, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

ATKINSON, J. The defendant was convicted of murder, with recommendation that he be punished by imprisonment in the penitentiary for life. He moved for a new trial, which being refused, exception was taken by writ of error to this court. The evidence disclosed that the deceased was the wife of the defendant, and that the cause of her death was a wound inflicted by the defendant by discharging a gun loaded with small shot, which took effect in the calf of her leg. The theory of the defense was accident.

1. One of the grounds of the motion for new trial complained that the court erred in charging: "If you should find in this case that the defendant used a weapon, a shotgun, and that was a weapon in its nature likely to produce death, and that he, in shooting that gun, shot and killed the party alleged in the bill of indictment, intending to shoot her, that if there were no circumstances which would justify or mitigate the shooting, he would none the less be guilty of murder, although at the time he shot he might not have intended to take the life of the party whom he shot." The criticism made upon the charge was "that it relieved the state from the legal duty upon it to show a specific intention to kill at the moment the fatal shot was fired, and left the jury to infer from the court's charge that the defendant would be guilty of murder if he shot his wife without an intention to kill her, and that the shooting was not accidental." Inasmuch as death actually ensued as a result of the gunshot, the charge of the court was sustained by the rulings reported in the cases stated below, and was not sufficient cause for the grant of a new trial. *Stovall v. State*, 106 Ga. 443, 447, 32 S. E. 586; *Freeman v. State*, 70 Ga. 736, 739; *Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449; *Hill v. State*, 41 Ga. 485; *Chelsey v. State*, 121 Ga. 340, 344, 49 S. E. 258; *Napper v. State*, 123 Ga. 573, 51 S. E. 592.

2. Another ground of the motion for a new trial was: "Movant further contends that evidence was introduced by defendant to impeach the witness Lee Shropshire, who testified for the state, and without whose testimony, as defendant contends, there could have been no conviction, and the court failed to refer to said impeaching testimony in its charge, on which account movant contends he was deprived of a legal trial." This ground

of the motion fails to set forth or otherwise specify the impeaching testimony relied on; but, aside from this, a judgment refusing a new trial on a ground complaining of a failure to charge the law with regard to impeachment of witnesses, where no timely written request was made for such charge, will not be reversed. *Caesar v. State*, 127 Ga. 710, 57 S. E. 66.

3. Another ground of the motion for new trial was as follows: "Movant further amends, and says a new trial should be granted on account of the partiality of one of the twelve jurors that found defendant guilty, and because of his prejudice against defendant when he qualified as a juror in said case, as shown in the affidavit of D. W. Ledford, hereto attached as a part of this amendment." The affidavit referred to was as follows: "Affiant is a bailiff in said court, and in such capacity has been in attendance upon said court and its trial juries at the present September term, 1908; that he knows C. F. Hense, who was one of the jurors who tried defendant and returned a verdict of guilty against him at said term; and affiant says that he heard said above-named juror say, prior to being sworn and accepted as a juror in the above-stated cause, and while serving as a juror in another case. Affiant says that he never communicated these facts to defendant, or to either of his counsel, until after the conviction of defendant; that he heard C. F. Hense say that he did not care if he did get on the jury to try Luke Scott, that it would not take long to hang him; that said Luke Scott ought to be mobbed, and that said C. F. Hense was then talking of the above-stated cause." There was no affidavit from the defendant or his counsel to the effect that they did not know of the alleged disqualification of the juror. In this respect the motion was defective.

If the defendant or his counsel knew of the incompetency of the juror before verdict, they should have complained then, without waiting to take the chance of any benefit that might flow from a favorable verdict, and, as the presumptions are all in favor of the legality of the verdict, the burden of proof rested upon the defendant to show that neither he nor his counsel knew of the disqualification before verdict. There was no attempt made to prove these negatives, except by the affidavit of the witness offered to impeach the competency of the juror. He merely said that "he never communicated these facts to defendant, or to either of his counsel, until after the conviction of defendant." That is insufficient, because others may have heard the remarks made by the juror, and may have communicated them to the defendant or his counsel, or the witness may have told others what he had heard the juror say, and they may have informed the defendant or his counsel. The requisite proof on questions

of this kind is usually made by affidavits of the defendant and his counsel, in which they expressly deny having had knowledge of the existence of the incompetency of the juror at any time before the verdict. This was done in *Glover v. State*, 128 Ga. 1, 57 S. E. 101, and *Moncrief v. State*, 59 Ga. 470, and other cases where judgments refusing motions for new trials have been reversed.

4. The statement made in the fourth headnote needs no further reference.

Judgment affirmed. All the Justices concur.

(132 Ga. 478)

MANRY et al. v. TWITTY.

(Supreme Court of Georgia. April 19, 1909.)

1. JUDGMENT (§ 143*)—DEFAULT—OPENING—TIME FOR APPLICATION.

Where an application by petition to open an entry of default was made at the trial term of the superior court, in which it was alleged that, when the appearance term convened, the petitioner was not physically able to attend court, that he had employed attorneys and given them full information in regard to his defense and instructed them to file an answer, which he thought they would do, that his attorneys, not finding him at court, did not file any defense, but where it failed to show any reason why the defendant's presence was necessary to the filing of the answer, or that he was sick and unable to be present at or before the time during the continuance of the term when the docket was called and the default entered, or that he had taken any steps for about eight months after the commencement of the return term, alleging that he then discovered the entry of default and moved to open it, the petition was demurrable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 281; Dec. Dig. § 143.*]

2. JUDGMENT (§ 143*)—DEFAULT—OPENING.

If the evidence placed before the court be considered, it showed affirmatively that the default was not entered for about three months after the return term of the court convened, and no excuse for the delay in filing the defense during that time appeared.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 270; Dec. Dig. § 143.*]

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; J. H. Scaife, Judge pro hac.

Petition by W. H. Manry and another to open a default judgment taken against them by W. C. Twitty. The petition was denied, and petitioners bring error. Affirmed.

On July 23, 1908, W. H. Manry and his wife presented to the judge presiding in the superior court of Mitchell county, then in session during an adjourned term, a petition, alleging in brief as follows: They reside in said county. On October 1, 1907, W. C. Twitty filed in the office of the clerk of the superior court an action against the present petitioners to recover certain land. The case was returnable to the October term, 1907, of the court, and service was perfected on the defendants. W. H. Manry, representing him-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

self and wife, went to the county seat and employed a firm of attorneys to represent them in the case. He delivered to the attorneys the copies of the plaintiff's petition which had been served on the defendants, together with their titles to the land in question, made to the attorneys a full and complete statement of the status of the case, and directed them to file the defense to the suit at the October term; but at that term W. H. Manry was sick and unable to attend court, and his attorneys, not finding him there, did not file a defense to the action. "When the October term, 1907, of said court convened, which was the return term of said case, petitioner W. H. Manry was not physically able to attend said court, but thought that said attorneys whom they had employed to file their defense would attend to the same." He would have been present at that term of the court, had he not been sick. The defendants did not know that the case was in default until the term when the petition was filed (April adjourned term, 1908). They came to court prepared to go into the trial, and upon inquiry as to the status of the case they learned that it had been marked in default at the October term, 1907. They have a legal, meritorious defense to the suit; the husband holding bond for title to the land and the right of possession thereto, having purchased it in 1906 and having from that date been in peaceable possession thereof. The wife is not interested in the land. There is in fact but about two-fifths of an acre involved in the litigation, but upon it the husband, since its purchase, has erected improvements of the value of \$200 or more, and these were made before the action to recover the land was begun. In a dispute as to the correctness of the land line, processioners, with the county surveyor, after having given to Twitty and other parties interested due and legal notice, surveyed the line of the tract, and their finding was in favor of Manry. They tendered the costs, announced that they were ready to proceed to trial, and prayed that the judgment of default be opened.

Twitty demurred to the petition because it set forth no legal reason for opening the default, and because no legal or meritorious defense was filed with the motion or set out therein. Thereupon the petitioners tendered an answer to the original suit, which admitted possession in Manry, denied that the plaintiff had title or that the defendants had received mesne profits of the value alleged by the plaintiff, admitted that they refused to deliver possession to the plaintiff, and alleged that Manry claimed title to the land under bond for title from H. H. Merritt, made March 1, 1908. On the hearing of the motion the respondent directed the attention of the judge to the records of the court in which the suit was pending, and tendered them as evidence. The court admitted them over objection. They showed that at the October term, 1907, the court remained in

session from the 21st to the 25th of October, and was adjourned until January 20, 1908, and remained in session from that date until January 28th, when the October term was finally adjourned. The docket showed that the entry of judgment by default had been made at the October term, 1907. It was admitted that the case had been called in open court but once since it was filed—that is, when the entry of judgment by default was entered—and also that the record did not show that the entry of judgment by default had been made on the last day of the court, or on any other day previously fixed by order of the court for the calling of the appearance docket. After considering the motion to open the default, the records of the court, and the defense tendered by the movants, the judge entered the following order: "Upon hearing this demurrer, the same is hereby sustained, and the motion to open the default judgment is hereby refused and denied." The plaintiff in the original suit was then allowed by the court to take a verdict by default, without the introduction of evidence, and the movants excepted.

E. E. Cox, for plaintiffs in error. Pope & Bennet, for defendant in error.

LUMPKIN, J. (after stating the facts as above). It is not altogether clear whether the presiding judge intended his order to operate as a dismissal on demurrer of the motion to open the default, or as a refusal of the motion upon the facts presented both by the pleadings and evidence. The order stated that the demurrer was sustained, but also added that the motion to open the default was refused and denied. But, in whichever light it is regarded, it must be affirmed, because neither on the face of the application, nor with the addition of the facts disclosed by the evidence, was the movant entitled to have the default opened. If the records of the court be considered in connection with the motion, it appears that the suit was brought to the October term, 1907, of the court of the county in which the defendants resided, as well as where the land lay; that the term of the court met on October 21st, and continued for five days, when it was adjourned until the 20th of January following, and remained in session until January 28th; and that the judgment of default was not entered until during the adjourned term. There is no evidence that during all that time Manry was sick or unable to attend court; nor is there anything to show why the defense could not have been filed during this period of about three months after the commencement of the return term; nor is any reason shown why his being sick, so that he could not attend court, rendered it impossible or even difficult for him or his attorneys to file a defense.

If the evidence be not considered, but only the written motion to open the default, it fail-

ed to state a case which would entitle the movant to have the application granted. On the face of the petition or motion it was alleged that the defendants in the suit to recover the land were duly served, and knew that the October term, 1907, was the return term at which they must plead; that Manry, on behalf of himself and wife, employed a firm of attorneys, delivered to them the copies of the petition and process which had been served on the defendants, together with their title to the land, made to the attorneys a full statement of the status, and directed them to file a defense at the return term. The only excuse for the failure to plead was that at the October term "defendant W. H. Manry was sick and unable to attend court, and his attorneys, not finding him here, did not file a defense to said case." Immediately after this statement followed the allegation that "when the October term, 1907, of said court convened, which was the return term of said case, petitioner W. H. Manry was not physically able to attend said court, but thought that said attorneys whom they had employed to file their defense would attend to the same. Defendant W. H. Manry would have been present at this term of the court, had he not been sick." The petition does not allege that Manry was sick at the time when the default was entered, and it fails to allege when such entry was made. The evidence which the judge admitted may furnish the reason for this omission; but on the face of the motion the entire failure to state the character of this malady, or how serious it was, or how long it continued, or that it existed when the default was entered, is significant. If, as he alleged, he had attorneys, and furnished to them all the information and data necessary for the filing of an answer, and instructed them to do so, it is not apparent how his absence from the court caused a failure to plead at the proper time, or why his presence at court was necessary at all for the purpose of filing an answer. It may, indeed, be conjectured that possibly the payment of a retainer required by his attorneys, or the performance of some other act not disclosed in his pleadings, was necessary as a condition precedent to his having a right to rely upon their representing him and filing pleadings on his behalf. But the causal connection between his absence from court and the absence from the file of an answer in due time is left to surmise.

When the answer to the original suit which Manry now proposes to file is inspected, the fact that his presence for the mere purpose of filing it was unnecessary is patent. It was not required to be verified. It consists of less than half a page of typewritten matter, in which he admits that he is in possession of the land and refuses to deliver it to the plaintiff, and denies that the plaintiff is the owner of it, or is entitled to it, or that the de-

fendant has received mesne profits of the yearly value alleged by the plaintiff. To this is added the following statement: "Defendant W. H. Manry claims title to said land under bond for title from H. H. Merritt, made March 1, 1908." It needs no argument to show that Manry's sickness when the October term of court convened furnished no reason why such an answer could not have been filed before the call of the docket and the entry of the default at some time during the term. The defendant took no action until the April adjourned term, 1908, which was held on July 23d, eight months after the convening of the October term, 1907, when he made his motion to open the default, alleging that he had come prepared to try the case. Neither the allegations nor the evidence (if considered) showed any ground requiring the opening of the default "for providential cause preventing the filing of a plea, or for excusable negligence." The presiding judge correctly declined to open it. Civ. Code 1895, § 5072; *Moore v. Kelly & Jones Co.*, 109 Ga. 799, 35 S. E. 168; *Ingalls v. Lamar*, 115 Ga. 296, 41 S. E. 573; *Brucker v. O'Connor*, 115 Ga. 96, 41 S. E. 245; *Kellam v. Todd*, 114 Ga. 983, 41 S. E. 39.

It was not contended that there was any other error which infected the final judgment, except the refusal to open the default.

Judgment affirmed. All the Justices concur.

(132 Ga. 360)

MITCHELL v. MASURY.

(Supreme Court of Georgia. April 14, 1909.)

1. APPEAL AND ERROR (§ 784*)—DISMISSAL—GROUNDS.

It is no ground to dismiss a bill of exceptions that the certificate thereto directs the clerk to transmit it and the record of the case to the Court of Appeals, where that court, on receipt and examination of the record, being of the opinion that the case is one of which the Supreme Court, and not that court, has jurisdiction, orders the case dismissed from its files and the bill of exceptions and record transmitted to the Supreme Court; it further appearing from an inspection of the record that the Supreme Court has exclusive jurisdiction of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3126; Dec. Dig. § 784.*]

2. APPEAL AND ERROR (§ 783*)—DISMISSAL—GROUNDS.

It is no ground for the dismissal of a bill of exceptions that the brief of evidence considered by the judge in passing on a motion for new trial was not filed pursuant to the order of the judge providing for the filing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3125; Dec. Dig. § 783.*]

3. APPEAL AND ERROR (§ 627*)—BRIEF OF EVIDENCE—TIME FOR FILING.

Where a motion for new trial is filed in term, and, contemporaneously with the grant of a rule nisi calling on the respondent to show cause why the motion should not be granted, the judge passes an order providing "that the movant have until the hearing, whenever it may

be, to prepare and present for approval a brief of the evidence in the said case, the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of the evidence has not been filed in the clerk's office before the date of the hearing, said brief of the evidence may be filed in the clerk's office at any time within 10 days after the motion is heard and determined," and where at the hearing the brief of evidence is approved by the judge and considered by him in passing on the motion for new trial, and where the brief is thereafter filed in the clerk's office more than 10 days after the hearing and determination of the motion for new trial, on the same day the bill of exceptions is certified, and the brief of evidence is incorporated in the record sent to this court by specification in the bill of exceptions, this court will not refuse to consider such assignments of error as depend on the evidence for adjudication, merely because the brief of evidence was not filed with the clerk within 10 days of the disposition of the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2744; Dec. Dig. § 627.*]

4. LANDLORD AND TENANT (§ 303*)—DISPOSSESSORY PROCEEDINGS—AMENDMENT.

An affidavit, which is the basis of a dispossession warrant, and the warrant, after the filing of the counter affidavit, become mesne process, and are amendable by striking out the representative character of the landlord, and allowing the case to proceed in his individual name.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1307-1309; Dec. Dig. § 303.*]

5. LANDLORD AND TENANT (§ 303*)—DISPOSSESSORY PROCEEDINGS—AMENDMENT.

An undated affidavit to dispossess a tenant may be amended by supplying the date, on the trial of an issue formed by the tenant's counter affidavit.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1307-1309; Dec. Dig. § 303.*]

6. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Under the statutory affidavit the tenant can raise the issue that no oath was administered to or taken by the person subscribing the alleged dispossession affidavit. Even if this issue could also be raised by special plea, the striking thereof by the court will not require a new trial, where the defendant is allowed to make the issue under his counter affidavit, and the jury are instructed by the court as to the appropriate law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4110; Dec. Dig. § 1042.*]

7. TRIAL (§ 193*)—INSTRUCTIONS—EXPRESSION OF OPINION.

The charge complained of contained an expression of opinion, and was prejudicial to the plaintiff in error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

8. AFFIDAVITS (§ 11*)—OATH.

If an affiant, at the time of tendering the affidavit to the officer, uses language signifying that he consciously takes upon himself the obligation of an oath, and the officer so understands, and immediately signs the jurat, this will amount to such concurrence of act and intention as will constitute a legal swearing.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 45; Dec. Dig. § 11.*]

9. NEW TRIAL (§ 18*)—GROUNDS—REFUSAL TO STRIKE PLEADINGS.

The refusal of the court, on oral motion, to strike pleadings as insufficient, is not a proper ground of a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 27; Dec. Dig. § 18.*]

10. APPEAL AND ERROR (§ 690*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—EVIDENCE.

An assignment of error that the court allowed the testimony of a named witness to be withdrawn from the jury's consideration is insufficient, where the substance of the testimony is not made to appear. The testimony may have been irrelevant and harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2897; Dec. Dig. § 690.*]

11. APPEAL AND ERROR (§ 690*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—EVIDENCE.

Complaint as to the allowance of testimony in evidence must disclose the substance of the testimony which is alleged to be inadmissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2897; Dec. Dig. § 690.*]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; C. P. Hansell, Judge pro hac.

Action by Grace Masury against J. W. H. Mitchell. Judgment for plaintiff, and defendant brings error. Reversed.

Fondrew Mitchell and Roscoe Luke, for plaintiff in error. J. H. Merrill and Haygood & Cutts, for defendant in error.

EVANS, P. J. 1-3. On the call of the case the defendant in error moved to dismiss the bill of exceptions, on the ground that the certificate thereto directed that it and the record be transmitted to the Court of Appeals, and, as the Court of Appeals had no jurisdiction of the case, no bill of exceptions had been legally filed in the Supreme Court. It appears from the record that the Court of Appeals, on an examination of the record, passed an order directing that the case be dismissed from its files, and that the bill of exceptions and the record be transmitted to the Supreme Court. The record was accordingly transmitted, and on an inspection thereof it appears that the Supreme Court has sole jurisdiction of the case; and under the ruling in Dawson v. State, 130 Ga. 127, 60 S. E. 315, such case will be retained and entered on the docket of the Supreme Court for hearing and determination. Nor will the writ of error be dismissed on the ground stated in the second headnote. Cook v. Childers, 94 Ga. 718, 19 S. E. 819.

Counsel for plaintiff in error make the further point that, even if the failure to dismiss the bill of exceptions on the ground that the brief of evidence considered by the judge in passing on the motion for a new trial was not filed pursuant to the order of the court, still such brief should be disregarded, and such assignments as are depend-

ent upon the evidence for determination present no question for decision. Where a term order allows the movant until the hearing to make out and present a brief of the evidence for the approval of the court, and to file the same with the clerk within 10 days thereafter, it has been held that a brief which has been approved by the judge, but not filed in the clerk's office at the time of the hearing, is sufficient to prevent the dismissal of the motion for a new trial. *Elmore v. Thaggard*, 130 Ga. 701, 61 S. E. 726. The brief of evidence is an essential part of a motion for new trial, and its approval by the judge under an order allowing him to do so at the hearing, and making provision for its subsequent filing, is the legal equivalent of an entry of filing upon the brief by the clerk. *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854. Such being the case, the limitation of time in the order providing for such subsequent filing after the hearing is necessarily directory, and not mandatory; and if the brief in point of fact be filed by the time the bill of exceptions is certified, and such brief be specified in the bill of exceptions as a part of the record, and accordingly transmitted, this court will consider and pass upon such assignments of error as depend upon an examination of the evidence for their determination.

4. The case under consideration arose in this manner: On October 11, 1900, Mrs. Grace Masury leased in writing to J. W. H. Mitchell, for a term of five years, a certain house and lot for \$200 per annum, payable quarterly in advance. On June 6, 1905, Mitchell wrote to Mrs. Masury, proposing to renew the lease for the same term of years, to which Mrs. Masury replied, June 20, 1905, as follows: "Mr. John W. H. Mitchell, Thomasville, Ga.—Dear Sir: Your favor of 6th instant came to hand to-day, and in reply would say I am willing that you should release the property on which you are now living at the same rate. At the extremely low rate which you pay, it seems to me that you could keep the premises in slightly better repair. The renewal of the lease can be drawn by my son-in-law, Mr. Sturgis, before the present one expires; and after the signing of the new lease you will kindly pay the rent to me directly. Mr. Sturgis will acquaint Mr. Mallette of this plan in due time. June 20, 1905. Yours truly, [Signed] (Mrs.) Grace Masury, per E. M. S." Mitchell remained in possession, paying rent according to the terms of the expired lease, and in April, 1906, Sturgis and Mitchell had an interview relative to the preparation of a new lease. Sturgis prepared a lease contract, and sent it to Mitchell for signature, who refused to sign it. On August 24, 1907, Mrs. Masury gave Mitchell written notice that she had agreed to sell the place, and for him to vacate. Mitchell declined to surrender possession, and on November 16, 1907, Mrs.

Masury sued out a dispossessory warrant. Mitchell filed the statutory counter affidavit thereto, and on February 4, 1908, Mrs. Masury dismissed her proceedings. On the same day, but after the dismissal of the dispossessory warrant proceedings, Mrs. Masury's attorney, W. C. Snodgrass, made affidavit as attorney for Mrs. Masury, executrix of the last will and testament of John W. Masury, deceased, that Mitchell occupied the premises (the same as described in the former proceedings) as a tenant at will; that demand was made for the same on August 14, 1907; that there was \$50 past-due rent, which rent was demanded after due, and payment refused. An eviction warrant issued, and Mitchell filed, with the officer to whom it was given to execute, his counter affidavit denying that he was a tenant holding over, and denying that he was due any rent. The affidavit and warrant of the landlord and the counter affidavit of the tenant were returned to the superior court for trial, and the plaintiff prevailed.

At the trial the plaintiff moved to amend the affidavit and eviction warrant by striking therefrom the words, "executrix of the last will and testament of John W. Masury, deceased," so that the cause may proceed in the name of Grace Masury. The amendment was allowed, and pendente lite exceptions were taken. All affidavits that are the foundation of legal proceedings are amendable to the same extent as ordinary declarations. Civ. Code 1895, § 5122. In an action by or against an executor, the declaration may be amended by striking out the representative character of the plaintiff. Civ. Code 1895, § 5106.

5. The defendant moved to strike the affidavit because it was undated, and the court allowed the date to be supplied by amendment. The allowance of this amendment was proper. Civ. Code 1895, § 5106.

6. At the trial term the defendant filed his plea in abatement on the ground that no oath was administered to or taken by the person who subscribed the alleged affidavit upon which the eviction warrant issued. The court struck the plea, and exception pendente lite was taken. It is immaterial to decide whether this defense could have been made by special plea, because, after the court made this ruling, the defendant, on his own initiative, examined as witnesses both the person alleged to have made the affidavit and the magistrate before whom it is alleged to have been made as to the execution of the affidavit, and whether any oath was administered at the time, and the court instructed the jury on this subject. The defendant was allowed to make the defense, notwithstanding his plea in abatement was stricken, and can have no real ground for complaint because of the refusal of the court to separately submit the issue. See *Le Master v. Orr*, 101 Ga. 762, 29 S. E. 32.

7. On the trial, in addition to the facts already appearing, evidence was introduced by the plaintiff tending to show that some time in April, 1906, Sturgis (the plaintiff's attorney) and Mitchell met and agreed upon the terms of a lease, which Sturgis reduced to writing according to his understanding of the agreement. One of these terms was that the landlord reserved the right to sell the premises on 60 days' notice. Sturgis sent the lease contract to Mitchell for execution, who refused to sign it. Mitchell testified that he did not sign the lease contract which Sturgis prepared, because its terms were different from the old lease, which was renewed by Mrs. Masury's letter of June 20th. The old lease expired October 1, 1905, and from that time to January 1, 1908, Mitchell has paid the rent to Mrs. Masury. The court charged: "In this case it is agreed that Mr. Mitchell, the defendant, was a tenant of Mrs. Masury of the property known as the Blackshear place, on the Boston road, on the outskirts of Thomasville, and that Mrs. Masury is seeking to recover the possession of that property from the tenant on two grounds—that he is a tenant at will, a tenant holding over beyond his term, who becomes, under such circumstances as testified here, a tenant at will; that is, if he holds beyond his term, and the landlord accepts rent from him, allows him to go on, accepts rent, that makes him a tenant at will." The criticism is that the court expressed an opinion that under the testimony in the case the defendant was a tenant at will. The defendant in his pleading and in his testimony denied that he was a tenant at will. It was his contention that his letter and Mrs. Masury's reply extended the provisions of the old contract for a period of five years; while the landlord contended that the letter disclosed on its face that it was not to be considered as closing up a lease contract, but only indicated her willingness to re-lease the property at the same rate. It is not altogether clear that the landlord intended by her letter that the new lease should embrace all the terms and covenants of the old lease, or only that the proposition as to rental price was absolutely accepted, leaving the other provisions, such as duration of term, etc., to be incorporated in the new lease. But Mitchell rejected the lease contract prepared by Sturgis in the spring of 1906, and continued to pay rent, according to his contention, pursuant to the obligation of the old contract, until January 1, 1908, and that the rent was received by Mrs. Masury with knowledge that he was relying upon her letter as extending the old contract, with all its provisions, for five years; and, if the jury should find such was the truth of the case, then Mitchell would not be a tenant at will. The charge was hurtful for the reason given.

8. Exception is taken to this charge: "There must be enough before you to satisfy your mind that the party making the affidavit meant to swear to it, and the officer so understood it—meant to swear to it, and to swear to the truth of it, and attest it." The court was instructing the jury upon the question as to whether there had been any affidavit made upon which the dispossessory warrant issued, and the criticism is that an intention to make an affidavit is treated as the equivalent of its actual execution. The excerpt to which exception is taken is but a fragment of what the court charged. The jury were instructed in the same connection: "There is no special form of words necessary to constitute an oath; but it is necessary for enough to be said by affiant to indicate to the officer that he wanted to swear to it, and did swear to it, and the officer so understood it, and accepted it as such, and signed it accordingly." According to the ruling in *McCain v. Bonner*, 122 Ga. 846, 51 S. E. 36, there was no error in the full instruction.

9-11. Than as otherwise indicated, no cause for a new trial is made to appear.

Judgment reversed. All the Justices concur.

(6 Ga. App. 77)
WYNN v. GEORGIA RY. & ELECTRIC CO.
 (No. 1,513.)

(Court of Appeals of Georgia. April 15, 1909.)

1. CARRIERS (§ 250*)—TENDER OF FARE—SUFFICIENCY.

A passenger upon a public conveyance may tender to the common carrier a larger sum than the amount due as fare in payment thereof, and require the carrier to return the change. The sum tendered, however, must be a reasonable amount, and not unduly disproportionate to the amount of the fare.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1001; Dec. Dig. § 250.*]

2. CARRIERS (§ 250*)—TENDER OF FARE—REQUEST FOR CHANGE—SUFFICIENCY.

A street railway company may enact and enforce a reasonable rule limiting the amount of change its conductors shall be required to make, when a sum in excess of the fare is tendered by the passenger. A rule that the conductors shall make change to an amount not exceeding \$2 is reasonable; and, where such a rule exists, the tender of a \$5 bill in payment of the 5-cent fare, with a request for a return of the change, is not a good tender of the fare.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1001; Dec. Dig. § 250.*]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. A. Wynn against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wynn brought suit against the Georgia Railway & Electric Company for damages

on account of being refused passage on one of its street cars. The case was heard before the trial judge upon a stipulation as to the facts as follows: "At the time and place named in the petition, plaintiff offered the conductor of defendant's car a \$5 bill, to pay the regular fare of 5 cents for passage on the car. This \$5 bill was the smallest change plaintiff had in his possession. The conductor refused to take said \$5 bill, and to take plaintiff's fare out of it, for the reason that the conductor did not have change for said \$5 bill. There was at the time in force a rule of the defendant requiring its conductors to keep on hand change to the amount of \$2, and not requiring them to keep on hand any greater amount of change than \$2. The conductor, when plaintiff offered the \$5 bill, and refused to pay fare in any other way, stopped the car and expelled plaintiff therefrom." The judge found in favor of the defendant, and the plaintiff excepts.

Moore & Branch, for plaintiff in error.
Rosser & Brandon and Ben J. Conyers, for defendant in error.

POWELL, J. (after stating the facts as above). 1. In ordinary commercial transactions the tender made for the payment of any debt ought to be for the exact sum due. The tender of a larger sum is good, however, provided a return of the balance is not required; but, if the tender of the larger sum is coupled with a demand for the return of the change, the person to whom the tender is made may decline to accept it. 28 Am. & Eng. Enc. of Law (2d Ed.) 17, 18. This rule, however, is not strictly applicable to passengers on public conveyances; the rule in such cases being that the passenger need not tender the exact fare, but may tender a reasonable sum and require a return of the difference between the actual fare and the amount tendered. 6 Cyc. 547; 28 Am. & Eng. Enc. of Law (2d Ed.) 167.

2. But few cases have arisen involving the question as to what would be a reasonable tender by a passenger upon a street car where the fare is only 5 cents. As in other matters affecting its relations with the public, which have not been made the subject-matter of statute or specific regulation by the general law, the carrier has a right to make reasonable rules touching the question as to how large a coin or bill it will accept and make change from as a tender for fare by the passenger. In the case of Barrett v. Market Street R. Co., 81 Cal. 296, 22 Pac. 359, 6 L. R. A. 336, 15 Am. St. Rep. 61, where it appeared the company had not promulgated a rule upon the subject, it was held that the tender of a \$5 gold coin for a fare of 5 cents was not unreasonable. This case, so far as we have been able to find, is the only

one holding so large a tender to be reasonable in such a case. In the case of Knoxville Traction Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992, 6 L. R. A. (N. S.) 579, the company had a rule requiring passengers to present, in payment of the 5-cent fare, a bill or coin not exceeding \$5; and this was held reasonable. In Barker v. Central Park R. Co., 151 N. Y. 238, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626, it was held that, where the street railway company required its conductors to accept any amount up to \$2, the rule was reasonable, and the tender of \$5 in payment of the fare was not a good tender. This case cites and distinguishes the California case, cited above, pointing out that in that case there was no rule on the subject, and also that the decision was probably influenced by the fact, noticed in the course of the opinion in the California case, that in that state at that time the \$5 gold piece was the smallest gold coin in general use among the people. The ruling in the case of Barker v. Central Park R. Co., supra, was followed in the case of Muldowney v. Pittsburg, etc., Traction Co., 8 Pa. Super. Ct. 335. In the case at bar the street railway company had a rule limiting the amount of change to be made by the conductor to \$2. We agree with the New York and the Pennsylvania courts that this rule is reasonable, and that the tender of a \$5 bill in payment of 5-cent fare is unreasonable.

Judgment affirmed.

(6 Ga. App. 46)

HUNTLEY MFG. CO. v. NIXON GROCERY CO. (No. 1,357.)

(Court of Appeals of Georgia. April 15, 1909.)

APPEAL AND ERROR (§ 588*)—RECORD—BRIEF OF EVIDENCE—COMPLIANCE WITH STATUTE—NECESSITY.

There is no brief of the evidence in this case, as required by Civ. Code 1895, §§ 5484, 5488. What purports to be a brief of the evidence consists of a lengthy correspondence between the parties, the many letters being given in full, with no attempt to brief their contents. This court cannot undertake to winnow the wheat from the chaff, or separate the material from the immaterial, in the evidence. This work can be better done by the attorneys; and, unless the statute is complied with in this respect, an affirmance must result, where the questions to be decided depend upon a consideration of the evidence. In this case the only question presented for decision depends upon the construction of the evidence; and, there being no proper brief of the evidence, the judgment must be affirmed. Hirsch v. Dozier Lumber Co., 2 Ga. App. 520, 58 S. E. 786; Harris v. McArthur, 90 Ga. 217, 15 S. E. 758.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2609; Dec. Dig. § 588.*]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Action between the Huntley Manufactur-

ing Company and the Nixon Grocery Company. From the judgment, the manufacturing company brings error. Affirmed.

Wm. H. Fleming, for plaintiff in error.
C. Henry & R. S. Cohen, for defendant in error.

HILL, O. J. Judgment affirmed.

(6 Ga. App. 74)

ROLLINS v. SPEER. (No. 1,487.)

(Court of Appeals of Georgia. April 15, 1909.)

CERTIORARI (§ 61*)—NOTICE OF SANCTION OF WRIT—DISMISSAL.

Notice of the sanction of a writ of certiorari and of the time and place of the hearing must be given to the defendant in certiorari at least 10 days before the sitting of the court to which the certiorari is returnable. It appearing in this case that the notice, which was sent by mail, did not reach opposing counsel until the ninth day before the sitting of the court, the judge erred in not dismissing the certiorari on motion.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 168, 169; Dec. Dig. § 61.*]

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Certiorari by J. A. Speer against T. M. Rollins. Judgment for plaintiff, and defendant brings error. Reversed.

Speer sued out a certiorari, and filed it in the office of the clerk of the superior court of Whitfield county on March 25, 1908. The next term of the superior court of that county convened on the first Monday in April, and therefore under the law the certiorari was triable at the next succeeding term of the court, which convened on the second Monday in October, which came on the 12th of October. More than 10 days prior to the April term of the court the attorney for the plaintiff in certiorari mailed to the attorney for the defendant in certiorari the statutory notice of the sanction of the writ, stating that it would be tried at the April term of the court. Discovering later that the writ was returnable to the October term, he on the 2d day of October mailed another notice to opposing counsel. However, it appears that opposing counsel did not receive it until October 3d, which was only 9 days before the sitting of the court. When the case was called for a hearing, the defendant in certiorari moved to dismiss on the ground that notice of sanction had not been given as required by law. The judge overruled the motion and sustained the certiorari, to both of which rulings the defendant in certiorari excepted.

M. C. Tarver, for plaintiff in error. J. M. Rudolph, for defendant in error.

POWELL, J. (after stating the facts as above). Personally we dislike to give this

case the direction which our opinion as judges leads us to believe it should take. The certiorari was meritorious, and the judge's action in sustaining it would be unhesitatingly affirmed, if we did not deem he had erred in refusing to dismiss the case. The provision of our Code requiring that the statutory notice of the sanction of the writ and of the time and place of hearing shall be served upon opposing counsel at least 10 days before the sitting of the court to which the writ is returnable is mandatory, and failure to give the notice, except in providential cases, results in the dismissal of the case, irrespective of the merits. The first notice given in this case was clearly insufficient, because it designated the wrong term. The second notice, while mailed on the tenth day before the sitting of the court, was not received until the next day, and therefore was too late.

Upon this question we think that the cases of Butler v. Farley, 99 Ga. 631, 25 S. E. 853, and Western Union Telegraph Co. v. Bailey, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933, are controlling. The only legitimate deduction from these cases is that, while the notice may be sent by mail, it must at least appear that the notice was deposited in the post office at such a time as that in the ordinary course of mail it would be received by the addressee within the time prescribed by the statute. Indeed, the cases just cited lean strongly to the conclusion that notice by mail would not be sufficient, unless the letter containing the notice, even though posted in time to have reached the addressee by due course of mail within due time, did actually so reach him. However, we need not pass upon that question now, for it does not appear from this record that the letter was mailed at such a time as that it ought to have been delivered earlier than the morning of the 3d. This, as we have said, was too late.

Judgment reversed.

(6 Ga. App. 112)

ROYAL v. CITY OF DUBLIN.

PLUMMER v. SAME.

(Nos. 1,771, 1,772.)

(Court of Appeals of Georgia. April 15, 1909.)

CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—SERVICE.

A bill of exceptions, complaining of a refusal of the judge of the superior court to sanction a certiorari to review a conviction in a municipal court, should be served upon the municipality or its attorney, and not upon the solicitor general of the circuit. McDonald v. Town of Ludowici, 8 Ga. App. 654, 60 S. E. 337.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

(Syllabus by the Court.)

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Lee Royal and Henry Plummer were convicted of violation of an ordinance of the city of Dublin, and each brings error. Writs of error dismissed.

Hal B. Wimberly, for plaintiffs in error.
Earl Camp, for defendant in error.

POWELL, J. Writs of error dismissed.

(5 Ga. App. 113)

WIMPEY v. MAYOR, ETC., OF GAINESVILLE. (No. 1,790.)

(Court of Appeals of Georgia. April 15, 1909.)

CRIMINAL LAW (§ 1091*)—APPEAL—DENIAL OF CERTIORARI—SUFFICIENCY OF RECORD.

In order for this court to review the refusal of the judge of the superior court to sanction a certiorari, the petition for certiorari must be incorporated in the bill of exceptions, or otherwise verified as a part thereof by the trial judge. An unsanctioned petition cannot be specified as a part of the record. *Clarke v. Deal*, 4 Ga. App. 326, 61 S. E. 295; *Hall v. State*, 2 Ga. App. 437, 58 S. E. 558.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2831; Dec. Dig. § 1091.*]

(Syllabus by the Court.)

Error from Superior Court, Hall County;
J. J. Kimsey, Judge.

Action between Arch Wimpey and the Mayor, etc., of Gainesville. From an order of the superior court refusing a writ of certiorari, Wimpey brings error. Dismissed.

B. P. Gaillard, Jr., for plaintiff in error.
Howard Thompson, for defendant in error.

POWELL, J. Writ of error dismissed.

(5 Ga. App. 104)

ZACKERY v. STATE. (No. 1,724.)

(Court of Appeals of Georgia. April 15, 1909.)

1. ADULTERY (§§ 1, 10*)—PERSONS LIABLE—BURDEN OF PROOF.

To constitute the offense of adultery in this state, both parties to the criminal act must be married persons at the time of its commission. The burden is upon the state to prove this essential fact before a conviction of either party would be authorized. Pen. Code 1895, § 381; *Bennett v. State*, 103 Ga. 66, 29 S. E. 919.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 2, 19; Dec. Dig. §§ 1, 10.*]

2. MARRIAGE (§ 50*)—COHABITATION AND REPUTATION.

Mere reputation, unsupported by proof of cohabitation, is by itself insufficient to establish a marriage. *Wood v. State*, 62 Ga. 407.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 86; Dec. Dig. § 50.*]

3. MARRIAGE (§ 50*)—SUFFICIENCY OF EVIDENCE—REPUTATION.

Where, on the trial of a man charged with the offense of adultery, the state relied upon evidence that at some indefinite time, prior to the commission of the alleged offense, the defendant was generally reputed to have been married and to have cohabited with some unnamed woman, and that he himself had so stated, it

was insufficient to establish the fact of his marriage at the time of the alleged adultery.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 86; Dec. Dig. § 50.*]

(Syllabus by the Court.)

Error from City Court of Sylvester; J. B. Williamson, Judge.

Minnie Zackery was convicted of adultery, and she brings error. Reversed.

Claude Payton, for plaintiff in error. J. H. Tipton, Sol., for the State.

HILL, C. J. Judgment reversed.

(6 Ga. App. 108)

MUNGIN v. STATE. (No. 1,740.)

(Court of Appeals of Georgia. April 15, 1909.)

LARCENY (§ 57*)—EVIDENCE.

There was no evidence whatever of the animus furandi and the possession of the property by the defendant. The only circumstance indicating guilt was fully explained, and was entirely consistent with innocence.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 150; Dec. Dig. § 57.*]

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; W. G. Charlton, Judge.

Isaac Mungin was convicted of larceny, and brings error. Reversed.

W. de R. Barclay, for plaintiff in error.
N. J. Norman, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(6 Ga. App. 109)

COLQUITT v. STATE. (No. 1,747.)

(Court of Appeals of Georgia. April 15, 1909.)

1. GAMING (§ 103*)—SUFFICIENCY OF VERDICT.

An accusation containing two counts charged the defendant with the offense of gaming by playing and betting for money at games played with cards and games played with dice. The verdict was guilty, without specifying upon which count it was based. *Held*, that the accusation charged but the one offense of gaming, the two counts varying the methods of its commission, and a general verdict of guilty will be upheld, if either count is supported by the evidence. *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917, and citations.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 103.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence fully supports the verdict.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Joe Colquitt was convicted of gaming, and brings error. Affirmed.

Howell B. Simmons, for plaintiff in error.
Zach Childers, Sol., for the State.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 79)

NATIONAL FOWLER BANK v. BURCH et al. (No. 1,577.)

(Court of Appeals of Georgia. April 15, 1909.)

APPEAL AND ERROR (§ 1004*)—REVIEW—EVIDENCE.

The plaintiffs sued upon a promissory note. The defendants pleaded partial failure of consideration. Under the plea and the testimony the verdict against the defendants should in no event have been for less than \$433. It was for only about one-third of that sum. Irrespective of other exceptions, the verdict must be set aside, upon the complaint of the plaintiff, on the ground that it is contrary to law and evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. § 1004.*]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by the National Fowler Bank against M. A. Burch and others. From a judgment for a part of the debt claimed, plaintiff brings error. Reversed.

Williams & Baldwin, for plaintiff in error.
J. F. DeLacy, for defendants in error.

POWELL, J. Judgment reversed.

(6 Ga. App. 47)

PENDERGRAST v. GREESON. (No. 1,373.) (Court of Appeals of Georgia. April 15, 1909.)**TRIAL (§ 143*)—QUESTIONS OF LAW OR FACT.**

While ordinarily a jury should attach more weight to positive than to negative testimony, yet they are not absolutely bound to do so. Therefore, where the existence of a material and controlling fact in a case is strongly affirmed by positive testimony, and weakly denied by other testimony, although somewhat negative in character, the question is issuable, and cannot be determined by the court as a matter of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by W. B. Greeson against T. J. Pendergrast. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

Max E. Land and Walter F. Hall, for plaintiff in error. Hal Lawson, for defendant in error.

HILL, C. J. This is a suit on a note for principal, interest, and attorney's fees. On the conclusion of the evidence the court directed a verdict for the plaintiff for the full amount of the suit. In this court the plaintiff in error expressly abandons all the assignments of error except as to the direction of a verdict for attorney's fees. He contends that, under the plea and the evidence, the question as to whether he had been served with the statutory notice claiming attorney's

fees was issuable, and that the direction of a verdict for attorney's fees was therefore erroneous.

The evidence on this subject, briefly stated, is as follows: The attorney for the plaintiff testified that he prepared a written notice in form for attorney's fees and gave it to his client, with direction to have it timely served on the defendant. The client testified that on the same day he received the notice from his attorney he delivered it to one Livingston, with direction to serve it on the defendant, and that Livingston immediately thereafter reported to him that he had served it on the defendant. Livingston also testified that he remembered serving on the defendant the paper given to him by the plaintiff, but did not remember the date on which he served it, and did not know what the paper was. The defendant testified: "I don't think Livingston served any notice of attorney's fees on me in this case. That is my recollection. I haven't any paper that he served on me, that I remember."

While the testimony of the defendant was vague, indefinite, and uncertain, it cannot be said that it was not sufficient to make the question of service of the notice of attorney's fees issuable, and, although fragile, is of sufficient strength to be submitted to the jury. The want of recollection by some men of the existence of a fact might be considered as weighty as the positive recollection of some other men that the fact did not exist. The weight of the testimony, whether positive or negative, is for the jury, and ordinarily they are not bound to accept positive in preference to negative testimony. *Hunter v. State*, 4 Ga. App. 761, 62 S. E. 466. Whether the defendant was served with the notice of attorney's fees should have been submitted to the jury.

The judgment is affirmed, on condition that the defendant in error write off from the judgment the amount of attorney's fees; otherwise, the judgment should be reversed.

Judgment affirmed, on condition.

(6 Ga. App. 67)

RIVERSIDE MILLS v. BROOKS.

(No. 1,447.)

(Court of Appeals of Georgia. April 15, 1909.)

MASTER AND SERVANT (§§ 116, 177, 216*)—SAFE PLACE IN WHICH TO WORK—TEMPORARY STRUCTURES—FELLOW SERVANTS—NEGLIGENCE—ASSUMPTION OF RISK—NEGLECT OF MASTER.

The master is not, under his general duty of respecting the servant's safety, held to the same quantum of care in the erection of platforms and scaffolds intended only for temporary use as he is in the building and maintenance of more permanent structures. If the servant is hurt by reason of the fact that, while he and fellow servants are attempting to handle a heavy object upon a temporary work scaffold consisting of planks laid loosely upon work horses, the fellow servants walked back

upon that portion of the planks lying beyond the support of the work horses, so that the planks tilted up and knocked the servant off, his injury is to be attributed to the negligence of the fellow servants, or to one of the assumed risks of the service. In such a case the leaving of the planks unfastened is ordinarily not an act of negligence on the part of the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 207, 852, 567-573; Dec. Dig. §§ 116, 177, 218.*]

(Syllabus by the Court.)

Error from City Court of Richmond County; Wm. F. Eve, Judge.

Action by Richard Brooks against the Riverside Mills. Judgment for plaintiff, and defendant brings error. Reversed.

Brooks sued the Riverside Mills, alleging in substance that the defendant directed the overhead shafting in one of the loom rooms of its factory removed for the purpose of making some changes therein; that in order for the workmen to reach this shafting a temporary scaffold was provided, consisting of three work horses or benches placed in a line a short distance apart, upon which was placed a flooring of planks; that the plaintiff had been assigned by the defendant to work in the picker room, and on the day of the injury was called therefrom and directed to take his place on this elevated platform and assist in removing this shafting to the floor; that he and the other workmen had removed the shafting to the floor, where the necessary changes were made, and at the time of the injury were in the act of replacing the shafting into the hangers overhead; "that the platform aforesaid was longer than the shafting, and that portion of the platform which was immediately under the overhead hangers was beyond the middle of the said platform; that the plaintiff and one other hand was handling the one end of the shafting, and two or more hands were handling the other end of the shafting, carrying it to its position under the overhead hangers, to lift it into its place; that as soon as the hands having in charge the farther end from plaintiff of the shafting aforesaid passed beyond the middle of the said platform, carrying to the said farther end the greater weight, the planks, having been left negligently unsecured, flew up, plaintiff was knocked from his position on the platform to the floor, and the planks of the platform and the shafting fell on him, knocking him unconscious" and inflicting other enumerated injuries; that at the time this plaintiff received his injuries aforesaid he was in the careful discharge of his duties, acting under the orders of the defendant and was free from fault; that the injuries received as aforesaid were "due to the negligence of the defendant in neglecting and failing to provide for this plaintiff a safe place on which to work, and in assigning him to duty thereon without warning him of its

dangerous character; that the plaintiff had no connection with the construction of the said platform, had no duty therewith, and was ignorant of its dangerous character, when he obeyed the order of the defendant to stand on said platform." The defendant excepts to the overruling of a general demurrer to the petition.

Jos. B. & Bryan Cumming and Jas. M. Hull, Jr., for plaintiff in error. F. W. Capers, for defendant in error.

POWELL, J. (after stating the facts as above). We are of the opinion that this case falls within the rules announced in *Daniel v. Forsyth*, 106 Ga. 563, 32 S. E. 621, *Ludd v. Wilkins*, 118 Ga. 525, 45 S. E. 429, *Bolden v. Central of Ga. Ry. Co.*, 130 Ga. 456, 60 S. E. 1047, and *Quinn v. Allen*, 1 Ga. App. 807, 57 S. E. 957, and that the general demurrer should have been sustained. It is distinguishable on its facts from those cases in which the servant has been allowed to recover for injuries received through defects in the construction of platforms and stagings intended for more than temporary use. There is no suggestion that the temporary platform erected in the present case was in any wise different from the ordinary temporary scaffold commonly used for the purpose of attending to some transitory overhead work. There is nothing intricate or hard to understand about a platform consisting of three work horses or benches placed in a line at a short distance from one another, with planks laid loosely thereon. Every man of ordinary experience and common powers of observation knows or can ascertain from superficial observation the nature and the dangers, if any, of this form of construction. It does not require any expert to know that, if the weight upon the platform is imposed upon that part of the plank which lies beyond the support of the work horse, the equilibrium is likely to be destroyed, so as to cause the planks to fly up.

No reason is alleged in the present petition why the master should have taken the unusual precaution of nailing down the planks, or why the servant should have had any reason to believe that the planks were nailed down. Planks upon temporary scaffolds of this kind are not usually nailed down. The natural inference arising in the mind of any man of ordinary intelligence and experience upon approaching such a platform is that the planks are unsecured, and this petition suggests no reason why the plaintiff conceived any other notion. It would be far-fetched, indeed, to say that the master ought to have foreseen that any servant would presume that the planks were nailed down. Indeed, it may be said with all fairness that the proximate cause of the plaintiff's injury was not the fact that the planks

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were left unsecured, for that was but a part of the natural order of things, but that the proximate cause of his injury was that his fellow servants, without exercising due caution, stepped back with their load upon that part of the planks which lay beyond the support of the work horse. The master of course, is not responsible for the negligence of fellow servants in cases of this kind. The plaintiff, as well as his fellow servants, should be held derelict, if they failed to observe and act upon familiar laws of nature applicable to the work at hand. See *Worlds v. Ga. R. R.*, 99 Ga. 283, 25 S. E. 646.

If, as the plaintiff alleges, the planks were so placed on the work horses that the carrying of the greater weight to one end would cause the other end to "fly up," then the law of nature applicable is one which even children playing "seesaw" thoroughly understand and appreciate. For a further discussion of the subject, see *Labatt on Master & Servant*, § 614, note 1 (a).

Judgment reversed.

(6 Ga. App. 69)

ANDERSON v. PETEET. (No. 1,453.)

(Court of Appeals of Georgia. April 15, 1909.)

LIMITATION OF ACTIONS (§ 22*)—"WITNESS ——— HAND AND SEAL"—"INSTRUMENT UNDER SEAL."

Where at the end of a note are the words "Witness ——— hand and seal," followed by the signature of the maker, with the word "Seal" in brackets annexed to the signature, this is equivalent to the words "Witness my hand and seal," or "Signed and sealed," and the note is an instrument under seal, according to Civ. Code 1895, § 3765. The omission of the pronoun "my" from the words "Witness ——— hand and seal" is without significance, and will be supplied by construction.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 22.*]

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action in a justice's court by Claude Peteet, for the use, etc., against J. C. Anderson. The justice gave judgment for defendant, which was reversed on certiorari by the judge of the superior court, and defendant brings error. Affirmed.

M. C. Few, for plaintiff in error. Percy Middlebrooks and F. C. Foster, for defendant in error.

HILL, C. J. This was a suit brought on a promissory note in a justice's court. A plea of the statute of limitations was filed by the maker. The justice, on inspection of the note sued upon, held that it was not an instrument under seal; and, as the suit was filed more than six years after the date of maturity of the note, he sustained the plea. This judgment was reversed on certiorari; the judge of the superior court holding that

the note was an instrument under seal, and that the statute of limitations on specialties or instruments under seal was applicable. To this judgment the defendant in the suit brings error to this court.

It will thus be seen that the only question in the case is as to whether the note was an instrument under seal. The note is dated January 17, 1895, and due eight months after date. It is in the usual form of a promissory note and concludes as follows: "Witness ——— hand and seal. J. O. Anderson. [Seal.] ———. [L. S.]" It is contended by the plaintiff in error, the maker of the note, that the omission of the pronoun "my" between the word "witness" and the word "hand" proves that the intention of the maker was to make the instrument a simple promissory note not under seal; and it was contended by the defendant in error, the payee in the note, that the omission of the pronoun "my" was only a clerical oversight, and that the words "Witness ——— hand and seal," followed by the signature of the maker, with the word "Seal" in brackets appended to the signature, clearly make the note an instrument under seal.

A statute of this state (Civ. Code 1895, § 3765) expressly declares that "no instrument shall be considered under seal unless so recited in the body of the instrument"; and, construing this section, the Supreme Court has held in several cases that to constitute an instrument under seal there must be the recitation of that fact in some form in the body of the note, as well as the word "Seal," or "L. S.," at the end of the signature of the maker—in other words, that neither the recitation in the body of the instrument that the same is a sealed instrument, nor the mere addition of a seal of any character after the signature of the maker, is sufficient to render a promissory note a sealed instrument, but both the recital and the seal annexed to the instrument must appear. *Jackson v. Augusta Southern Ry. Co.*, 125 Ga. 801, 54 S. E. 697; *Chambers v. Kingsberry*, 68 Ga. 828; *Stansell v. Corley*, 81 Ga. 453, 8 S. E. 868; *Ridley v. Hightower*, 112 Ga. 479, 37 S. E. 783; *Echols v. Phillips*, 112 Ga. 700, 37 S. E. 977. In *Humphries v. Nix*, 77 Ga. 98, it is held that "where, at the end of a note were the words 'Signed and sealed,' followed by the signature of the maker and a scroll for a seal, with the letters 'L. S.' written across it, this was equivalent to the words 'Witness my hand and seal,' followed in the same way, and the paper was a sealed instrument under * * * the Code."

We do not think that there can be any doubt that the note in question is an instrument under seal. The omission of the pronoun "my" after the word "witness" and before the word "hand," so as to make the entire sentence read "witness my hand and seal," is a palpable inadvertence, and the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pronoun "my" can be supplied by construction. The original note is on a printed form, and the space for the pronoun is left blank for the contingency of single or joint obligors. The pronoun in the blank space would have given to the sentence grammatical accuracy, but its omission in no wise detracts from the legal significance of the words "Witness — hand and seal," appearing in the body of the note and followed by the signature of the maker, with the additional word "Seal" in brackets appended to the signature. In construing an instrument, the courts will give to the words used their usual and ordinary significance, without reference to grammatical construction. This is the conclusion from an examination of the note itself. If this conclusion needs any argumentative support, it may be found in the suggestion that, if the maker of the note had not intended it to be under seal, he would not have omitted the insignificant pronoun "my" when considered with the context of the execution of the instrument, but, by striking therefrom the words "Witness hand and seal" and the word "Seal," following his signature, would have left no room for construction.

The only question in the case being one of law, which must finally control, we affirm the judgment, with direction that the superior court enter a judgment on the certiorari in favor of the plaintiff for the amount of the note, principal, interest, and costs.

Judgment affirmed.

(6 Ga. App. 48)

BYNE v. MAYOR, ETC., OF CITY OF AMERICUS. (No. 1,378.)

(Court of Appeals of Georgia. April 15, 1909.)

1. INDEMNITY (§ 14*) — CONCLUSIVENESS — PERSONS CONCLUDED — PERSONS VOUCHERD INTO COURT.

Where a judgment for damages has been recovered against a municipality for negligence in permitting a dangerous obstruction to be erected and maintained in the street, and the owner of the abutting property, who erected and maintained the obstruction, has been duly and timely vouched into court to defend the suit, in a suit by the municipality over against the vouchee, the judgment against the former is conclusive against the latter as to the right of the injured party to recover the amount of the verdict, and as to all defenses that either the municipality or the party vouched could have set up in the first suit, and which were actually set up and passed upon in that suit.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

2. MUNICIPAL CORPORATIONS (§ 808*) — INDEMNITY (§ 13*) — OBSTRUCTIONS IN STREETS — LIABILITY OF ABUTTING OWNER.

While a person injured by an unsafe obstruction placed over the sidewalk by an owner of abutting property may have a right of action against the city for negligence in allowing the obstruction on the sidewalk, this does not affect the liability of the owner responsible primarily for such obstruction. The owner's liability arises from his negligent conduct in erecting and maintaining the dangerous obstruc-

tion on the sidewalk. The city's liability arises from its negligence in not keeping its sidewalks in a safe condition. A party injured by such obstruction has a right of action against either the owner or the city, or both; and, if the city is forced to pay for the injury caused by the obstruction, it ordinarily has a right of action over against the owner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. § 808.* Indemnity, Cent. Dig. § 29; Dec. Dig. § 13.*]

3. LANDLORD AND TENANT (§ 167*) — LIABILITY OF LANDLORD FOR DEFECTIVE REPAIRS BY TENANT.

The owner of property is liable for injuries caused by defective repairs made by the tenant in possession, where the law imposes upon the owner the duty of making such repairs, or where the tenant is authorized by the owner to make the repairs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 672; Dec. Dig. § 167.*]

4. SUFFICIENCY OF EVIDENCE.

No error of law appears, and the verdict is supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by the Mayor and Councilmen of the City of Americus against Mrs. G. V. Byne. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error was the owner of a building in the city of Americus, to which was attached a wooden shed or awning extending on and above the sidewalk. On December 22, 1905, a runaway mule hitched to a wagon ran against one of the posts of the shed or awning, knocking it out of place, and on instructions from the chief of police of the city the agent of the plaintiff in error who had the property in charge repaired the shed or awning, and on inspection by the chief of police it appeared to be in a safe condition. On the following day, without any cause so far as the evidence discloses, the shed or awning fell upon the sidewalk, injuring several persons, one of whom was the minor son of Henry Martin. Henry Martin, as next friend for his minor son, brought suit against the mayor and council of the city of Americus to recover damages sustained by him from the falling of the shed or awning, alleging that it was in a dangerous condition and likely to fall, which condition was known to the city, and charging that the city was negligent in allowing the shed to remain in a dangerous condition on and over the sidewalk of the city. The city served the plaintiff in error, as the owner of the building in question and the shed or awning attached, with timely notice of the filing of this suit, vouching her into court to defend the same. This she declined to do. The city of Americus defended the suit, and the trial resulted in a verdict against it for \$300, which was fully paid and discharged by the city. The city brought suit against the plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff in error to recover from her the amount paid out by it on account of the judgment, and on the trial of this case a verdict was rendered in favor of the city. The defendant excepts to the judgment overruling her motion for a new trial.

S. J. Jones, for plaintiff in error. Maynard & Hooper and Pope & Bennet, for defendant in error.

HILL, C. J. (after stating the facts as above). Under the above statement of facts, section 5234 of the Civil Code of 1895 entitled the city to a judgment against the plaintiff in error as the owner of the property, if she was in fact negligent in the construction of the shed or awning or was negligent in maintaining it in an unsafe condition. This section makes the judgment rendered against the city in the suit to recover damages, if the owner of the property which caused the damage has been duly vouched into court, conclusive against the owner so vouched as to the amount and right of the plaintiff to recover in the suit against the city. As stated by Judge Powell in *McArthur v. Ogletree*, 4 Ga. App. 429, 61 S. E. 859, this section of the Code is merely declaratory of the principle announced by the Supreme Court in the case of *Western & Atlantic R. Co. v. Atlanta*, 74 Ga. 774, which decision itself follows the decision of the Supreme Court of the United States in the case of *Chicago v. Robins*, 2 Black, 418, 17 L. Ed. 298. This principle has also been fully discussed in the opinion rendered by Judge Powell in the *McArthur Case*, supra. See, also, in this connection, *Taylor v. Allen* (Ga.) 62 S. E. 291; *Faith v. Atlanta*, 78 Ga. 780, 4 S. E. 3. The law is therefore well settled in this state on the subject now under consideration.

The plaintiff in error as defendant in the court below, averred in her answer that she had not been duly and timely served with notice of the pendency of the suit against the city to recover damages, and had had no opportunity of appearing and defending the suit. There was no evidence introduced by her in support of this plea, and the positive testimony in behalf of the city established the fact that she was duly and timely vouched into court to defend the suit. This, therefore, left in the case only one question for the consideration of the jury, to wit, whether the plaintiff in error, as the owner of the property in connection with which the shed or awning was erected and used, failed to exercise ordinary care and diligence in the construction of the shed or awning, or in keeping and maintaining it in a safe condition for pedestrians who were entitled to the use of the sidewalk. She contended that although the shed or awning may have been defectively constructed, and defectively repaired after it had been injured by the running away of the mule attached to the wagon, yet it had been examined and approved by the chief of

police of the city after the repair had been made, and therefore her duty with reference thereto was ended. And she further contended that the city was solely responsible for the falling of the shed or awning, in that the city negligently allowed negro boys to assemble under the shed, who had unlawfully pushed it down.

The verdict against the city in the suit for damages settled the question that the shed or awning was defectively constructed or repaired, and that the city was guilty of negligence in permitting it to remain over the sidewalk in such unsafe condition. It also settled the question that the injury to the plaintiff did not result from the unlawful conduct of the negro boys gathered on the sidewalk in pushing the awning down; for, if the jury had believed that the unlawful conduct of the negro boys in question had caused the injury to the plaintiff, the city would not have been liable. On this point the trial court held that, if the fall of the shed onto the sidewalk was caused by the negligent conduct of the negro boys, the landlord would not be responsible for it, and was not concluded as to this question by the verdict against the city; and the court admitted evidence as to this fact.

We do not think the owner of this shed or awning can escape liability for defective construction or defective repairs because a policeman of the city examined it after the repairs and it appeared to be in a safe condition. The duty was still upon the owner of the property to exercise ordinary care in inspecting the shed or awning, to find out if in fact it was in a safe condition. If the owner placed an obstruction over the sidewalk of the city, which was defectively constructed, or if she maintained it in an unsafe condition, she would be liable for any damages caused by such defective construction or condition, and the fact that the city may have been also negligent in allowing such unsafe obstruction to be erected over the sidewalk, or to remain there in an unsafe condition, would in no wise relieve the owner from liability for her own negligence. The plaintiff in error admitted that she erected the shed, and that when it was injured by the runaway mule and wagon she paid for its repair; and the issuable facts as to her were whether she had exercised ordinary care in its original construction and in its repair after the injury. *Schneider v. Augusta*, 118 Ga. 610, 45 S. E. 459.

She insists that she was not responsible for any defective repair of the shed, because her tenant had possession of the property and made the repairs. It may be true that a landlord will not be liable for injuries resulting from a nuisance maintained by his tenant on the leased premises, and with the creation of which the landlord had no connection (*Gardner v. Rhodes*, 114 Ga. 932, 41 S. E. 63, 57 L. R. A. 749); but in this case the landlord

constructed the shed and authorized the tenant to repair it after it had been injured, and under these circumstances would be liable for her own negligence and that of her agent in doing the work of repair for her (*White v. Montgomery*, 58 Ga. 204; Civ. Code 1895, § 3118).

The charge, when considered in its entirety, is without material error, but clearly and fully submits the law applicable to the issues, and the verdict is supported by the evidence.

Judgment affirmed.

(6 Ga. App. 65)

JOHNSON v. WALTER J. WOOD STOVE CO. (No. 1,437.)

(Court of Appeals of Georgia. April 15, 1909.)

1. ATTACHMENT (§ 63*)—SEIZURE—PROPERTY CONDITIONALLY SOLD.

Where an attachment for purchase money of personal property to which the plaintiff in attachment has reserved title is served by seizure of the property, before the property can be levied upon and sold under final judgment and execution, the plaintiff must reconvey it by quitclaim to the defendant; but this reconveyance is not necessary before the issuance of attachment and seizure of the property thereunder.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 168; Dec. Dig. § 63.*]

2. JUDGMENT (§ 206*)—PERSONAL JUDGMENT IN ATTACHMENT.

In an attachment for purchase money, the plaintiff is entitled to a general judgment in personam, as well as a judgment on the attachment, by giving the defendant the notice prescribed in Civ. Code 1895, § 4557.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 379; Dec. Dig. § 206.*]

3. JUSTICES OF THE PEACE (§ 124*)—PROCEEDURE IN CIVIL CASES—JUDGMENT—PERSONAL JUDGMENT IN ATTACHMENT.

Under the evidence in this case the magistrate was fully authorized to render a judgment on the attachment for the balance of the purchase money, and also a general judgment against the defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 389; Dec. Dig. § 124.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Attachment proceedings by the Walter J. Wood Stove Company against S. D. Johnson. Judgment for plaintiff, and defendant brings error. Affirmed.

S. D. Johnson, in pro. per. Francis L. Myles, for defendant in error.

HILL, C. J. The Walter J. Wood Stove Company sued out an attachment against Johnson for the purchase money of a stove, under which attachment the stove was seized by a constable. Notice in writing of the pendency of the attachment and of the seizure of the property thereunder was served personally on the defendant 10 days before final judgment, as preliminary to a gen-

eral judgment, according to the provisions of Civ. Code 1895, § 4557. Attached to this notice was a copy of the attachment proceedings, and a copy of the conditional contract of purchase, with a statement of the account, sworn to, showing the balance due thereon. There was no defense, and the justice, after the introduction of the papers showing the contract of purchase and the seizure of the personal property described in the contract under the attachment, and after hearing oral evidence as to the balance due, and evidence of the service of the notice on the defendant for a general judgment, rendered a judgment in rem for the amount proved to be due and a general judgment against the defendant for the same amount. The defendant thereupon filed his petition for the writ of certiorari, in which he attacked the validity of the attachment proceedings and the special judgment thereon, on the ground that there could be no seizure under this attachment, or special judgment thereon, until the personal property to which the plaintiff had reserved title had been reconveyed by him to the defendant; in other words, that section 5432, Civ. Code 1895, requires that a reconveyance be made before the seizure of the personal property under the attachment and a judgment thereon. He also alleged in his petition that the justice entered two judgments against him, when there should have been but one judgment, with direction to the constable to sell the personal property to satisfy the judgment. He further alleged that there was no proof before the magistrate authorizing him to enter either of the judgments rendered. The superior court, on hearing the certiorari, overruled it, and the plaintiff in certiorari excepted.

1. In the case of *Rhodes & Son Furniture Co. v. Jenkins*, 2 Ga. App. 475, 58 S. E. 897, following the decision of the Supreme Court in *Cooper v. Smith*, 125 Ga. 167, 53 S. E. 1013, this court held that the provisions of section 5432, supra, applied to a levy and sale of the property under a final judgment, and did not apply to an attachment and seizure of the property thereon; in other words, that the reconveyance or transfer of title by the plaintiff was only necessary to be made prior to the levy of the execution under final judgment.

2. Civ. Code 1895, § 4557, entitles the plaintiff in an attachment for purchase money to a general judgment against the defendant, in addition to a judgment on the attachment, when the provisions of the section with reference to giving the notice have been complied with by the plaintiff, as seems to have been done in this case.

3. This attachment proceeding was in justice's court, where there is no necessity to file a declaration in attachment; neither was the summons a necessary part of the attach-

ment proceeding. It appeared before the magistrate that the attachment had been duly served by seizure of the property described therein, and that this property, when seized, was in the possession of the defendant. The original contract of purchase was proved. The balance due on account was also proved by the testimony of the plaintiff, and it was shown that the written notice required by the statute which entitled the plaintiff to a general judgment had been duly given to the defendant. Under these facts there was nothing to do but enter up judgment in rem for the amount shown to be due, and also a general judgment against the defendant for such amount. The judgment in overruling the certiorari must therefore be affirmed.

Judgment affirmed.

(6 Ga. App. 76)

COOPER et al. v. KING. (No. 1,508.)
(Court of Appeals of Georgia. April 15, 1909.)
BILLS AND NOTES (§ 427*) — PAYMENT — PERSONS TO WHOM PAYMENT MAY BE MADE.

Under Civ. Code 1895, § 3717, "payment of money due to the creditor or his authorized or general agent, or one whom the creditor accredits as agent, though he may not be so, or to his partner interested with him in the money, shall be good; and, if such agent receives property other than money as money, the creditor is bound thereby."

[Ed. Note.—For other case, see Bills and Notes, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.*]

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Judge.

Rule between J. P. Cooper and others and F. M. King to distribute money raised by a levy on and sale of property of Glenmore Thorp. Judgment for King, and Cooper and others bring error. Reversed.

This case comes to this court upon exceptions to the direction of a verdict upon a rule to distribute money raised from the levy and sale of certain property, sold by the sheriff as the property of Glenmore Thorp. King had a distress warrant against Thorp for \$90 and costs, and also a landlord's lien for supplies for \$126.13 and costs. Cooper had a mortgage *fi. fa.* against Thorp. Cooper was respondent in the rule, and made by his pleadings the point that King's rent had been paid. Cooper made it appear in the testimony that he had paid to W. A. Davis & Company, at Macon, the rent note of \$90 given by Thorp to King for rent; also that he had paid to Davis certain notes of Thorp, aggregating about \$168. However, the testimony seemed to indicate that these notes last referred to did not represent the items upon which the landlord's lien for supplies was prosecuted. The plaintiff admitted on the stand that he had placed the rent note with

W. A. Davis & Co. for collection. The judge directed a verdict ordering the sheriff to pay over the money to King on his landlord's lien and distress warrant, in preference to the mortgage *fi. fa.* of Cooper. The record does not definitely disclose whether Cooper paid Davis & Co. the rent note before or after the distress warrant was sworn out.

R. N. Holtzclaw and J. P. Duncan, for plaintiffs in error. J. H. Hall and M. Kunz, for defendant in error.

POWELL, J. If King's rent was paid either to him or to Davis & Co., the agents with whom he had placed the note for collection, before the distress warrant was issued, no portion of the proceeds from the property sold should have been appropriated to the distress warrant. If this payment was made after the distress warrant was sued out, then King would have been entitled to receive on his distress warrant only the costs which had accrued on it up to the time of payment of the note. Payment to Davis & Co. was equivalent to payment to the plaintiff himself. Civ. Code 1895, § 3717. The court, therefore, erred in directing any portion of the proceeds to be appropriated to the principal sum due on the distress warrant.

Judgment reversed.

(6 Ga. App. 72)

ALEXANDER v. WEST et al. (No. 1,458.)
(Court of Appeals of Georgia. April 15, 1909.)
MALICIOUS PROSECUTION (§ 7*) — CRIMINAL PROSECUTION.

An affidavit, a warrant, and an accusation, in which it is alleged that a named person did "commit the offense of selling or otherwise disposing of mortgaged property," but not alleging any fraudulent or unlawful intent, charge no crime against the laws of this state, nor any criminal constituent element of an offense, and, therefore, constitute no legal basis of an action to recover damages for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 9; Dec. Dig. § 7.*]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by B. J. Alexander against A. S. West, executor, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Seaborn & Barry Wright, for plaintiff in error. M. B. Eubanks, for defendants in error.

HILL, C. J. This is a suit to recover damages for malicious prosecution, and comes before us on error assigned to the judgment of the trial court in sustaining a demurrer and dismissing the petition. The suit is predicated on the arrest and prosecution of the plaintiff on a warrant issued by a justice of the peace, based on an affidavit therefor, and on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an accusation in the city court, charging that the plaintiff, in the county of Floyd, "on the _____ day of _____, in the year 1904," did "commit the offense of selling or otherwise disposing of mortgaged property." The petition, by amendment, further alleges that the plaintiff in the present case was arrested on this warrant and confined in the common jail of the county, that he thereafter waived commitment trial or preliminary investigation by the justice and was bound over to the city court under a \$250 bond, and that subsequently an accusation was filed against him in the city court, "charging that petitioner did dispose of mortgaged property."

The view which this court takes of one controlling question in the case renders a decision on the others presented unnecessary. This controlling question is whether there was any criminal prosecution on which a suit for damages for malicious prosecution could be predicated. Section 8843 of the Civil Code of 1895 gives a right of action to recover damages for "a criminal prosecution maliciously carried on and without any probable cause," etc. Do the affidavit and warrant or the accusation in the city court, show that there was a prosecution for any criminal offense? It may be stated that an affidavit and warrant need not describe the offense with all the technical particularity of criminal pleading as in cases of indictment. But it should affirmatively appear by both the affidavit and the warrant, or the affidavit and the accusation, that some criminal offense against the laws of this state was charged therein as having been committed by the defendant, or at least that the acts set out in the affidavit and warrant or the affidavit and accusation, constituted the substance of some criminal offense, or, as Justice Atkinson expresses it, "some act amounting to a constituent element of such an offense." It is no offense against the criminal laws of this state "to sell or otherwise dispose of mortgaged property," and this could not amount to a criminal offense, unless the sale or other disposition of the personal property was made by the mortgagor before the payment of the mortgage debt, without the consent of, or with intent to defraud, the mortgagee, and loss was thereby sustained by the holder of the mortgage. Every one of these things must appear before the sale or other disposition of mortgaged personal property amounts to a criminal offense. It is clear, therefore, that the affidavit, warrant and accusation upon which the suit for malicious prosecution are predicated do not describe any criminal offense, in form or in substance, or any criminal constituent of an offense. It is not even charged in general terms that the act of selling, or other disposition of the personal property mentioned was fraudulent or unlawful.

While the sale or other disposition of mort-

gaged personal property is a necessary part of a fraudulent sale of such property, yet it cannot be said that the mere sale or disposition constitutes any criminal element of the offense. On the contrary, the sale or other disposition of personal property might in many cases be legitimate and for the benefit of the mortgagee, and could not amount to a crime, unless it was fraudulent and resulted in damage. Under the facts in this case, as set forth in the petition as amended, no criminal prosecution was maliciously instituted or carried on, because neither the affidavit and warrant nor the accusation set forth any crime or any criminal constituent of a crime; and therefore the appropriate remedy, if any, was for malicious arrest and false imprisonment.

For this reason the judgment of the court sustaining the demurrer and dismissing the petition must be affirmed. *Satilla Mfg. Co. v. Cason*, 98 Ga. 14, 25 S. E. 909, 58 Am. St. Rep. 287.

(6 Ga. App. 109)

HAWKINS v. STATE. (No. 1,763.)

(Court of Appeals of Georgia. April 15, 1909.)

1. CRIMINAL LAW (§ 519*)—EVIDENCE—CONFESSIONS—ADMISSIBILITY.

Whether a confession was freely and voluntarily made, when issuable, should be submitted to the jury for determination; but, where the state's evidence shows that an alleged confession was not freely and voluntarily made, the court should not allow it to go to the jury. The alleged confession in this case, having been shown by the evidence for the state to have been induced by a well-founded fear of punishment, should have been excluded.

[Ed. Note.—For other cases, see Criminal Law Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

On a trial for burglary, where the indictment charged the larceny of certain described articles, evidence tending to show a larceny by the defendant of other articles than those described in the indictment would not be admissible against him, unless the evidence also showed that the other articles were in the house when the burglary was committed, and were then stolen therefrom, or their larceny was in some way connected with the burglary and the taking of the property described in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.*]

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Juney Hawkins was convicted of burglary, and brings error. Reversed.

A. Y. Clement, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

HILL, C. J. Plaintiff in error, a negro boy about 13 years of age, was convicted of burglary, and his motion for a new trial was overruled.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The evidence for the state shows, that the storehouse of the prosecutor had been burglarized, and that the property set out in the indictment, consisting of \$7 in silver money, three pounds of cheese, and five pounds of crackers, had been stolen therefrom. Several days thereafter this boy attempted to open the cash drawer in another storehouse, and, for this attempt, was severely whipped by the owner of the store. Immediately after this whipping had been administered to him, the son of the prosecutor came into the store and proceeded then and there to administer another severe whipping to the boy, and, after he had finished, asked him if he had not broken his father's store open. At first he denied it, but after the two persons who had administered the chastigation had argued "a little bit with him" he finally said that he and his brother went into the store and took certain things, among them money. The evidence does not disclose the character of the argument which these two men used with the boy, except the whipping that they had both given him. Subsequently on the same day, while he was in jail, the prosecutor went to see him, and the boy again confessed that he and his brother had entered the storehouse and stolen some of the property described in the indictment. This witness testified that he did not think that "the whipping, or the influence of fear of a whipping, had anything to do with his confession in the jail"; but the son who had whipped him on the same day, and the sheriff who had arrested him, were present when he made this last confession.

1. The rule is that, where the state's evidence shows that an alleged confession was not voluntary, the court should exclude it entirely from the jury; but, where the evidence for the state and the defendant make the question as to whether it was freely and voluntarily made an issuable fact, the alleged confession should be allowed to go to the jury for the purpose of determining whether it was in fact voluntarily made. We think the state's evidence in this case clearly shows that the confession was not made without the "remotest fear of injury." It would seem that the confession that immediately followed the infliction of two severe whippings might reasonably be attributed to an apprehension on the part of the boy that he would be again whipped if he did not confess. It is true that the boy again confessed that afternoon in the jail to the prosecutor; but probably he had not entirely forgotten the whippings which he had received in the morning, and the fact that the prosecutor's son, who had whipped him, was present in jail when he made the last confession might have quickened somewhat his recollection of the morning's occurrence. Taking into consideration the boy's age, his lack of intelligence, and the two whippings

which he had received, and remembering that this character of evidence should be received with great caution, a confession made under the circumstances was not only without any probative value, but should not have been allowed to go to the jury at all. Pen. Code 1895, §§ 1005, 1006; *Dawson v. State*, 59 Ga. 334.

2. Over the objection of the defendant, the state was allowed to show by the prosecutor that he had lost from his storehouse other property besides that set out in the indictment. There was no evidence that this other property had been taken from the storehouse the same night when the store was burglarized and the property described in the indictment stolen therefrom. Indeed, it is not clear from the evidence that this other property was stolen by any one, and certainly it does not appear in any manner that the defendant had anything to do with this larceny. If it had been shown that this other property was taken from the storehouse on the occasion described in the indictment, this evidence would have been an incriminating circumstance, and could have been shown, although it was not among the articles set out in the indictment. But, where the evidence fails to show that this property was taken from the storehouse at the same time that the property described in the indictment was stolen, the fact that it may have been stolen therefrom at some other time was entirely irrelevant, and did not in any manner tend to connect the defendant with the larceny of the articles described in the indictment. The admission of this testimony was, in our opinion, prejudicial error. This evidence and the alleged confession necessarily contributed in a very large measure to the conclusion of the jury that the defendant was guilty. Outside of this evidence, the case made by the state against the defendant was exceedingly weak; and it certainly could not be strengthened by a confession proved by the state's own witnesses to have been virtually extorted from a young and weak-minded boy under a well-founded apprehension of punishment, and by the irrelevant fact that on some other occasion than that set out in the indictment other property than that described in the indictment had probably been taken from the storehouse by the defendant.

Judgment reversed.

(6 Ga. App. 83)

WILSON v. TUTTLE. (No. 1,598.)

(Court of Appeals of Georgia. April 15, 1909.)
NEW TRIAL (§ 76*)—EXCESSIVE VERDICT.

It appearing from the evidence that the verdict included certain amounts for which the defendant is not liable in law, the court erred in not granting a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 155; Dec. Dig. § 76.*]

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by J. F. Tuttle against George Wilson and Florence Wilson. Judgment for plaintiff, and George Wilson brings error. Reversed.

Strange & Cobb, for plaintiff in error. R. W. Sheppard, for defendant in error.

POWELL, J. Tuttle sued Florence and George Wilson upon an open account for \$67.60. The jury found in favor of the plaintiff the full amount claimed, less a conceded credit of \$10. The account began in the year 1906, with an item, under date of January 18th, of balance due, \$37.19. By an amendment the plaintiff recited that this amount had been agreed upon between him and the defendants as correct, and that his books had been subsequently destroyed, and it was impossible for him to list the items going to make up this total. The other items were regularly set forth. The defendants demurred to this first charge on the account, because it was not itemized; but, the amendment referred to above having been filed and allowed, the court overruled the demurrer. We think this ruling was correct.

We cannot, however, see on what basis the verdict against George Wilson for the full amount found can be sustained. The facts are rather meagerly and indefinitely set out in the brief of the evidence; but, as we understand the plaintiff's testimony, he made the following case: Florence Wilson, a sister of George Wilson, had opened up an account with the plaintiff, and having traded a certain amount, and having paid only \$10, she was refused further credit. As we understand the matter, the balance due at this time constituted the item of \$37.19, referred to above. George Wilson and his brother (since deceased, and therefore not joined in the suit) told the plaintiff, at this stage of the matter, to let their sister have such goods as she wanted, and they would pay for them in the fall of 1906. The plaintiff continued to sell the sister goods, not only throughout the year 1906, but also up to June 8, 1907. In the fall of 1906 the plaintiff presented his account to George Wilson, who then refused to pay it. He never told the plaintiff to let his sister have any goods in the year 1907.

The liability of George Wilson for so much of the account as was made prior to the time that he and his brother told the plaintiff to furnish goods to their sister must fail, by reason of the fact that it was not in writing; for, being a promise to answer for the then existent debt of another, it was within the statute of frauds. Certainly George cannot be held responsible for such goods as were furnished to his sister after his refusal to pay and his denial of liability in the fall of 1906; for this was necessarily in legal effect

a withdrawal of any assent to being further bound for any goods to be sold to his sister. He might be held liable for such goods as were furnished between the time he gave the instructions to furnish his sister and the time when he gave the plaintiff notice that he would no longer be liable. The mere fact that they were charged on the plaintiff's books as being bought by Florence Wilson would not change George Wilson's liability in this respect. *Flournoy v. Wooten*, 71 Ga. 169.

Ordinarily we could make final disposition of the matter by giving direction for the writing off of the unauthorized portions of the recovery; but the record before us does not furnish a sufficient basis for the calculation, and hence it is necessary to grant a new trial that the error may be rectified.

Judgment reversed.

(5 Ga. App. 52)

GARBUTT LUMBER CO. v. WILCOX & PARSONS. (No. 1,889.)

(Court of Appeals of Georgia. April 15, 1909.)
ACCORD AND SATISFACTION (§ 11*) — WHAT CONSTITUTES.

The only question in this case is fully controlled by the decision of this court in *Bass Dry Goods Co. v. Roberts Coal Co.*, 4 Ga. App. 520, 61 S. E. 1134.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75-83; Dec. Dig. § 11.*]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by Wilcox & Parsons against the Garbutt Lumber Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Hal Lawson, for plaintiff in error. Haygood & Cutts, for defendants in error.

HILL, C. J. Wilcox & Parsons brought suit against the Garbutt Lumber Company for a balance claimed to be due on a contract. The defense filed was that there had been a full settlement of all demands arising out of the contract sued on. The jury found a verdict for the full amount, with interest, and the defendant's motion for a new trial was overruled.

The case made by the evidence is substantially as follows: There was a dispute between the parties as to the correct amount due under the contract; Wilcox & Parsons contending that the amount was \$125, and the Garbutt Lumber Company insisting that it was \$75. After some correspondence between the parties on the subject, without an agreement as to the amount due, Wilcox & Parsons drew a draft on the Garbutt Lumber Company for \$125, and delivered it to Wilkinson, cashier of the Citizens' Bank of Abbeville for collection. Wilkinson noti-

fied the lumber company by letter that he held the draft for collection, and received a reply from the lumber company denying the indebtedness of \$125, but stating that it was willing to send check for \$75, if this was satisfactory. Wilkinson notified Wilcox & Parsons that the lumber company would not pay the \$125, but would pay \$75. Wilcox & Parsons thereupon drew another draft through the bank on the lumber company for \$75, and this draft was promptly paid. When Parsons, a member of the firm of Wilcox & Parsons, was informed by Wilkinson that the lumber company refused to pay the draft for \$125, and would pay only \$75 in settlement of the matter, he (Parsons) drew the draft for \$75, and said that he would "see about the balance."

We think that Wilkinson was the agent of Wilcox & Parsons, and the information that he had that the lumber company refused to pay the \$125 in settlement was information received by them. But this is immaterial, as Parsons, a member of the firm of Wilcox & Parsons, admitted that he had actual knowledge that the lumber company denied owing the \$125, and would pay only \$75 in full settlement. With this knowledge, Wilcox & Parsons drew the draft for the \$75, and received and kept the money. The dispute as to the amount due was settled, and the debt was paid in full. If Wilcox & Parsons did not intend that the payment of the \$75 by the lumber company should be in full payment of the debt, they should have refused the \$75, and not have drawn the draft for this amount when it was offered by the lumber company in full settlement, and collected and retained the money. *Bass Dry Goods Co. v. Roberts Coal Co.*, 4 Ga. App. 520, 61 S. E. 1134.

The verdict to the contrary was wholly unauthorized by the evidence and the law, and the judgment refusing a new trial must be reversed.

(6 Ga. App. 75)

SMITH v. DUKE. (No. 1,497.)

(Court of Appeals of Georgia. April 15, 1909.)

1. **REPLEVIN** (§ 69*)—**BAIL TROVER**—**PLEADING**—**VARIANCE**.

The plaintiff sued in trover for one 60-inch solid Ohlen saw, No. 16,413. At the trial he proved that he had loaned the defendant a 60-inch solid Ohlen saw, but did not remember the number. The defendant refused to return the saw after demand. There was no other saw in controversy. *Held*, the failure to prove the number was immaterial.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 69.*]

2. **REPLEVIN** (§ 83*)—**BAIL TROVER**—**MEASURE OF DAMAGES**.

Where the plaintiff in trover elects to take damages instead of the property, he may recover the value of the property at the date of the conversion and either hire or interest from that date, according to whether the hire would be worth more than the interest or not. *O'Neill*

Mfg. Co. v. Woodley, 118 Ga. 114, 44 S. E. 980; *Bank of Blakely v. Cobb*, 5 Ga. App. —, 63 S. E. 24.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 83.*]

3. **TRIAL** (§ 168*)—**DIRECTION OF VERDICT**.

The evidence demanded the verdict rendered, and there was no error in directing it.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 168.*]

4. **DAMAGES FOR DELAY**.

Under the facts disclosed by the record, the court deems it proper to grant the motion of the defendant in error that damages for delay be awarded. *Wilcox v. Leffler Co.*, 3 Ga. App. 740, 60 S. E. 357.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Trover by W. L. Duke against John M. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. J. W. & G. E. Maddox and Geo. A. H. Harris & Son, for defendant in error.

POWELL, J. Judgment affirmed, with damages.

(6 Ga. App. 113)

CAMPBELL v. FOUTE, Judge. (No. 1,831.)

(Court of Appeals of Georgia. April 20, 1909.)

EXCEPTIONS, BILL OF (§ 53*)—**COMPELLING ALLOWANCE**—**MANDAMUS**.

Where a judge, to whom a bill of exceptions is tendered, returns the same to counsel for correction, under Civ. Code 1895, § 5545, on the ground that it is not true, or that it does not contain all the necessary facts, and specifies his objections in writing as required by that section, this court will not issue mandamus against the judge to compel him to sign the bill of exceptions, unless counsel removes the objections specified by the judge.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Dec. Dig. § 53.*]

(Syllabus by the Court.)

Original petition for mandamus by D. F. Campbell to compel A. M. Foute, Judge of the City Court of Cartersville, to sign a bill of exceptions. Mandamus denied.

James B. Conyers, for petitioner. Watt H. Milner, Sol., opposed.

PER OURIAM. Campbell, through his counsel, tendered to the judge a bill of exceptions, complaining of the judge's refusal to grant him a discharge under a demand for trial, according to section 958 of the Penal Code of 1895. Within the time required by law the judge returned to counsel the bill of exceptions, together with the statement in writing that it did not contain all the necessary facts, and set forth a list of the facts which he says should have been incorporated in the bill of exceptions. Counsel for the plaintiff in error, insisting that these proposed corrections would be unfair to him and

would not set forth the actual truth of the matter, has filed in this court a petition for mandamus, setting up what he claims to be the entire history of the case, including the written specifications returned by the trial judge in connection with the bill of exceptions, from which it appears that the judge did not refuse absolutely to sign the bill of exceptions, but, on the other hand, expressly stated that, when the revisions indicated were incorporated in the bill of exceptions, he would sign it.

The determination of what is true and what is not true as to matters occurring on the trial of a case, when it is sought to review the trial by a bill of exceptions, addresses itself exclusively to the presiding judge, and the court is by law compelled to take his statement as true. If the judge says that certain corrections are necessary to make the bill of exceptions speak the truth, we have no power to allow counsel to take issue with him, nor can we take issue with him ourselves. It is the duty of counsel to make these corrections and tender the bill of exceptions as corrected to the trial judge. If there are other and additional facts which counsel thinks should be stated in connection with the matters required to be stated by the trial judge, he may yet (for the time for the final return of the bill of exceptions has not yet expired) ask the judge to state these facts, and, if the judge considers them to be true, he will no doubt allow them to be incorporated in the bill of exceptions before it is finally signed; but, if he does not do so, this court cannot and will not interfere.

Mandamus nisi denied.

(6 Ga. App. 102)

HOUSER v. FARMERS' SUPPLY CO. (No. 1,671.)

(Court of Appeals of Georgia. April 15, 1909.)

1. CORPORATIONS (§ 484*) — POWERS — CONTRACT OF GUARANTY.

A contract of guaranty or suretyship, entered into by an ordinary commercial or industrial corporation, not in furtherance of one of its authorized corporate purposes, is ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

2. LIMITATION OF ACTIONS (§ 46*) — ACCRUAL OF RIGHT OF ACTION — BREACH OF CONTRACT.

The breach of a material term of a contract gives rise to a cause of action immediately, and the statute of limitations begins to run therefrom, notwithstanding the injured party may have suffered only nominal or general damages. The fact that at the time of the breach no special damages are ascertainable, or that the special damages are indefinite as to amount, does not prevent the running of the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 240; Dec. Dig. § 46.*]

(Syllabus by the Court.)

Error from City Court of Dublin; E. W. Jordan, Judge.

Action by J. P. Houser against the Farmers' Supply Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Houser sued the Farmers' Supply Company, a mercantile corporation, alleging that the corporation had agreed with him, if he would enter its employment and would become a stockholder therein, it would, in addition to paying him a salary, indorse his note at the bank for a sum necessary to pay for the stock, continuing the indorsement from time to time and from year to year for five years, at the end of which period there was to be a division of profits, through the declaration of an accumulated dividend; that at the end of the first year (December, 1902) the corporation refused to continue to indorse the note given for the procurement of the money under the circumstances just stated, whereupon it became necessary for him to make a new arrangement to get the money, by which the person from whom he got the funds was to obtain 4 per cent. interest in addition to one-half of the profits to be earned by his stock; that on account of the prosperity of the business the profits amounted to a considerable sum in excess of what the legal interest on the loan would have been. The alleged contract with the corporation was made through the persons who, on its organization, became president and general manager. The plaintiff was himself a director and vice president. No express power appeared in the charter authorizing the corporation to enter into any contract of suretyship and guaranty. The court granted a nonsuit, and the plaintiff excepts.

Peyton L. Wade, for plaintiff in error. J. S. Adams and W. C. Davis, for defendant in error.

POWELL, J. (after stating the facts as above). 1. While industrial and mercantile corporations are not wholly prohibited from making contracts of guaranty and suretyship, such contracts are closely scrutinized, and are not valid unless it appears that they were in direct furtherance of authorized corporate purposes. Ordinarily the officers of a corporation have no power to make a contract in its behalf guaranteeing a private debt of one of its stockholders. Brandt on Suretyship (3d Ed.) § 12, and note. The contract in the present case seems to have been ultra vires, and not binding on the corporation.

2. The nonsuit was proper for another reason. It appears that the plaintiff's cause of action was barred by the statute of limitations. If he had any right of action, it arose immediately upon the corporation's breach of the contract. The plaintiff seeks to avoid the statute by saying that it did not appear, until the dividend was finally declared, how large his loss would be, or what his damages for the breach of the contract amounted to. It is true that, as a general rule, where the

right of action on a claim depending on a contingency or condition does not accrue until the happening of the contingency, the statute does not begin to run until then. *Allen v. Stephens*, 102 Ga. 598, 29 S. E. 448; *Busby v. Marshall*, 125 Ga. 647, 54 S. E. 646. But the contingency or condition which gives rise to the right of action for the breach of a contract is the breach itself. In contemplation of law, injury immediately flows from every breach of contract to the person against whom it has been broken. If he cannot show special damages, he can at least recover general or nominal damages. Therefore for the breach of a contract a cause of action exists at once, and the statute of limitations begins to run, notwithstanding the fact that the full amount of the special damages which would ensue remains unknown and not definitely ascertainable until after the time when the statute has barred the action.

Nor is the plaintiff entirely precluded in such a case from recovering special damages, though the exact amount of them is not known at the time he begins his action; for, if the damages which are to ensue will flow proximately and directly from the breach, it is the duty of the jury, upon the trial of the case, to estimate such damages, and to award them according to the light to be obtained from the evidence and the probabilities arising therefrom. The case at bar is controlled by the cases of *Lilly v. Boyd*, 72 Ga. 83; *Gould v. Palmer*, 96 Ga. 798, 22 S. E. 583. The plaintiff seems to have suffered a hardship, but the law is against him on the facts of his case as developed at the trial.

Judgment affirmed.

(6 Ga. App. 85)

LANHAM v. McWILLIAMS. (No. 1,603.)

(Court of Appeals of Georgia. April 15, 1909.)

1. LANDLORD AND TENANT (§ 114*)—HOLDING OVER AFTER TERM—EFFECT.

A lease for one year gave the tenant an option of claiming an additional term of 1, 2, 3, or 4 years, provided notice of his election be given the landlord 90 days prior to the expiration of the first year. No notice was given; but the tenant nevertheless continued to occupy the premises and paid rent, which the landlord accepted without question, objection, or explanation on the part of either party, for several months after the expiration of the first year. *Held*, both the landlord and the tenant are bound for an additional term of one year.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 378; Dec. Dig. § 114.*]

2. LANDLORD AND TENANT (§ 118*)—TENANCY AT WILL.

Where a lease for a certain term gives the tenant the option of claiming an additional term of one to four years, and the tenant continues in possession after the expiration of the first term under such circumstances as to show an election of an additional term of one year, there cannot be another election to extend the lease over the remaining three years; and continued

occupancy after the expiration of the second term under a parol agreement creating an additional term of more than one year would create a tenancy at will.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 410, 411; Dec. Dig. § 118.*]

3. VERDICT CONTRARY TO LAW.

The verdict being contrary to law, a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by O. H. McWilliams, survivor, against J. H. Lanham, survivor. Judgment for plaintiff, and defendant brings error. Reversed.

McWilliams leased a storehouse to Lanham for a period of one year, beginning September 1, 1905, at \$125 a month, and the lease gave the tenant the option of claiming an additional term of from 2 to 5 years from September 1, 1905 (in other words, an additional term of 1 to 4 years from September 1, 1906, when his first term expired), provided notice of an intention to claim the additional term was given to the landlord 90 days prior to the expiration of the first year. Some time in the summer of 1906 the landlord went to the tenant and asked him what he intended to do about the lease, and the tenant gave an equivocal reply. No notice was given of an intention to claim any additional term; but the tenant continued to occupy the premises into the second year and to pay the same rent month by month, and the landlord accepted it without question. Thus the matter stood until some time in June, 1907. Just what happened after this time depends upon whether the landlord or the tenant was correct in his recollection of the conversations between them, as their evidence is squarely conflicting. On the one hand, the tenant testified clearly and unequivocally that in June, 1907, the landlord gave him notice that after the expiration of the second year he would increase the rent to \$150 a month; that he refused to agree to pay such rent, and a parol agreement was made that the tenancy would be continued at the will of each party. The landlord denied making any such agreement, but admitted that he threatened to increase the rent, and also that he advertised the property for rent in August before the expiration of the second year. He stated that he was merely attempting to force the tenant to a clear and unequivocal election of just how long he intended to occupy the premises; that the tenant kept on evading the question, and insisting that, if "he would only sit steady in the boat and let matters rock along," everything would be all right; that at no time did the tenant state that he would quit the premises at the expiration of the second year, but, on the contrary, as-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sumed the attitude of having a right to remain in possession of the premises for the full period up to 1910 if he chose so to do; that one time the landlord had an opportunity to rent the premises to a third person but the tenant objected, and the landlord then let the matter drop, thinking that the tenant would keep the premises for the full period mentioned above; that a little later he had a clear, unequivocal parol agreement with the tenant, whereby the lease was to be continued in force until September 5, 1910. In November, 1907, the tenant gave the landlord 80 days' notice, and then sent him a check for rent up to that time and surrendered the keys. The landlord sued out a distress warrant for rent for the two following months; that is, for December, 1907, and January, 1908. The jury returned a verdict in favor of the landlord, and the tenant excepts to the overruling of his motion for a new trial.

W. W. Mundy and Dean & Dean, for plaintiff in error. John W. & G. E. Maddox, for defendant in error.

POWELL, J. (after stating the facts as above). The motion for a new trial contains, among other grounds, an assignment of error complaining of the following excerpt from the charge of the judge to the jury: "I charge you that in the event a party passes into possession of property under a contract like this one, with the right of renewal, and continues in possession after the expiration of the first term, without any notice, the law then would bind him to the full term named in the contract. In other words, Lanham & Sons would be bound, under this contract, from September 1, 1906, to September 1, 1910, unless they have been released by the plaintiff in this case, or there had been some verbal change in the contract, or they have an agreement that there would be a tenancy at will. A continuance to occupy the building in question after the expiration of the two-year term provided for in the contract relied upon by the plaintiff would thereby extend the original contract and spread the same over a term of five years from the date thereof, unless said contract has, in some way, been changed or abrogated by the parties." It has been held that where a lease gives the tenant the right to an extension of his term for an additional period at his option, and the lease is silent as to notice being given to the landlord of the tenant's election to claim the additional term, the mere continuance in possession after the expiration of the first term without notice, and the payment of rent by the tenant and the acceptance thereof by the landlord, will bind both tenant and landlord for the additional term. *Slater v. Kimbro*, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19; *Hamby v. Georgia Iron Co.*, 127 Ga. 802, 56 S. E. 1063; *Walker v. Wadley*, 124 Ga. 275,

52 S. E. 904; *Cavanaugh v. Clinch*, 88 Ga. 610, 15 S. E. 678. The reason for this is that the tenant has plainly shown by his conduct that he has elected to claim the additional term. He having a right to continue in possession of the premises lawfully in accordance with the provisions of the lease, it will be presumed that he has availed himself of this right, and not that he is continuing in possession unlawfully as a tenant at sufferance.

But these cases expressly recognize that there is a difference in the effect of holding over, where the lease provides that the tenant must give the landlord notice of his intention to claim the additional term, from what it would be if the contract contained no such provision. The stipulation for notice is primarily for the benefit of the landlord, so that he may be looking out for another tenant in the event there is no election to claim the additional term. The giving of the notice is a condition precedent to the tenant's right to claim the additional term; and his failure to perform it will forfeit this right to the additional term, unless the landlord waives its nonperformance. The tenant's failure to give the notice, combined with his knowledge of the fact that thereby he is forfeiting his right to the additional term, is a circumstance tending to show that he has decided not to avail himself of this right; and therefore in such a case usually there must be more than a mere naked holding over by the tenant to authorize the inference that he has elected to claim the additional term. There should be some additional manifestation of his intention to elect. *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414. If, however, the holding over is under such circumstances as plainly to show that the landlord has waived the condition as to notice, and that the tenant has elected to continue in possession under the lease, both parties are bound for the additional term. For example, if the lease provides that at the beginning of the second term the rent shall be increased, the mere failure to give notice becomes immaterial, if the tenant holds over and pays the higher rent and the landlord accepts it. The payment and the acceptance of the higher rent, combined with the holding over, show a clear mutual intention to continue the lease—an intention on the part of the landlord to waive the requirement as to notice, and an intention on the part of the tenant to claim the additional term—and both parties are accordingly bound for the additional term. *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522, 525; *Insurance Co. v. National Bank*, 71 Mo. 58.

Intent may be derived from silence, as well as from words, especially where silence is accompanied by expressive conduct; and even if the additional term is at the same rental, and without giving notice the tenant nevertheless holds over, and nothing is said or done by either party as to the failure to

give notice, and the tenant, after the beginning of the second term, pays the rent, and the landlord accepts it, the evidence of such intention to waive on the part of the landlord and to elect on the part of the tenant, deduced both from silence and conduct, may be so clear that both parties become bound for the additional term. *Probst v. Rochester Laundry Co.*, 171 N. Y. 584, 64 N. E. 504; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623; *Jones on Landlord and Tenant*, § 342; 24 Cyc. 1003. In the present case, when in the summer of 1906 the landlord inquired of the tenant whether he intended to claim an additional term, and the tenant made an equivocal reply, but at no time gave notice that he intended to claim the additional term, the landlord could have dispossessed the tenant at the expiration of the first term, namely, September 5, 1906. The equivocal reply of the tenant was not an election, but rather a refusal to elect. The subsequent conduct of the tenant and of the landlord, however, was sufficient to show a waiver of notice on the one hand and an election on the other hand of an additional term.

But under the provisions of the lease the tenant had the privilege of claiming an additional term of from two to five years from the date of the beginning of the first term, and it therefore becomes necessary to determine which of these additional terms he had elected. The method by which the election was made shows that he had elected the shortest additional term to which he would be entitled. *Falley v. Giles*, 29 Ind. 114. His failure to give the prescribed notice primarily indicated that he had decided not to elect an additional term at all; but his subsequent conduct in holding over and paying rent under the circumstances indicated a change of mind. This change of mind is deduced largely from the fact that, since the tenant had a right to hold over lawfully in accordance with the provisions of the lease, it is to be presumed that his holding over was by virtue of this right and of the landlord's apparent willingness to waive the nonperformance of the condition as to notice. His occupancy after the first year is consistent with an election to renew for the shortest period, and at the same time this construction of his conduct gives due weight to the equivocal state of his mind, evinced by his failure to give the prescribed notice. *Falley v. Giles*, supra. Indeed, the conduct of the landlord a few months before the expiration of the second year indicates clearly that he so understood the tenant's election. His threat to increase the rent and his act in advertising the property for rent indicate that he knew the premises would be vacant at the expiry of the second year.

2, 3. The tenant having made this election, and the lease providing for only one

election, his right to elect was exhausted, and there could be no further extension under this lease. *Falley v. Giles*, supra. The tenant's occupancy after the expiration of the second term, therefore, was not within the terms of this contract. *Jones, L. & T.* § 336. After both of the terms provided for by the original lease had expired, the parties could not by a parol agreement extend that lease over a further period, exceeding one year. Therefore, adopting the evidence of the landlord as the truth, the parol agreement made in October after the expiration of the second term in the preceding September, whereby it was agreed that the lease should be continued until 1910, had the legal effect of creating a tenancy at will. *Hayes v. Atlanta*, 1 Ga. App. 25(2), 57 S. E. 1087. The tenant having given the statutory notice to quit, the verdict of the jury finding him liable for rent after the expiration of 30 days is contrary to law.

This result makes it unnecessary to consider the inaccuracies in the charge of the judge. Judgment reversed.

(6 Ga. App. 38.)

MYRICK v. MACON RY. & LIGHT CO.

(No. 1,321.)

(Court of Appeals of Georgia. April 15, 1909.)

1. CARRIERS (§ 347*)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Whether it is negligence for a passenger to be upon the platform of a moving train must depend upon the attendant circumstances of danger and the reason causing him to go upon the platform. So far from its being, as a matter of law, necessarily negligence for a passenger to be upon the platform of a moving train, it is ordinarily a question of fact for the jury whether his presence upon the platform is an act of negligence. The question of negligence cannot be said to be one of law unless, under the peculiar circumstances, the danger is so obviously great as that no one of ordinary prudence would, under any circumstances, subject himself thereto.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1376-1379; Dec. Dig. § 347.*]

2. CARRIERS (§ 347*)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Under the facts in evidence in this case, the cause was not one for the determination of the court, and should have been submitted to the jury. It was, therefore, erroneous to award a nonsuit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1376-1379; Dec. Dig. § 347.*]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Henry Myrick against the Macon Railway & Light Company. Judgment of nonsuit, and plaintiff brings error. Reversed.

R. L. Anderson, for plaintiff in error. Roland Ellis, for defendant in error.

RUSSELL, J. The court sustained a demurrer to the plaintiff's evidence and awarded a

nonsuit, and exception is taken to the judgment. The legal question presented is whether, under the evidence introduced by the plaintiff, the negligence of the plaintiff was so great as to preclude any recovery upon his part as a matter of law. It appears that the plaintiff, without any signal on the part of the conductor, or any knowledge on the part of the conductor, went out upon the platform of the street car, upon which he was riding a short distance, before the car had reached his destination, and while standing on the step with some bundles in his hands was thrown from the step of the car and injured. The evidence did not develop the fact that there was anything unusual in the speed of the car, except that the plaintiff testified that there was a sudden jerk or quickening of the speed as the car rounded the curve and just before his fall. As the court could not have held as a matter of law that the plaintiff was guilty of negligence from the mere fact that he was on the platform or on the step (*Suber v. Georgia, Carolina & Northern Ry. Co.*, 96 Ga. 42, 23 S. E. 387, and *Augusta Southern R. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005), we assume that the learned trial judge based the nonsuit upon the idea that the plaintiff had no sufficient reason for going upon the platform at the time that he did, or that the danger was so obvious that the plaintiff's act defeated his cause of action.

We think that the question of negligence, as to a passenger upon the platform of a moving train, is as much a question of fact to be determined by the jury as any other phase of the subject which may be presented in any action for personal injuries. It is true that in reaching this conclusion we are confronted with two lines of decisions, apparently conflicting; but we think the proper rule was laid down in *Suber v. Ga. C. & N. R. Co.*, *supra*, and *Turley v. A. K. & N. R. Co.*, 127 Ga. 594, 56 S. E. 748, 8 L. R. A. (N. S.) 685. As said by Chief Baron Kelly in *Siner v. Railway Co.*, L. R. 3 Exch. 150, 156: "A railway company is not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he can legally be called upon to choose, namely, either to go on or to take his chance of danger and jump out; and if they do so their choice is made at their peril. I agree that, if it can be seen by the passenger that the act must be attendant with injury, it may then be fairly contended that he is not entitled to choose this obviously and certainly dangerous alternative." Judge Thompson, in his *Commentaries on the Law of Negligence*, referring to Baron Kelly's dissenting opinion, says it "is probably now recognized as the more correct exposition of the law than the views of the majority of the court in that case," and gives many citations of authority sustaining Chief Baron Kelly's holding. "The weight of modern authority seems to sustain the view that an attempt by the passenger to

alight from a railway train while it is passing a place at which it should stop to enable him to alight, or at which it has failed to stop a reasonable time to permit him to leave it, will not, as a matter of law, be considered a negligent act, unless the attending circumstances so clearly show that he acted so imprudently or rashly that reasonable minds could fairly arrive at no other conclusion, and that the question whether the act of the passenger in so attempting to alight from the train was negligent—that is, whether he exercised for his safety that degree of care and caution which a person of ordinary prudence would be expected under like circumstances to exercise—must ordinarily be submitted to the jury." 3 *Hutchinson on Carriers* (3d Ed.) § 1179.

There can be no difference in the rule as affecting one who intends to board a train, and as to one who intends to alight therefrom, where the passenger is attempting to do something either toward taking passage upon a car or disembarking therefrom. But in the present case the plaintiff was not attempting to alight, for he had not quite reached his destination. His presence upon the step was, at most, but preparation to alight when the point should be reached at which the car ought to have been stopped; and, according to his statement, his being thrown from the car was not caused by any effort upon his part to alight, but by a sudden jerk or increase of speed. In the *Suber Case*, *supra*, Chief Justice Simmons draws the distinction between the cases of *McLarin v. Railway Co.*, 85 Ga. 504, 11 S. E. 840, *Coleman v. Railway Co.*, 84 Ga. 1, 10 S. E. 498, and *Barnett v. Railway Co.*, 87 Ga. 768, 13 S. E. 904, upon which the learned counsel for the plaintiff in error relies, and in which it was held, as a matter of law, that the negligence of the plaintiff necessarily defeated recovery, and those cases (of which we think the case at bar furnishes an instance) in which the jury alone are to determine whether the act of the passenger, under the peculiar circumstances of the case, or on account of the reason for his act, was properly upon the platform of a passenger car, and whether his presence there is to be construed as negligence.

The evidence of the plaintiff, in the present case, authorized the inference that the defendant company was negligent in two particular respects: (1) In the failure of the conductor to give the necessary signal to stop the car, and the consequent failure of the motorman to diminish its speed, so that it might be stopped at the plaintiff's destination; (2) in the failure of the motorman to reduce the speed of the car preparatory to turning the curve, whereby the violent jerk which threw the plaintiff off the car was probably caused. We think that these inferences might be authorized, without intending to intimate that the jury would be com-

pelled to infer that the defendant company was negligent in either of these respects.

If it be conceded that the defendant company was negligent in any respect, as alleged in the petition, the next question which arises is whether the plaintiff could, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence. Nothing is better settled than that what does or does not constitute such negligence as will preclude a recovery is peculiarly a question for the jury. The rule more peculiarly applicable to the case now under consideration is that, "unless the danger is obviously great, the court cannot hold as a matter of law, that a given act constitutes such negligence as will preclude a recovery." *Suber v. G., C. & N. R. Co.*, supra; *Coursey v. Southern Ry. Co.*, 113 Ga. 297, 38 S. E. 866; *Mack v. Savannah & Statesboro R. Co.*, 118 Ga. 629, 45 S. E. 509; *Augusta Southern R. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005; *M. & B. R. Co. v. Anderson*, 121 Ga. 686, 49 S. E. 791; *Turley v. A., K. & N. R. Co.*, 127 Ga. 594 (2), 56 S. E. 748, 8 L. R. A. (N. S.) 685; *Central of Ga. R. Co. v. Forehand*, 128 Ga. 547, 58 S. E. 44. In these cases the question related to passengers upon railway trains; but if it be true that the mere presence of a passenger upon the platform of a train, or even his attempting to alight from a moving train, is not negligence per se, it would seem to be true a fortiori of a passenger on an ordinary street car, operated upon the streets of a city, and necessarily run at a lower rate of speed than the passenger trains of railroad companies. In *Augusta Southern R. Co. v. Snider*, supra, the Supreme Court held that the rule of negligence applicable to a passenger attempting to alight from a moving train is also applicable to passengers on the platform, not attempting to alight. This rule would seem to be peculiarly sound when applied to passengers upon street cars for the reason that, in a case where a passenger may intend to transfer from one line to another, he may not have determined the exact point at which he will disembark from one car to take another; and it may frequently be necessary for him to go upon the platform to ascertain the point from which he can most expeditiously reach his destination.

2. Under the undisputed evidence in the present case the passenger had notified the conductor that he desired to leave the car at a certain street corner where the cars stopped. The conductor was eating his dinner, and continued to eat until the car was near the passenger's destination; but no signal was given to the motorman to stop, nor any warning to the passenger that he should make preparation to alight. The passenger had a number of bundles, and went out on the platform, and thence to the step of the

car. He had the right to presume that the conductor would even yet notify the motorman to stop at the proper place. While standing upon the step, and when within 23 feet of the usual stopping place, the car was suddenly jerked and its speed increased, and he was thrown to the ground, and, according to his testimony, painfully injured. Under the facts in evidence the cause was not one for the determination of the court, and should have been submitted to the jury. It was therefore erroneous to award a nonsuit.

Judgment reversed.

(6 Ga. App. 56)

HEARN v. HUFF. (No. 1,428.)

(Court of Appeals of Georgia. April 15, 1909.)
LANDLORD AND TENANT (§ 265*)—ACTION FOR RENT—EVIDENCE.

The relation of landlord and tenant, either by express contract or by legal implication, is an essential basis of a distress warrant. Therefore, where the undisputed evidence affirmatively shows that this relation did not exist, a judgment for rent was unauthorized.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1063; Dec. Dig. § 265.*]
(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by W. A. Huff against Paul Hearn. Judgment for plaintiff, and defendant brings error. Reversed.

Jno. R. L. Smith, for plaintiff in error.
T. J. Cochran, for defendant in error.

HILL, C. J. The questions in this case arise on a distress warrant sued out by Huff against Hearn. The affidavit for the warrant contained the statement by Huff that Hearn "is justly indebted to him in the sum of \$22.50 for rent of lands in the county of Bibb, and that said rent is now due and unpaid." Attached to this affidavit is a bill of particulars stating that Hearn was indebted to Huff "for trespassing upon, using, and occupying and cultivating two lots of land in Vineville." When the case was called for trial in the justice's court, Huff amended by alleging that he brought the suit for the rent "as agent for the use and benefit of the receiver of the federal court in the case of *Bidwell et al. v. Huff et al.*" Hearn filed a counter affidavit. On the trial Huff testified in substance as follows: "The amount I claim is for using and occupying two lots of land, one for 2½ years, and one for 3 years. \$27.50 is the reasonable rental value of the land for that time. I never did rent the land to Mr. Hearn, or consent to his using or occupying it; but his doing so was without my consent, over my objection and protest. During all the time he occupied and used it, it was in the hands of a receiver of

the United States court appointed in the case of *Bidwell et al. v. Huff et al.* Mr. Clem P. Steed was the receiver. I was acting for the receiver in looking after this and other land during the receivership, and during the time Mr. Hearn used and occupied this land. Mr. Hearn went to see Mr. Steed about renting this land. Mr. Steed refused to have anything to do with him. He said he did not like his face and referred him to me. I refused to let him have the land, and in order to prevent him from occupying it I placed a wire fence around it. Mr. Hearn went and cut the wire fence, and used and occupied it anyhow. Since Mr. Steed died, Mallary and Cone have been appointed receivers of the property in his place, but I have not been agent for them." Hearn testified that he did not see, apply to, or negotiate with Steed, the receiver, about the land in question. The jury found a verdict for the plaintiff, and the defendant filed a petition to the superior court for a writ of certiorari, and the writ was granted. On the hearing, the superior court overruled the certiorari, and held that there was no question of fact involved, and entered final judgment for the amount of the verdict in favor of Huff and against Hearn and his bondsman, with interest and cost. The specific assignments of error made in the petition for certiorari will be sufficiently indicated in the following opinion:

The essential basis upon which the right to a distress warrant arises is the existence of the contractual relation of landlord and tenant. Such relation must exist either by express or by implied contract. Section 3116 of the Civil Code of 1895 provides that, "when title is shown in the plaintiff and occupation by the defendant, an obligation to pay rent is generally implied; but if the entry was not under the plaintiff, or if possession is adverse to him, no such implication arises." The case of *A. K. & N. Ry. Co. v. McHan*, 110 Ga. 543, 35 S. E. 634, was an action for use and occupation of land of the plaintiff by the defendant, "without the consent of the plaintiff and without any authority whatever or right to the said use." The court says: "Under the allegations of the petition * * * the railway company was a trespasser, pure and simple; and, this being so, the plaintiff could not maintain against it an action for the use and occupation of the premises as upon an implied promise to pay rent." And in *Allen v. Macon & Dublin R. Co.*, 107 Ga. 849, 33 S. E. 700; the court says: "The relation of landlord and tenant must exist between the parties; for by virtue of that relation alone can one of them be said to have contracted with the other to pay rent. In no sense is a trespasser the tenant of the owner of land tortiously entered and held adversely to him; and, however guilty of wrongdoing such trespasser may be, it is doubtful whether any court could be persuaded to go so far

as to punish him to the extent of making him become the tenant of one with regard to whom he had at least acted consistently in refusing to recognize him as a landlord." In the instant case, according to the plaintiff's own testimony, not only had the defendant refused to recognize him as his landlord, but the plaintiff had absolutely refused to recognize the defendant as his tenant, had objected to and protested against his use and occupancy of the land in question, and had erected a wire fence for the purpose of keeping the defendant out. "The fundamental basis of a distress warrant is that the relation of landlord and tenant shall exist. Rent must be due. This can only be by contract, express or implied. An adverse holder of the land cannot be due rent." *Cohen v. Broughton*, 54 Ga. 296. And further on in the case just cited the court says, alluding to a distress warrant for rent, that "the writ is a harsh one, and has always been restricted to the case of a tenant by contract, and has never been extended to one holding adversely."

It being, therefore, well settled that the relation of landlord and tenant is essential to the maintenance of a distress warrant, it follows that any fact which precludes the existence of such contract, express or implied, prevents the maintenance of this remedy. *Civ. Code 1895, §§ 3115, 3124; Sims v. Price*, 123 Ga. 97, 50 S. E. 961; *Lathrop v. Standard Oil Co.*, 83 Ga. 307, 9 S. E. 1041; *Cohen v. Broughton*, supra. Certainly it cannot be claimed that under the evidence of the plaintiff there was any express contract creating the relation of landlord and tenant; and section 3116 of the Civil Code, under the facts, expressly negatives the existence of any implied contract creating such relation. According to the plaintiff, the title to the property was not in him, but was in the receiver in the United States court. The entry upon the lands by the defendant was not under him, but was expressly over his objection and protest, and the possession of the defendant was adverse to him, as well as to the receiver; in other words, relatively to the plaintiff and to the receiver, the defendant was nothing but a trespasser, and the relation of landlord and tenant, therefore, could not, under the law, have existed between him and the defendant, or between the defendant and the receiver, by the express terms of the section of the Code just cited. Besides, there was no evidence of any agreement fixing the amount of rent, nor any evidence on this subject from which a fixed amount could have been ascertained, and a distress warrant cannot be maintained upon a quantum meruit. *Cohen v. Broughton*, supra. We are clear that under the evidence this case is fully controlled by section 3116 of the Civil Code, above quoted, and the decisions of the Supreme Court cited in this opinion, and we therefore conclude that the judgment of the superior court in overruling

the certiorari and in entering a final judgment against the defendant was erroneous.

Judgment reversed.

(6 Ga. App. 33)

CENTRAL OF GEORGIA RY. CO. v. MOBLEY et al. (No. 1,275.)

(Court of Appeals of Georgia. April 15, 1909.)

1. MASTER AND SERVANT (§ 276*)—ACTION FOR DEATH—EVIDENCE—SUFFICIENCY.

The evidence authorized the verdict, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 954; Dec. Dig. § 276.*]

2. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—RULES—QUESTIONS FOR JURY.

The rules of the defendant company were not introduced in evidence. The trial judge properly restricted an instruction, which had been requested, that the plaintiffs could not recover if their deceased father had violated a contract by which he obligated himself under certain conditions to release the defendant from all liability, by adding a qualification in which the jury were instructed to inquire whether the stipulation of the contract by which the defendant sought to relieve itself was inserted for the purpose of bona fide enforcing the rules of the company, or merely for the purpose of avoiding liability which might arise from the violation of a rule, to the nonenforcement of which the company had consented.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1000; Dec. Dig. § 284.*]

3. MASTER AND SERVANT (§ 144*)—INJURIES TO SERVANT—RULES—CUSTOMARY VIOLATION.

Proof that an employer, with full knowledge of the continued violation of rules imposed by him for the government of his employes, has acquiesced therein, will authorize the inference that the rule has been abrogated.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 287; Dec. Dig. § 144.*]

4. CORPORATIONS (§ 428*)—EMPLOYEES—INJURIES—VIOLATION OF RULES—NOTICE TO AGENT.

A corporation knows of the violation of its rules and acquiesces therein whenever the particular agent of the corporation who is charged with the enforcement of the rule in question knows of its violation and acquiesces therein. The knowledge of the agent is the knowledge of the corporation, and, though it is the duty of the inferior agent charged with the enforcement of a rule to inform his superior thereof, a breach of this duty cannot affect the rights arising from his knowledge that the rule is being violated.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1745; Dec. Dig. § 428.*]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by Joseph Mobley and others, by next friend, against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

E. A. Hawkins and J. B. Hudson, for plaintiff in error. J. A. Hixon and Shipp & Sheppard, for defendants in error.

RUSSELL, J. The assignments of error contained in the several grounds of the motion for new trial really present but four points—the sufficiency of the evidence, the right of an employe to rely for guidance upon the orders of his superior officer, the abrogation of the rules of a carrier by nonuser, and the question as to what officer of a railroad company must the knowledge of a uniform disregard of its rules be brought to effectuate an abrogation of the rules.

1. Upon the point as to the sufficiency of the evidence it appears, from the testimony in behalf of the plaintiffs, that their father was engaged by the defendant company as a switchman in its yards in the city of Americus. On the occasion when he met his death he was assisting in the shifting of certain freight cars. The yardmaster was temporarily absent, but in his absence the head switchman took his place and directed the shifting of the cars. Plaintiffs' father was ordered by the head switchman to go in between two cars while the engine was attached to them. After uncoupling the cars as directed, the deceased gave a signal which was repeated to the engineer by the acting yardmaster. Instead of obeying this signal, the engineer backed the train of cars down toward the deceased, whose foot got fastened in the switch frog; and, although he made efforts to extricate himself, he was run down by the heavily loaded cars and was so mangled that he died a very few moments afterwards. The witnesses for the defendant did not unequivocally deny that in the absence of the yardmaster Mr. Johnson, the head switchman, had authority to direct in the shifting and making up of trains. But the defendant relied upon a contract, signed by the deceased, in which he stated that he knew that the rules of the company forbade his getting between cars while they were in motion, or even while the cars were standing still, if the engine was attached to them. No rule of the company was introduced in evidence, and the deceased's understanding of the rule mentioned in the contract, to which reference has just been made, as stated by the yardmaster himself when upon the stand, was that, while he was forbidden to go between moving trains for any purpose, he was not forbidden to go between two cars for the purpose of coupling or uncoupling, if the train was standing still, although the cars may be attached to the engine.

The case, as presented by the plaintiffs, was one in which an employe was directed by his superior officer to do what he had contracted not to do, and while engaged in executing these orders was killed without fault upon his part, unless the jury had inferred that by the exercise of ordinary care he could have prevented his foot from being caught in the switch frog; and even upon this latter point there was evidence that the railroad

company omitted to provide the frog with a block. The question was not whether the deceased had violated any of the printed rules of the company (for there is no evidence that he had ever seen a printed copy of the rules, or that any such are furnished to the employes of this defendant), but whether by the violation of his contract the plaintiffs are inhibited from recovering for his death. The jury would have had as much right to infer that the deceased received his knowledge of the rules which he bound himself to obey from the verbal explanation of the yardmaster and the construction placed by that officer upon the rules as to infer that he had been provided with a copy of the rules and derived his knowledge from their printed contents. The evidence authorized the jury to find that the contract did not defeat the power of the deceased's superior officer to order, nor the right of the deceased to obey instructions of this superior officer, or to find that, even if the rules were known by the deceased not to be subject to the construction placed upon them by his supposed superior officer, the rule, if such existed, had been abrogated by custom and with the acquiescence of the defendant. This being true, the verdict in favor of the plaintiffs is authorized by the evidence, and a new trial was not required, unless the finding was induced by an error of law on the part of the court.

2. We come, then, to consider whether the court should have qualified the defendant's request to charge by the modification of which complaint is made. In this qualification the court submitted to the jury the question as to whether the stipulation of the contract which referred to the rule was made in good faith by the company, with the intention that the rule should be enforced, or whether the stipulation was an unreasonable and impossible one, not made in good faith, but for the purpose of contracting against any liability which might arise against the defendant and in favor of the employe. For the reasons stated in *Austin v. Central of Ga. Ry. Co.*, 3 Ga. App. 775, 61 S. E. 998, we think the modification and qualification which the judge placed in the requested instruction was appropriate and proper. The judge charged the jury, as requested, that if they believed from the evidence that the deceased by contract obligated himself not to go between cars while they were attached to an engine, and agreed to release and relieve the defendant from all liability for damages for any injury occurring to him while he should be between the cars so attached to the engine, and that he was thus so injured, and died from the injuries thus received, then his children could not recover damages for the homicide, but added: "If you deem that a reasonable rule and requirement was made in good faith by the company, and intended to be used and enforced by the defendant company, then it would be binding. On the contrary, if it

was an unreasonable and impossible rule, and not made in good faith, not intended to be enforced, but made for the purpose of contracting against any liability that might arise against the defendant in favor of the employe, then it would be contrary to public policy and would not be binding, but would be null and void." The judge charged, further: "If that contract was a reasonable one and bona fide, and intended to be enforced at the time, and not made for the purpose of defeating any liability that might arise under the contract, and he was injured and died from the injuries thus received, then his children could not recover damages for his homicide under such circumstances."

The charge of the court was really more favorable to the defendant than it was entitled to, inasmuch as no rules were put in evidence, and for this reason the court was not required to determine whether any rule of the company was reasonable or unreasonable. The only question before the jury, under the evidence, was whether the stipulation of the contract was an unreasonable or impossible one; and as, in this instance, the determination of this inquiry must depend upon pure questions of fact, we think it was properly submitted to the jury to say, from the evidence, whether it was unreasonable to require the deceased, as a switchman, not to go between cars, if it otherwise appeared from the evidence that it was a practice well-nigh universal for switchmen to go between cars; and it certainly was a question for the jury (if they found the stipulation of the contract to be unreasonable) to determine from the evidence upon that subject whether the rule, if such existed, was so generally disregarded that the stipulation in the contract was a mere subterfuge to avoid liability.

3. As we held in the *Austin Case*, *supra*, rules which have been adopted by a corporation (or any employer for that matter) for the government of its employes may be suspended or abrogated by continual acquiescence in their violation on the part of those officials of the corporation charged with the enforcement of rules, with full knowledge of the fact that the rule in question is being generally disregarded by the employes. The trial judge did not err in his instruction upon this subject, and the evidence was ample that, if there was a rule requiring those employes who were engaged in coupling and uncoupling cars not to go in between cars while the engine was attached to them, the rule was more honored in the breach than in its observance.

Plaintiff in error claims that the court could not properly have instructed the jury to consider the good faith of the defendant and its intention in taking the contract, for the reason that there was no evidence to authorize such a charge. We think the apparent disregard of the company's regulation furnished circumstantial evidence, which

might be considered by the jury, as well as direct evidence; and if the knowledge of this disregard was brought home to the defendant it would be fair to infer that the company had no intention of enforcing the rule it is assumed to have adopted, and that the company itself regarded it as unreasonable and incapable of enforcement. A fact may be proven by circumstantial as well as by direct evidence, and intention and good faith, as facts, are not usually susceptible of any other kind of proof than that which may be deduced from circumstances.

4. It is insisted, however, that for the company have such knowledge of the general disregard of its rule as that it can be inferred that it has acquiesced in the abrogation of the rule, knowledge of the general disregard of the regulation must be brought home to the president, general manager, or directors of the corporation. We do not agree to the statement as thus broadly made. It is true that the company must first know that its rules are being disregarded, and thereafter acquiesce in the disuser or nonuser of its regulations before it can be said that it has consented to the abrogation of a rule and waived its enforcement, as well as waived any rights which might accrue to it by the terms of the rule; but it is not essential that knowledge of consent to the abrogation of the rules of a corporation should be brought home to its official head. Corporations, being artificial persons, act only through their agents, and they gain information only in this way. It is sufficient, therefore, so far as the rights of any particular person are dependent upon the existence or the nonexistence or waiver of a corporate regulation, if the corporation's agent, charged with the enforcement of a particular regulation at a particular place, waives the rule or consents to its abrogation. As such agent, and being required to enforce the rule, it would be within the scope of his authority, so far, at least, as an employé who works under his direction is concerned, to waive the enforcement of the rule. We think, therefore, that the court properly refused to instruct the jury that "yardmasters, switchmen who act as yardmasters or as switchmen, conductors, engineers, or agents at certain stations, are not officers of the railroad company, and are not such superior officers of the company as to whom knowledge of continued violations of rules will be presumed, so as to abrogate the rule or rules, or to set aside a contract made by an employé."

The fifth ground of the amended motion is not approved by the trial judge, and is therefore not considered. Another ground depends upon the erroneous assumption that the rules of the company had been put in evidence, and was, therefore, properly overruled.

Judgment affirmed.

(6 Ga. App. 97)
PACETTI v. CENTRAL OF GEORGIA RY. CO. (No. 1,680.)

(Court of Appeals of Georgia. April 15, 1909.)

1. PLEADING (§ 8*)—PETITION.

In a petition seeking damages on account of negligence, an allegation that the defendant "knew or ought to have known" of a matter, knowledge of which is essential to raise the duty and the consequent liability for neglect, is equivocal, and will be construed as asserting merely the conclusion of the pleader that the defendant had constructive knowledge. Such an allegation is permissible, however, when the petition alleges specific facts showing a relationship or a set of circumstances which impose upon the defendant a duty to anticipate or to know of the thing in question. The facts set forth in the present petition were adequate to show a violated duty of anticipation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

2. NEGLIGENCE (§ 72*)—CARRIERS (§ 347*)—CONTRIBUTORY NEGLIGENCE—SUDDEN DANGER.

Persons confronted by a dangerous situation, or by an emergency or other circumstances likely to impair judgment and ordinary discretion, are not held to the same quantum of care as they would be otherwise. The question as to whether the plaintiff was guilty of such contributory negligence as to defeat her cause of action for the defendant's negligence is issuable under the facts alleged in the petition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 99, 100; Dec. Dig. § 72.* Carriers, Dec. Dig. § 347.*]

3. PLEADING (§ 9*)—PETITION.

A pleader may, without subjecting his petition to demurrer, allege matters by way of general conclusion, where the specific facts upon which the conclusion rests are detailed with requisite definiteness.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by A. C. Pacetti against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

This case comes to this court upon the sustaining of demurrers, general and special, to the plaintiff's petition. The substance of the plaintiff's petition is that she went to the passenger station of the defendant in Savannah, in company with other relatives, to bid her brother adieu; that she and her immediate party were standing in the lobby of the station, near one of the gates which led from the general waiting room to the train shed. A set of gates constructed of transverse collapsible iron bars shut off the crowd in the waiting room from the train shed. It was a special occasion, and a large number of persons had gathered in the waiting room and were surging down in the direction of the gate, so that they might enter as soon as the guard stationed there should open the gate. A gentleman accompanied by two ladies shoved his way through the crowd and approached the gate. The guard made preparations to open it and permit the gentle-

man and the ladies to enter. The crowd to the rear of the plaintiff, seeing that the gate was about to be opened, and thinking that all who wished would be permitted to enter, surged forward and pushed against the plaintiff, and she was being pushed in the direction of the gate, when, for the purpose of lessening the blow which would ensue from the pushing of her body against the gate, she extended her left arm and hand and placed it against the gate. While the plaintiff's hand was thus on the movable framework of the gate, "in plain view of the gatekeeper," he opened it violently, and, as the bars closed up, her thumb was caught between two of the bars, as if between the blades of a pair of shears, and was severely cut, bruised, and crushed. She cried out, and the guard then closed the gate and released her thumb, and she pushed on through the gate.

The eighth paragraph of the petition, to which a special demurrer was sustained, is as follows: "Your petitioner shows that the said gatekeeper of said defendant company, in opening said gate while your petitioner was crushed up against the same, knew that to open the gate would be to inflict injury upon your petitioner. Said gatekeeper knew, or in the exercise of ordinary care should have known, that your petitioner's hand was on the gate at the time the same was opened, and recklessly disregarded your petitioner's safety and welfare." It is also alleged in the petition, in general terms, that the plaintiff was in the exercise of due and ordinary care, and did not contribute to her injuries; also that she was at a place where she had a right to be and where the public was invited to come. The twelfth paragraph of the petition, to which a special demurrer was sustained, is as follows: "Petitioner further shows that the injuries which she sustained were due entirely to the negligence and want of care of said defendant company, in that (1) the said gatekeeper, as the agent and employé of said defendant company, knew, or in the exercise of ordinary care should have known, that at the time he opened said gate your petitioner's body was crushed against the same, that she was unable to remove her hand from the surface of the gate or to prevent her body from pressing against the gate, because of the crush of the crowd to her rear, and, so knowing, the said agent and employé of said defendant company willfully did that which was calculated to injure and damage your petitioner; (2) in that the said defendant railway company did not afford to your petitioner that protection which is due to the public while lawfully on the ground around its station, but, on the contrary, negligently and carelessly permitted her to receive injury, as above described, at the hands of its agent, servant, and employé."

The special demurrers were as follows: "(1) Paragraph 8 of the petition, which alleges that defendant's gateman recklessly dis-

regarded petitioner's safety and welfare, is the conclusion of the pleader; there being no facts recited in the petition to show that the defendant's agent willfully and knowingly injured said petitioner. (2) Subdivision 1 of paragraph 12 of the petition, which alleges that the defendant's agent willfully did that which was calculated to injure and damage petitioner, is the conclusion of the pleader; there being no facts recited in the petition to show that the action of defendant's agent was willful. (3) Subdivision 2 of said paragraph 12 of the petition, which alleges that the defendant did not afford to petitioner that protection which was due to the public around its station, but negligently and carelessly permitted her to receive injury, does not allege or show what duty or care was due to the petitioner under the law by the defendant, and because the allegation of said paragraph that she was negligently and carelessly permitted to receive injury is the conclusion of the pleader. (4) Defendant demurs specially to the last sentence of paragraph 7 of the petition, because the same does not state what assistance she called on the gateman to render her, and because the allegation therein that he treated her with indifference and seeming anger is the mere conclusion of the pleader."

The court sustained the first, third, and fourth special demurrers, and also the general demurrer, and dismissed the petition. To this ruling the plaintiff excepts.

Oliver & Oliver, for plaintiff in error. H. W. Johnson and Lawton & Cunningham, for defendant in error.

POWELL, J. (after stating the facts as above). Under the allegations of the petition, the plaintiff was on the premises of the defendant as an invited guest, and the defendant owed her the duty of exercising toward her ordinary care and diligence to secure her safety. *Mandeville Mills v. Dale*, 2 Ga. App. 607, 58 S. E. 1060; *Civ. Code* 1895, § 3824; *Rollestone v. Cassirer*, 3 Ga. App. 161, 59 S. E. 442. The brief of the counsel for the defendant in error, and the opinion of the trial judge contained in the record, present the proposition that the petition is defective, in that the gateman's knowledge of the presence of the plaintiff's hand upon the gate is alleged in the alternative, that "he knew or in the exercise of ordinary care should have known that the petitioner's hand was upon the gate at the time the same was opened," and that this allegation, under a familiar rule of construction, will be held to mean simply that it was the gateman's duty to know, and not that he actually did know. See *Southern Bell Tel. Co. v. Starnes*, 122 Ga. 604, 50 S. E. 843; *Babcock v. Johnson*, 120 Ga. 1030 (6), 48 S. E. 438. It is true that when a petition, in alleging the element of the knowledge of the defendant or his agent as one of the ingredients of the negligence complained of, leaves it doubtful whether the

knowledge was actual or constructive, the petition as a whole must set up such a state of facts as prima facie will show a duty (arising from the relationship existing between the parties as asserted, or from the particular circumstances surrounding the transaction) that the defendant or his agent should have known. In other words, to state it differently, in that class of cases in which the duty of anticipation is normally absent, the plaintiff, in order to assert a valid cause of action, must state unequivocally that the defendant had actual knowledge, or else must set up such a state of facts and circumstances as would take the case out of the normal, and raise the duty where it otherwise would not exist.

We think that the present petition does this. Normally, perhaps, a gatekeeper at a railway station would not be called upon to anticipate that any one standing near the gate would have his hands on it. But circumstances alter cases. Under the petition, this was not a normal or ordinary occasion. A crowd of people were surging down the lobby toward the gate. The plaintiff, in front of them, was being pushed against the gate. The conduct of persons jostled about in a crowd is not usually the same as it would be under normal circumstances. Gatekeepers, guards, trainmen, and others whose movements are to be performed in the range of a crowd of people, must of necessity use more caution than they would at other times. It is alleged that the plaintiff's hand was upon the gate in plain view of the gateman. The plaintiff's person was about to be crushed against the gate, and the crowd was pressing her on. It will not do to say that under such circumstances the gatekeeper acted prudently and without negligence in opening the gate without stopping to see whether he could do so without injury to the plaintiff or others who might be pressed up against it. If the allegations of the plaintiff's petition be true (and, of course, on demurrer, their truth is admitted), the gateman's conduct was not only negligent, but it was reckless.

2. It is said, however, that the plaintiff's cause of action fails because of her contributory negligence in placing her hand upon the gate. To our minds this is a more doubtful proposition than the one we have just discussed. It would seem that a person of ordinary intelligence and prudence would not place his hand upon a collapsible iron gate about to be opened, when the opening of it would probably inflict injury upon the hand. As we have said above, however, the plaintiff was not acting under ordinary circumstances. It became necessary for her to throw out her hands in order to keep her body from being crushed against the gate. We are unwilling to say as a matter of law that she went beyond the limits of common

prudence in doing this. She may have reasonably believed that, if she threw her hand upon the gate in plain view of the gateman, he would desist from his previously manifested purpose of opening the gate until she had opportunity of extricating herself from the position in which the crush of the crowd had involved her. A person threatened with an imminent danger is not held to the same circumspection of conduct that he would be held to if he were acting without the compulsion of the emergency. A person has a right to choose even a dangerous course, if that course seems the safest one under the circumstances. Our conclusion is that the question of the plaintiff's contributory negligence is issuable, and, under the facts stated in the petition, it should be submitted to the jury.

3. As to the special demurrers: The first, which relates to the eighth paragraph of the petition, was not well taken. The facts alleged seem to support the conclusion asserted. The conclusion of the pleader is demurrable only when the facts alleged do not support it. For a like reason the sustaining of the second special demurrer was erroneous. We find no error in the court's action in sustaining the fourth special demurrer.

Judgment reversed.

(5 Ga. App. 731)

AMERICAN INS. CO. v. I. F. PEEBLES & CO. (No. 1,164.)

(Court of Appeals of Georgia. Feb. 20, 1909.)

1. INSURANCE (§ 668*)—FIRE POLICY—ACTIONS—QUESTIONS FOR JURY.

Where a policy of fire insurance requires the insured to submit proofs of loss within a reasonable time, ordinarily it is for the jury to determine whether the proofs were submitted within such time; but, where the undisputed evidence demands a particular finding, it is not error for the judge to direct a verdict accordingly.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1747; Dec. Dig. § 668.*]

2. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Proper diligence prior to the trial would have revealed the newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 210; Dec. Dig. § 102.*]

3. NO ERROR.

No error appears which would authorize the grant of a new trial.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by I. F. Peebles & Co. against the American Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

I. F. Peebles & Co., a partnership composed of I. F. Peebles and his mother, brought suit against the American Insurance Com-

pany on a policy of fire insurance covering a one-story brick building in the town of Butler, Ga., in which the plaintiffs carried on a general merchandise business. The fire, which resulted in the total destruction of the building, occurred on April 6, 1906, and originated in another part of the town. The day after the fire the insured gave the company notice in writing of their loss and requested the customary blanks on which to make formal proofs thereof. Receiving no answer to this letter, the insured wrote again, and finally went to the company's general manager at Atlanta and requested in person that the blanks be furnished. This was on July 11th, and immediately thereafter the blanks were filled out and submitted under date of July 18th. The policy contained a provision that the insured "shall give immediate notice of any loss thereby in writing to this company, * * * and within 60 days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating * * * the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon." The policy does not provide that a failure to submit proofs of loss within 60 days shall avoid the policy. The trial resulted in a verdict for the plaintiff directed by the court, and the defendant excepts to the overruling of its motion for a new trial.

Burton Smith and Lawton Nalley, for plaintiff in error. Ben J. Conyers and Walter T. Colquitt, for defendants in error.

RUSSELL, J. (after stating the facts as above). 1. The first assignment of error raises the point that, since the insured failed to submit proofs of loss within the time stipulated by the policy, it was a question for the jury as to whether such proofs were submitted within a reasonable time. So far as material to a consideration of this point, the policy involved in the case of *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216, contains provisions similar to the one involved in the case at bar. In that case the Supreme Court held that a failure to submit proofs of loss within the time stipulated by the policy would not work a forfeiture, if the proofs of loss were submitted "in time for at least 60 days to elapse between the date upon which they were furnished and the expiration of the 12 months' limitation" within which suit should be brought on the policy. This time was fixed by the court as being a reasonable compliance with the stipulations of the policy; it being said by Judge Cobb that the policy would never be forfeited if the insured submitted proofs of loss within a reasonable time. What is a reasonable time must be determined in light of the peculiar facts and circumstances of each par-

ticular case. Where under the evidence reasonable men might draw different inferences or there is material conflict in the evidence, the determination of the question is for the jury. *Brooks v. Boyd*, 1 Ga. App. 65, 70, 57 S. E. 1093; *Cin. Glass Co. v. Stephens*, 3 Ga. App. 766, 60 S. E. 360. But, where the undisputed evidence clearly demands a finding that the proofs were submitted within a reasonable time, it is not error for the judge to direct the jury in accordance with the only legal result possible in the case. *Abbeville Trading Co. v. Butler*, 3 Ga. App. 138, 59 S. E. 450; *Emerson v. Knight*, 130 Ga. 100, 60 S. E. 255; *Perry v. Macon Consolidated R. Co.*, 101 Ga. 400, 29 S. E. 304; *Barnshaw v. United States*, 146 U. S. 60, 13 Sup. Ct. 14, 38 L. Ed. 887. Applying this rule to the evidence in the case at bar, it was not error for the judge to instruct the jury that the proofs were submitted within a reasonable time. The fire occurred on April 6th. The very next day the plaintiffs notified the defendants of the loss, and requested blank forms, which were kept by the company and customarily sent to policy holders upon which proofs of loss are made. After waiting several days the plaintiffs wrote again, and were finally forced to make a trip to Atlanta in order to obtain the blank forms, and immediately thereafter filled them out and sent them to the company. In view of these facts it would have been illegal for the jury to have found that the delay on the part of the insured was unreasonable.

2. The policy contains a provision that it "shall be void * * * if the subject of insurance be a building on ground not owned by the insured in fee simple." Where the company claims a breach of this condition, the burden of so proving rests upon it. 2 *Clement on Fire Insurance*, 182; *Indian River Bank v. Hartford Ins. Co.*, 46 Fla. 283, 35 South. 228 (3); *Gate City Ins. Co. v. Thornton* (No. 1,522) 63 S. E. 638; *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595. The insurance company did not introduce any evidence at the trial tending to show a breach of this condition. The evidence of the plaintiff on the question of ownership of the land, at the trial, was to the effect that I. F. Peebles & Co. had been in possession since 1895, claiming a fee-simple title, and that the deeds were not on record and had been lost. One of the grounds of the motion for a new trial is based on alleged newly discovered evidence tending to show that the land upon which the building stood was owned by I. F. Peebles, instead of I. F. Peebles & Co. Even if it should be established beyond question that one of the partners owned the lot individually and that the other had no interest therein, it is extremely doubtful whether this would show a breach of the condition, under the rule of strict construction which must be indulged against the insurer; for there is respectable authority for the propo-

sition that, to hold the policy void because of this condition, there must be an ownership in some person who is not a party to the contract of insurance. *Mascott v. Insurance Co.*, 69 Vt. 116, 119, 37 Atl. 255. The policy was to be void only if the building was on "ground not owned by the insured in fee simple." The moral hazard may possibly be increased where some of the persons insured are interested in the building and not in the land, because, where the ownership attaches both to the building and the land, the temptation to burn is lessened, since the owner might lose the value of the use of the land during the period of vacancy; and this reason might apply even in the case of a partnership. But we deem it unnecessary to decide the question just suggested.

The alleged newly discovered evidence would not authorize a new trial. It is not necessarily inconsistent with plaintiff's testimony at the trial, and is of slight probative value, consisting merely of a deed, dated in 1883, from Charlton G. Ogburn to I. F. Peebles, and a deed, dated November 23, 1907, from I. F. Peebles to Mrs. S. A. Peebles, his mother, conveying an undivided one-half interest in the land in question, together with the certificate of the clerk of the superior court to the effect that the latter deed had been lodged with him for the purpose of being recorded. The Ogburn deed has been of record in Taylor county, Ga., since 1883, and could easily have been discovered by the exercise of proper diligence prior to the trial. The deed from Peebles to his mother, given after the trial in the court below, is not inconsistent with the testimony, delivered at the trial, to the effect that the deed of I. F. Peebles & Co. to the property had been lost, and that the new deed was merely to take the place of the lost one. Furthermore, a proper notice to produce would have put the defendant in possession of the plaintiffs' muniments of title, and would have enabled the defense now sought to be raised to have been presented at the former trial. This court is now thoroughly committed to the proposition that new trials will not be given to litigants who have exercised post mortem diligence only. *Murphy v. Meacham*, 1 Ga. App. 155, 57 S. E. 1046; *De Vane v. A., B. & A. R. Co.*, 4 Ga. App. 141, 60 S. E. 1079.

3. We have carefully considered each of the assignments of error, and have examined the authorities cited in connection therewith, but find nothing to authorize the grant of a new trial.

Judgment affirmed.

On Rehearing.

It is proper, perhaps, that we should notice that ground of the motion for rehearing in which it is insisted that the judgment refusing a new trial should be reversed because of the error of the trial judge in directing the verdict, for the reason especially 'hat it is for the jury to say in every case

whether the proofs of loss are filed within a reasonable time. It is insisted that the court has overlooked the ruling in *Southern Fire Ins. Co. v. Knight*, 111 Ga. 623, 36 S. E. 822 (52 L. R. A. 70, 78 Am. St. Rep. 216), in which it is held that "it was a question for the jury whether a reasonable time for furnishing the proofs had elapsed between the date the fire occurred and the date that the proofs of loss were submitted." And it is argued that (as the question as to what was a reasonable time was not submitted to the jury in the present case) to uphold the error of the trial judge in directing a finding upon that point would be to attempt to reverse the decisions of the Supreme Court and to permit judges to invade the province of the jury, thus opening wide the door to fact-finding judges. The fact that this court did not overlook the decision in the *Knight Case* is evidenced by the fact that it is cited in the original opinion as authority for our decision upon the point involved. We did not go very fully into the subject, because we apprehended that reference to the *Knight Case* itself would dispense with the necessity of repetition of the views therein expressed. For this reason, in quoting from the *Knight Case* that "what would be a reasonable time is to be determined by the particular facts of each case," we inserted as our own, after the word "facts," the words "and circumstances," instead of pursuing the text of the opinion in the *Knight Case*, and quoting the remainder of the sentence, holding that "in determining this question a valid stipulation in the policy that no suit should be brought thereon after the lapse of a given time should be taken into consideration." The reason why we say anything further at this time is in order that we may impress clearly our judicial judgment that all issues of fact are for the determination of the jury, and to point out that there is nothing in the decision in this case which contravenes this opinion, and nothing held in this case which is in conflict with our repeated rulings upon the same subject. So fixed is this rule in this court that we have universally held that as a matter of strict law the direction of a verdict in any case is error, but that it is harmless error, and not reversible, if a different finding from that directed could in no view be supported.

As has already been said in the opinion in this case, the verbiage of the stipulation in the policy in the *Knight Case* upon the subject of proof of loss, and the stipulation in the policy now under consideration, are practically identical. Each policy requires that suit shall be brought within 12 months; and the policy issued and now contested by the plaintiff in error contains a proviso that proof of loss must be made within 60 days, just as did the policy considered in the *Knight Case*. In the *Knight Case* it appeared that proofs of loss, as in the present case, were not submitted until after the ex-

piration of 60 days from the date of the fire. The Knight Case was decided, and the judgment of the lower court reversed, upon another point; but, in so far as the decision in the Knight Case is controlling upon the point now before us, it was held that, unless there was an express stipulation to that effect, the mere failure to file proofs of loss within the period designated by the policy would not work a forfeiture, and that an express stipulation that failure to submit proofs within the time limited should forfeit the policy was required to effectuate that end. And the conclusion of the whole matter is that (varied by the peculiar facts and circumstances of each particular case) any time may be said to be a reasonable time for the filing of proofs of loss which would allow 60 days to elapse between the time of the submission of proofs and the commencement of suit within 12 months, as provided for by the policy. If we look only to the decision in the Knight Case as precedent, and the contract in the present case be construed, as such contracts always should be, most strongly against the insurer, then it would perhaps have devolved upon the insurer to show that the time within which the proofs of loss in the present case were furnished was unreasonable. But if the insured carries the burden, as we think he should, of showing that the proofs of loss, though not submitted within the stipulated time, were filed within a reasonable time, what issue of fact upon the subject of reasonableness was there to submit to the jury, and wherein was the direction of the judge harmful to the plaintiff in error?

There was no conflict in the evidence upon the subject. The insured promptly notified the company of the fire, and requested blank proofs of loss to be sent to them. The uncontradicted testimony shows that the company had these blanks, and that it was the custom of this and of other companies to forward their special blanks prepared by them to their patrons when fires occurred. The request of the defendant in error in this case was treated with silent contempt. A second request met with a like fate. As it is a universal custom for these blanks to be forwarded, and as their request for the blanks was ignored, in the absence of any proof to the contrary, what inference could arise under the testimony, except that the company waived the stipulation requiring the proofs of loss to be made within 60 days? It matters not whether the supposition was to be indulged that the company did not intend to pay the policy, or that it intended to pay the policy. The only reasonable inference which could arise from the neglect to comply with the request for the blank forms of proof of loss, which the company had prepared for the use of its patrons and had in wholesale quantities in its office, was that the company was not in any haste to adjust the claim, and, knowing that it had 60 days in any event af-

ter the receipt of proofs of loss before suit could be brought, was contended to let the proof of loss be deferred to such later time as might suit the convenience of the insured. Is it conceivable that any jury of plain, honest men would find otherwise than that the insurance company's refusal and neglect to furnish a particular patron with as slight a thing as a mere blank proof of loss (with which it was supplied in wholesale quantities, and which it and all other insurance companies are accustomed to furnish, as prepared each for itself, whenever a fire occurs) was a waiver of the stipulation (which does not necessarily amount to a forfeiture), and that the time of the proof of loss was waived?

The case is very similar to that of Merchants' & Mechanics' Ins. Co. v. Vining, 67 Ga. 661 (1), and German-American Ins. Co. v. Davidson, 67 Ga. 11 (6). In the Merchants' & Mechanics' Insurance Co. Case, supra, the court held that: "Where the general agent of an insurance company refused to settle with a policy holder who claimed to have sustained a loss until the termination of certain garnishment cases, and refused to fix either the liability or the amount thereof, alleging such garnishments as a reason, such conduct amounted to a refusal to pay and a waiver of preliminary proofs, at least during the pendency of the garnishment cases." And in discussing the case Chief Justice Jackson says: "The important question in this case in respect to the charge of the court touching the refusal of the company to pay the policy, and thereby the waiver of the proof of loss, at least so far as not to defeat the recovery here because of the delay in making that proof, has been discussed and decided by this court this morning in the opinion pronounced by Judge Crawford, and hence it is unnecessary to do more than refer to that decision. It may be added to that argument that the terms of these two policies, both exactly alike, do not require the forfeiture of the policies, even if nothing equivalent to an absolute waiver had occurred, because the stipulation is that the company shall not be sued until 60 days after the proof of loss, and this suit has not been brought sooner than that time. But, when a man absolutely refuses to settle with another until the termination of another suit, it would seem that such refusal to settle is an absolute refusal to pay until that time has expired; and, as the proof was made in some two months afterwards to the general agent at Columbus himself, it is difficult to see how the defendant was hurt by any charge bearing on this point. The time when made is reasonable under all the facts, and it would have been a great wrong to allow the recovery to be defeated on such a point. A great wrong, or that which works a great wrong, without some show of reason, cannot be law."

In the Knight Case, as we understand it, it is held as a matter of law that any time

which allows the company 60 days before the termination of the 12 months in which suit may be brought to contest the justness of the claim may be a reasonable time. There was, therefore, under the evidence, no issue of fact to submit to the jury upon the subject of reasonable time; but even if the Supreme Court had not ruled, as it has, upon the point, the uncontradicted evidence was such, we think, as to have permitted but one finding, and therefore, if there was an error on the part of the court in not submitting to the jury the determination of whether the proofs were submitted within a reasonable time, it was harmless, and not reversible error. Upon the authority of the Knight Case and the Merchants' & Mechanics' Insurance Co. Case, supra, as precedent, as a matter of law, the ruling of the trial judge was without error. Under the opinion of Chief Justice Jackson, which we have quoted, the conduct of the defendant in the present case, in regard to the request for its forms of proof of loss, was subject to no other construction than that it waived the stipulation within sixty days. Whether it waived proofs of loss or not, the unusual course of the company in neglecting to forward its blanks to the plaintiffs upon their request caused the delay, according to the evidence; and the conduct of the plaintiffs in subsequently coming to Atlanta for the blanks, in the absence of any evidence introduced by the defendant upon this point, could, in our judgment, lead a jury to no other conclusion than that the proofs of loss, in such form as required by the contract of insurance, could not reasonably have been presented sooner than they were submitted.

Another point urged in the motion for rehearing, and to which we did not refer in the opinion, though it was not overlooked in reaching our decision, was the exception taken to the amendment of the plaintiff, and the evidence thereunder in regard to the character of the house. As to this we need only say that, while the policy described the building as a brick building, and the evidence showed it to have been largely composed of concrete blocks, there was no error in the allowance of the amendment, or in the admission of the testimony in accordance with the amendment. It was not, as is insisted, a case where the company insured one building and is held liable for another of an entirely different kind. No written application for a policy was made by the insured. The agent of the company who wrote the policy saw the building before the issuance of the policy, and knew it was largely constructed of concrete blocks. There was nothing to deceive him as to the character of the building. It spoke for itself, and his knowledge was the company's knowledge. The company, therefore, had seen the build-

ing before they insured it, and knowingly and voluntarily assumed the greater risk, if a greater risk was in fact assumed. The amendment and the evidence was in accord with this undisputed state of facts.

(6 Ga. App. 43)

SOUTHERN RY. CO. et al. v. PEEK.

(No. 1,331.)

(Court of Appeals of Georgia. April 15, 1909.)

1. TRIAL (§ 236*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

The charge of the court on the credibility of witnesses successfully impeached is in harmony with repeated decisions of the Supreme Court and this court, and is substantially in the language of Civ. Code 1895, § 5295.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531, 532; Dec. Dig. § 236.*]

2. FALSE IMPRISONMENT (§ 23*)—EVIDENCE—ADMISSIBILITY.

Where a railway company and one of its agents were jointly sued by an employé of the railway company to recover damages for his false arrest and imprisonment on the charge of larceny in taking coal from the company's yard, evidence that for years the employés of the company, with the knowledge and consent of the company and the agent, had made a practice of taking coal from the company's yard, was admissible. This evidence illustrated both the question as to the animus furandi of the employé in taking the coal and the quo animo of the defendants in causing his arrest and imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 23.*]

3. SUFFICIENCY OF EVIDENCE.

No error of law appears, and the verdict is supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. H. Peek against the Southern Railway Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Dorsey, Brewster, Howell & Heyman, for plaintiffs in error. Westmoreland Bros., for defendant in error.

HILL, C. J. Peek brought suit in the city court of Atlanta against the Southern Railway Company, and Dwyer as one of its servants or agents to recover damages for false imprisonment and malicious prosecution. The jury returned a verdict in his favor for \$500 as damages for false imprisonment, and the defendants' motion for a new trial was overruled. Besides the general grounds, the motion alleges error in certain rulings on evidence and on certain portions of the charge.

As to the general grounds, it may be stated that the evidence fully supports the material allegations of fact in plaintiff's petition, to wit, that while he was engaged as an engineer in the company's yards in the city of Atlanta he was arrested without a warrant

or legal authority by Dwyer, acting for the railway company, on the charge of simple larceny; that after his illegal arrest he was taken by Dwyer to the station house in the city of Atlanta and was there incarcerated for about eight hours, when he was taken before the recorder and was prosecuted by Dwyer at the instance and under the direction of the railway company on the charge of simple larceny, and after a full investigation he was acquitted and discharged by the recorder; that he had not committed the offense of simple larceny for which he was arrested, and his arrest was entirely without probable cause, and the detention of his person and his imprisonment was without warrant or legal authority. The facts upon which the charge of larceny was based were the taking by the plaintiff, Peek, of some coal which had dropped from coal cars into the yard of the railway company, and the taking of a "sack of shorts" which he picked up where it had fallen from one of the cars of the railway company, and which he had carried and placed in the inspector's house in the yard; and the material question was as to Peek's intention in taking these articles. He did not deny taking the articles, but did deny intent to commit a larceny in taking them. As to the coal, he proved that it had been a custom for years among the employes of the railway company to take up coal which had fallen from the cars, and that this practice was well known by the company, and no objection to the practice had been interposed by the company, and that in taking the coal he did so openly and followed the practice above stated; that this custom and practice was not only known to the company, but was fully known to the defendant Dwyer at the time of the arrest; and that, as to the sack of shorts that he had taken from where he found it in the yard, he placed it in the inspector's house for the benefit of the company. All these questions were settled by the jury in favor of the plaintiff, and unless the court committed some material error of law which contributed to the verdict it should not be disturbed.

There was an attempt on the part of the defendant to impeach Peek as a witness by evidence of general bad character, which attempt was met by Peek by counter evidence proving his general good character, and the evidence as to the general custom or practice by the employes of the railway company alluded to was admitted by the court over the objection of the defendant. The special assignments of error may be reduced to two, and will be considered in their order.

1. The first ground of the amended motion for a new trial objects to the following charge of the court: "If a witness is successfully impeached, then as to the matters with reference to which he is impeached, he should not be believed by the jury, unless his evidence is corroborated by other un-

impeached evidence or circumstances proved to your satisfaction in the case." It is contended that this charge is error, because it limits the effect of the impeachment to matters with reference to which the impeachment is sought; that, while it is a question for the jury to determine as to the credibility of the witness whose evidence is impeached by proof of bad character or contradictory statements, the impeachment, if successful, goes to all of his evidence, and should not be limited to that evidence with regard to which he is charged with making contradictory statements. In addition to the excerpt above objected to, and in the same connection, the court charged that, if the witness swore willfully and knowingly falsely, his testimony should be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. The charge, as a whole, on the subject of impeachment of witnesses, is almost in the exact language (certainly with no material variance) of section 5295, Civ. Code 1895, and charges in similar language have been repeatedly approved by the Supreme Court and by this court. See, especially, the case of *Sims v. Scheussler* (No. 1,385, decided by this court March 22, 1906), 64 S. E. 99. We conclude that the charge excepted to is, therefore not subject to the criticism made that it "modified and restricted the rules of law governing the impeachment of witnesses to the prejudice of the defendants." It may be remarked in this connection that whether any witness had been successfully impeached was solely a question for the jury, and under the evidence submitted to them they could well have come to the conclusion that an attempt made to impeach any witness had not been successful.

2. The plaintiffs in error make several assignments of error, based on the rulings of the court in admitting evidence, over objection, as to the existence of a custom or practice on the part of the employes of the railway company and other people in taking up and carrying away, with the knowledge of the company and its agents, coal and other things found in its yard, and which had fallen from its cars; and error is also assigned upon certain portions of the charge to the jury as to the effect of such evidence, if they believed that such custom or practice existed and was known to the defendant company, or its servants or agents. The objection to this evidence and to the charge thereon are elaborated with great detail, but are embraced in the general statement that such evidence was immaterial and irrelevant, that there was no evidence that the existence of such a custom or practice was known to the railway company or its agents, and that, if such a custom or practice existed, it constituted no defense or justification that could be urged by any particular person. We think that the evidence which tended to

show the existence of this custom or practice by the employees and others was clearly relevant and material, as illustrating both the question as to the animus furandi of Peek and the quo animo of the defendants in making his arrest. Peek did not deny that he had taken the coal from the yard. His defense was that he did not intend to steal it, and to prove such defense he set up this custom or practice. If it had existed for a long time, and was known to the railway company or to Dwyer, its existence would certainly tend to illustrate Peek's innocent purpose and intention in taking the property, and would tend to strengthen the truth of his contention that his arrest and imprisonment were unlawful and without probable cause; in other words, that in taking the coal he had committed no offense, and that this fact was well known to the defendants when they nevertheless arrested and imprisoned him. We therefore conclude that the court did right in admitting the evidence, and properly instructed the jury as to the manner in which such evidence should be considered by them.

From a careful consideration of the case, we are satisfied that no error of law was committed, that the verdict of the jury is supported by the evidence, and that the judgment refusing to grant a new trial should be affirmed.

Judgment affirmed.

(6 Ga. App. 59)

WALKER v. CITY OF ROME
(No. 1,429.)

(Court of Appeals of Georgia. April 15, 1909.)

1. WITNESSES (§ 363*)—BIAS OR PREJUDICE.
It is always competent, as illustrating the credibility of a witness, to show his animus as to a matter relevant to the controversy or his feelings toward either party to the cause.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1177, 1178, 1181; Dec. Dig. § 363.*]

2. EVIDENCE (§ 215*)—ACKNOWLEDGMENT OF INDEBTEDNESS—ADMISSIBILITY.

A statement of an account, which contains or upon which is indorsed an acknowledgment of indebtedness, is admissible either as original proof or in corroboration of other testimony showing the defendant's indebtedness.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 215.*]

3. MUNICIPAL CORPORATIONS (§ 1035*)—INDEBTEDNESS—PROOF—MINUTES.

Proof of the indebtedness of a municipal corporation is not necessarily confined to the contents of its minutes. A creditor of a municipal corporation may prove his debt by evidence other than the minutes of the municipality, or even by credible testimony which is in direct conflict with the minutes. His right to recover cannot be defeated by the mere failure of the municipal corporation to keep correct minutes of its proceedings.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1035.*]

4. MUNICIPAL CORPORATIONS (§ 36*)—ABSORPTION OF MUNICIPALITY—LIABILITY FOR DEBTS.

Where two municipal corporations are consolidated and the new corporation receives assets of value, or where one municipality absorbs another and receives property and cash which is liable for the payment of the debts of the absorbed and dissolved corporation, the absorbing municipality becomes liable, at least to the amount of the assets it receives, for such pre-existing debts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 105-111; Dec. Dig. § 36.*]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Henry Walker in a justice's court against the City of Rome. Defendant had judgment, and plaintiff sued out a certiorari, which was overruled by the judge of the superior court, and plaintiff brings error. Reversed.

The plaintiff in error, an attorney at law, brought suit in a justice's court against the city of Rome for services rendered as city attorney of the town of East Rome. It appears that in accordance with the provisions of the act of August 20, 1906 (Acts 1906, p. 1010), the town of East Rome was annexed to the city of Rome, and that the latter corporation assumed sovereignty over the former territory and the inhabitants of East Rome, and received, under the terms of the act of annexation, about \$8,000 in solvent tax debts and in personal and real property, including about \$280 in cash. The act of 1906 (Acts 1906, p. 820) authorized the town of East Rome to employ counsel for the town. The evidence was undisputed that Mr. Walker, the plaintiff in error, was the regularly employed attorney of East Rome, and that as such he performed the services for which the suit was brought, and that under the direction of the finance committee of the council of East Rome he incurred the expense of the bill for typewriting and stenographic work which formed a part of the account sued upon. In the statement of account attached to the summons in the justice's court the plaintiff set forth his cause of action very fully. It was alleged that the city of Rome is indebted to the plaintiff because the debt "was assumed by the city of Rome under an express enactment contained in the act of August 20, 1906, amending the charter of said city," and that "the city of Rome, having taken over the territory of East Rome, became liable to plaintiff in the sum sued for; and it is also liable because sovereignty carries with it obligation. The city of Rome received from East Rome, under the scheme of annexation, a sum of cash, and personal and real property of East Rome, more than sufficient to pay said debt." The plaintiff then set forth

in detail his services in preparing four resolutions, and the item of clerical work "ordered and had done in pursuance of" the last resolution mentioned. The account had entered upon it the approval of the chairman of the finance committee of East Rome. The defendant did not file any answer denying the justness and fairness of the plaintiff's claim, or any portion of it, and did not introduce any testimony. The jury found in favor of the defendant. The plaintiff certiorari; and the writ of error complains of the judgment overruling and dismissing the certiorari.

Henry Walker, for plaintiff in error. W. J. Nunnally, for defendant in error.

RUSSELL, J. (after stating the facts as above). We think the court erred in overruling the certiorari. Three errors were assigned in the petition for certiorari. In the first place it is insisted that the justice of the peace erred in permitting a witness to testify, over plaintiff's objection (that the testimony was irrelevant), that "plaintiff and said three councilmen actively opposed annexation at the polls and elsewhere." It is always competent and proper to show the animus of a witness as to a matter relevant to the controversy or his feelings toward a party to the cause. There was no error in admitting the testimony showing the feeling of the witnesses as to the matter which was the original bone of contention. A party cross-examining the witnesses of his adversary should be allowed the fullest right of thorough and sifting cross-examination, and the feelings or bias of a witness as to the subject-matter of controversy, or as to any party involved in the litigation is always the legitimate subject-matter of inquiry, because it may affect the credibility of such witness before the jury.

2. We think the court erred in excluding the original approved account from the evidence. Under the evidence of the clerk of the council at East Rome, the account when approved by the chairman of the finance committee, was a duly approved voucher. It was an acknowledgment by the debtor which, under the practice prevailing in that municipality, was entitled to payment. According to the evidence, the account was examined, found correct, approved, and directed to be paid. It was declared upon as a liquidated debt, and was relevant as evidence. As appears by the record, the objection urged at the time to the introduction of the voucher into evidence was irrelevancy, because "no evidence of any debt against East Rome." As has already been said, it was uncontradicted in the evidence (and the testimony had been admitted without objection) that Mr. Walker was the city attorney of East Rome, that he performed the services charged in the account, and the minutes of East Rome gave evidence of the fact that these services were accepted. Of necessity, an im-

plied contract arose, by which East Rome was bound to pay the reasonable value of these services, which the proceedings of the council show had been accepted by the municipality. As heretofore stated, there was no denial of the justice of the claim or that the services were rendered; and for that reason, if the suit had been proceeding against the town of East Rome, the plaintiff should have recovered. The testimony which the court ruled out, so far as it relates to the approval of the account by the chairman of the finance committee, was strictly in corroboration of the testimony theretofore adduced in behalf of the plaintiff, being an admission of East Rome's liability for the amount stated, after it had been shown by the evidence that the defendant by having accepted the services, was liable for some amount.

3. A county cannot be held liable upon any contract which is not entered upon the minutes kept by the proper county authorities; and it is insisted, in the brief of learned counsel for the defendant, that inasmuch as there is no evidence from the minutes of East Rome, showing that a contract was made with Mr. Walker to act as city attorney, the plaintiff failed to make out his case against East Rome. The provision in regard to contracts which impose liabilities upon counties is a statutory requirement limited to counties. We know of no rule by which a municipal corporation is relieved from liability for the obligations assumed in its behalf, or for debts incurred in its behalf, by the properly constituted agent or agencies, or for services which have been accepted by the proper municipal authority, under an implied agreement to pay for the same; and certainly, where in the ordinary conduct of the business of a municipality debts are incurred in the purchase of supplies, or where in the procurement of services necessary for the ordinary administration of the business of the municipality an indebtedness is created, for which funds have already been raised and are in hand in cash sufficient for its payment, as appears in the present instance, there is lacking neither the proper authorization to create the debt nor the liability to comply with it. So far as the present case is concerned, the minutes of the council of East Rome show that that municipality, knowing that Walker expected pay for his services, received the benefit of them. But, even if the evidence for the plaintiff had depended entirely upon the oral testimony, we see no reason why he would not still be entitled to recover if the suit were proceeding against the town of East Rome. So far as a debt created by the properly authorized agent of a municipality is concerned, the creditor is not estopped from enforcing his contract because the contract which is the basis of the indebtedness has not been entered upon the minutes of the municipality. Proof of the indebtedness of a municipal cor-

poration is not necessarily confined to the contents of its minutes. A creditor of a municipality may prove his debt by evidence other than the minutes of the municipality, or even by evidence in direct conflict with the minutes, if such evidence is credible to the jury. One who claims to be a creditor of a municipality must, of course, show that the agent by whom the debt was created had full authority to contract with him; but the right of a creditor to recover upon a debt due him by a municipal corporation cannot be defeated by its mere failure to keep correct minutes of its proceedings, or even if no record be kept at all. It is essential to the protection of every municipality that the minutes of the proceedings of its officials be kept; but this is rather for the protection of the municipality against the misfeasance of its own agents than to defeat the just claims of creditors to whom the city may properly have become indebted upon contracts legally made by agents of the municipality, authorized or required to make such contracts.

4. It being clear to us that the original liability of East Rome was established by the evidence, we come next to consider whether the liability of the city of Rome as defendant in the suit was established. In the absence of any evidence to the contrary, we think the circumstance that the clerk of the council of East Rome had delivered to the city of Rome \$8,000 worth of real property, tax *fi. fas.*, and cash, considered in connection with the resolution of the mayor and council of East Rome, taken from the minutes, is sufficient to establish the fact that annexation, by virtue of the act of 1906 (Acts of 1906, p. 1010), is an accomplished fact and that the town of East Rome, in accordance with the provision of that legislation, has been merged into the city of Rome, with the right of sovereignty in the latter over the inhabitants and territory formerly within the municipality of East Rome. In view of the language contained in the act of 1906, no other inference is suggested by the transfer of the assets of the town of East Rome. The effect of the act of 1906, then, was to repeal the act incorporating the town of East Rome and to deliver its assets to the city of Rome. As held in *Broughton v. Pensacola*, 93 U. S. 268, 269, 23 L. Ed. 896, Justice Field delivering the opinion of the court (and reiterated in *New Orleans v. Clark*, 95 U. S. 654, 24 L. Ed. 521), the rule as to public corporations is not different from that as to private corporations, where a merger or consolidation of two corporations is effected whereby one of them becomes possessed of the assets of the other. True, in the case of private corporations, the consolidation may be effected by the agreement of the corporations themselves, without the intervention of the state; whereas the consolidation of two public corpora-

tions, or the absorption of one municipality into another, can only be effectuated by the sovereign legislative power of the state. But, whether the corporation be public or private, if the effect of the consolidation is to dissolve or destroy one of the corporations previously existing, and, by reason of the merger, the remaining corporation becomes possessed of property or assets of the extinct corporation, it takes these assets and properly charged with the debts of the deceased municipality. The rule laid down as to private corporations, in *Tompkins v. Augusta Southern R. Co.*, 102 Ga. 443, 30 S. E. 992, and in *Hawkins v. Central of Ga. Ry. Co.*, 119 Ga. 163, 46 S. E. 82, is equally applicable to cases where one municipality absorbs another.

We do not say that, in the exercise of its broad powers to create and destroy municipalities at its pleasure, the Legislature might not provide to the contrary, by express enactment to that effect; but where, as in the act of 1906, *supra*, no provision is made upon the subject, the municipality which is given sovereignty over the territory and inhabitants of a former existing municipality, and receives funds which are charged with the payment of its debts, takes these assets charged with a trust which it is bound, *ex æquo et bono*, to discharge. There may have been no courtship and no romance attendant upon the ceremonial; but the act of 1906 effected a marriage between Rome and East Rome, and attached a liability "analogous to that of the husband for the debts of the wife under the old law of baron and feme." When the plaintiff, after having established the primary liability of East Rome, thereafter showed that the city of Rome had received \$280 in cash which was subject to his debt and to no other, he was entitled to a verdict in his favor. The verdict rendered against him was wholly without evidence, and contrary to evidence, and should have been set aside.

Judgment reversed.

(5 Ga. App. 722)

FINLEY v. SOUTHERN RY. CO. et al.
(No. 1,007.)

(Court of Appeals of Georgia. Feb. 16, 1909.)

1. APPEAL AND ERROR (§ 1176*)—DECISION—DIRECTIONS TO COURT BELOW.

The Court of Appeals is clothed with power to direct any order necessary for the proper adjudication of a cause. It may give any direction to a cause pending in the court below which may be consistent with the law and justice of the case, including the power of directing a specific final disposition of the case. But this power will not be exercised unless the discretion of the lower court has been improperly used, or not exercised at all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4583, 4589; Dec. Dig. § 1176.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. NEW TRIAL (§ 8*)—INSUFFICIENCY OF EVIDENCE.

It was not error to order a new trial. A verdict for damages rendered against two or more defendants as tort-feasors should be set aside when it is, as against any one of the defendants thus held liable, unwarranted by the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 11; Dec. Dig. § 8.*]

3. JUDGMENT (§ 239*)—TORTS—JOINT TORT-FEASORS.

A plaintiff can sue one or more than one, or he can sue all, of several joint tort-feasors in the same action, and the jury, by its verdict, can bind one and relieve another, as the evidence may authorize; but if the verdict be rendered against all of the defendants, the judgment thereon is single, and must stand or fall alone. Such a judgment is in law a creature of such nature that it cannot survive the severance or amputation of any one of its members.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 417, 424; Dec. Dig. § 239.*]

4. JUDGMENT (§ 239*)—TORTS—JOINT TORT-FEASORS.

In an action brought against a defendant as a joint tort-feasor, a recovery may be had upon an allegation of negligence in which the other alleged tort-feasors did not participate; and where it is alleged that one of the defendants, by his servant, committed a tort and that two other defendants directed, counseled, caused, or procured this servant to commit the tort in the conduct of his master's business, upon proof of these facts, all or any one of them may be held liable. But, if the connection essential to hold the two others is not established—that is to say, if it is not shown that they directed, counseled, caused, or procured the servant to commit the tort—they may be discharged from liability, and the master alone be held liable for the wrongful conduct of his servant who committed the act.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 417, 424; Dec. Dig. § 239.*]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. C. Finley, by his next friend, against the Southern Railway Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Burton Smith, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendants in error.

RUSSELL, J. Finley, a minor, by his next friend, sued the Southern Railway Company, together with Wadar Turner and Walter Hagan (who were the yardmaster and assistant yardmaster, respectively, of the defendant corporation), for \$20,000. On the trial of the case the jury rendered a verdict in favor of the plaintiff for \$8,000, and upon motion the judge of the city court granted a new trial. The plaintiff excepted, and asks that the judgment granting a new trial, apparently on a point of law alone, be reversed, with direction to the lower court to pass upon the single question whether the verdict is supported by the evidence. The contention of the plaintiff is that the trial

judge erred in his construction of the petition and in his application of the evidence thereto. It is insisted that the allegations of the petition were amply supported by the evidence, and that the verdict, which was set aside, was required by the evidence.

In granting the motion for new trial the trial judge passed the following order: "The only negligence complained of in this suit, and charged to have caused the plaintiff's injury, is that of the two individual defendants, and of the railroad company through their conduct. There is no complaint of the engineer's negligence. Such an allegation would have made a severable cause of action, and the court would not have charged that the verdict must be against all or none. Under the pleading the defendant railroad company was not called upon to defend as to the engineer's negligence. As I regard it, it is not a question of variance between the pleading and the evidence. The evidence was all admissible to show how the accident occurred, and it completely disproves the negligence alleged. I do not see how the plaintiff can recover on this pleading on the evidence in the record. I believe, for this reason, the law requires the grant of a new trial; and it is so ordered." The plaintiff insists that it does not appear from this judgment but that the court was satisfied with the amount of the verdict, and contends that the judge might approve the finding of the jury after the ruling by this court upon the law, and upon direction given by us that his discretion be exercised solely upon the point of the sufficiency of the evidence. To use the language employed by counsel for the plaintiff in his brief, it is proposed "that this court shall direct the court below to pass upon the verdict, subject to right directions received therefrom as to the law, and if, subject to these directions, he approves, the verdict be allowed to stand."

1. We entertain no doubt of the prerogative of this court, in a proper case, to make a tentative or even a final disposition of a case by appropriate direction. In fact, we have several times exercised the power. The constitutional amendment creating the Court of Appeals gave this court, as to the cases within its peculiar jurisdiction, the same powers as the Supreme Court within its peculiar jurisdiction. Among the powers of the Supreme Court, enumerated in Civ. Code 1895, § 5498, it is empowered "to hear and determine all causes, civil and criminal, that may come before it, and to grant judgments of affirmance or reversal, or any other order, direction, or decree required therein, and, if necessary, to make a final disposition of the cause, but in the manner prescribed elsewhere in this Code." Like authority is conveyed in section 5586 of the Civil Code in these words: "It shall be

within the power of the Supreme Court to award such order and direction in the cause in the court below as may be consistent with the law and justice of the case." Indeed, this would seem to be a power inherent in all courts of review in the absence of statute. Following these Code sections this court has, in numerous cases, given direction touching the proceedings in the lower court, when we considered the direction to be in conformity with the law or in the interest of justice. See *Askew v. So. Ry. Co.*, 1 Ga. App. 79, 58 S. E. 242; *Jarrell v. American Machine Co.*, 2 Ga. App. 769, 59 S. E. 186; *Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189; *Oglesby v. State*, 1 Ga. App. 195, 57 S. E. 938; *Hartman Stock Farm v. Henley*, 4 Ga. App. 60, 60 S. E. 808; *Dennis v. Schofield*, 1 Ga. App. 491, 57 S. E. 925; *Bashinsky v. Western Union Tel. Co.*, 1 Ga. App. 765, 58 S. E. 91; *Cole v. State*, 2 Ga. App. 738, 59 S. E. 24; *Mandeville Mills v. Dale*, 2 Ga. App. 607, 58 S. E. 1060. These rulings go back to *Davis et al. v. Gurley*, 51 Ga. 74, and *Irwin v. Riley*, 68 Ga. 606. See, also, *Harvey v. Jewell*, 84 Ga. 238, 10 S. E. 631; *Morton v. Frick*, 87 Ga. 230, 13 S. E. 463; *Central Ry. & Banking Co. v. Kent*, 91 Ga. 687, 18 S. E. 850; and *Comer v. Dufour*, 95 Ga. 376, 22 S. E. 543, 30 L. R. A. 300, 51 Am. St. Rep. 89.

In *Central Ry. Co. v. Kent*, supra, the court disagreed upon another point, and Chief Justice Bleckley dissented, entertaining the view that the evidence in that case warranted the verdict rendered; but there was no division upon the proposition that under the section of the Code above cited the court had the right to order the case dismissed. Following Judge Bleckley, we would be unwilling to set aside the verdict of a jury upon issuable facts, and, indeed, if in any case this is the only issue presented, we are without jurisdiction to do so. But in the *Kent Case*, supra, there was no division of opinion on the part of the Supreme Court as to the power of that court, in a proper case, to dismiss a cause from the lower court. In fact, at no time has the court questioned its constitutional right to direct a final disposition of a cause in the lower court. In *Comer v. Dufour*, supra, the facts being undisputed, the superior court was ordered to render a final judgment in favor of the defendant. And likewise we apprehend it to be within the appropriate jurisdiction of this court to exercise directory powers in any case where there is no issue of fact. See, also, *Green & Colwell v. Hill*, 101 Ga. 258, 28 S. E. 692; *Gibson v. Wilkins et al.*, 110 Ga. 94, 35 S. E. 316; *St. Amand v. Lehman*, 120 Ga. 258, 47 S. E. 949; *Brown v. Joiner*, 77 Ga. 232, 3 S. E. 157; *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144 (4); *Sims v. Cordele Ice Company*, 119 Ga. 597, 46 S. E. 841; *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410. As said by Judge Hall, in speaking of the Supreme Court in *Harris v. Hull*,

Executor, 70 Ga. 838: "One great purpose in establishing this court was to terminate suits, and with this view it is made its duty, not only to grant judgments of affirmance or reversal, but any other order, direction, or decree required, and, if necessary, to make a final disposition of the cause (Code 1882, § 218 [Civ. Code 1895, § 5498]), and it is empowered to give to the cause in the court below such direction as may be consistent with the law and justice of the case. Code, § 4284 (Civ. Code 1895, § 5586). Litigation should never be protracted where this, with due regard to the rights of parties, can possibly be avoided. 'Interest reipublice ut sit finis litium' is a maxim so old that its origin is hidden in a remote antiquity, and the policy which it inculcates is so essential as not to admit of question or dispute."

Of course, this power, like the performance of any other duty of grave moment, is to be most cautiously exercised; but the framers of our organic law foresaw that cases might arise in which a court of last resort could well be intrusted with the power, not only of ordering amendments or directing their rejection in the court below, and of molding judgments by the application of the law to admitted facts, or of removing future ambiguity by construing and applying the law, but also of summarily directing in a proper case a final judgment in behalf of one of the parties to the cause. Without any purpose of discussing at this time the full and exact scope of this court's directory powers, it is sufficient to say that we deem that we have the power, in any case in which it appears that the trial judge has not exercised his discretion in the consideration of a motion for new trial, to order that that discretion be exercised, and we would feel it to be our duty to reverse the judgment of the lower court in the present case, if we were not satisfied that the trial judge exercised his discretion upon every point raised by the motion for a new trial. Furthermore, we are convinced that the judgment he rendered on the motion is right.

2. Recognizing the duty, the exercise of which has been invoked by counsel for plaintiff in error, we have carefully examined the record to ascertain whether, either through failure to exercise any part of his discretion or on account of misconstruction of the pleadings or misapprehension of the issues, the learned trial judge had erred in setting aside the verdict of the jury and in awarding a new trial. We do not understand that the plaintiff in error insists that the judge abused his discretion in passing upon the facts. The complaint is more especially addressed to the insistence that the judge erred in granting a new trial upon his construction of the pleadings and upon the ground that the finding of the jury was contrary to the charge of the court. We

are of the opinion that the trial judge properly granted a new trial, though not for the precise reasons stated by him, and that he should have granted a new trial (even conceding the strongest contentions of the plaintiff in error to be well taken) for the reason, as stated in the judgment, that the verdict, as construed by the evidence in the case, cannot be supported by the evidence. It may be true, as insisted by counsel for the plaintiff in error, that what the judge meant by this was different from what we now mean; but in passing upon the first grant of a new trial by the lower court this court will be slow in limiting the meaning of the language employed in the grant of a new trial, and will sustain the grant if, upon investigation of the record, it is found that the judgment awarding a new trial is for any reason right.

This suit proceeded against three defendants. The verdict was rendered in favor of the plaintiff against all of the defendants, and judgment was entered accordingly. Regardless of all other questions in the case, the judgment of the judge of the city court in awarding a new trial is right, because there is no evidence which would have authorized the jury to find a verdict against the defendants Turner and Hagan. *Brownlee v. Abbott*, 108 Ga. 761, 33 S. E. 44. The action in the *Brownlee* Case was trover, but under the decision in *Mashburn v. Dannenburg*, 117 Ga. 584, 44 S. E. 97, the same rule applies (as reasonably it must) to all actionable torts. In the *Mashburn* Case it is pointed out that the plaintiff may proceed against either one or all of several joint tort-feasors, and if he elects to sue more than one, and obtains a verdict against more than one, the verdict as to each must be authorized by the evidence. It is not alleged in the petition that either Turner or Hagan ordered the engineer of the defendant company to suddenly project his engine against the cars upon track No. 17, whereby the plaintiff was injured, nor is it proved that they either directed the movements alleged to be the cause of the injury or were present when it was done. The company might be liable for the negligence of its engineer in suddenly crashing his engine into a line of box cars, thereby causing a violent and dangerous collision. The company would be liable if under the general direction of Turner and Hagan, or either of them, this had happened through any inattention on their part in the conduct of the company's business; but Turner and Hagan themselves would not be individually liable unless they ordered the movement which caused the catastrophe. There is no evidence which authorized the finding of the verdict against these two defendants, and, as the lower court did not have the right to strike them either from the verdict or from the judgment, the court was required to set aside the verdict as to them, and also as to their codefendant.

From this it results that there is no reason why the judgment of the lower court should be reversed. If that court released Hagan and Turner from the jury's finding, as it should have done, the verdict's confining circle was broken as to all included therein. A single chain had fastened the three defendants together, and when the chain was broken, and two of the prisoners were released, the third was unconfined, regardless of whether a portion of the chain might still be on his person.

3. We think, however, that the court erred in charging the jury that this plaintiff must recover against all of the defendants or against none. Joint tort-feasors may be sued together, and recovery may be had against one or more of them, as the liability of each may appear from the evidence. One or more may be found liable. Others may be adjudged not guilty of the tortuous act alleged. *Hollingsworth v. Howard*, 113 Ga. 1090, 39 S. E. 465 (2); *W. U. Telegraph Co. v. Griffith*, 111 Ga. 558, 36 S. E. 850, and citations. A plaintiff can sue one or more than one, or he can sue all, of several joint tort-feasors in the same action, and the jury by its verdict can bind one and relieve another, as the evidence may authorize; but, if the verdict be rendered against all of the defendants, the judgment thereon is single, and must stand or fall alone. Such a judgment is in law a creature of such nature that it cannot survive the severance or amputation of any one of its members.

4. We are of the opinion, also, that the court erred in charging the jury that the plaintiff could only recover upon such acts of negligence as were shown to be chargeable to the servants Hagan and Turner. The court was right in charging the jury that the plaintiff could only recover upon the allegations of negligence set forth in the petition. But the defendant company, as a tort-feasor, though sued jointly with Hagan and Turner, might be liable for the negligence of some employé other than they, if, as is alleged in the petition, the negligence of the engineer contributed to the injury; and, though this statement might have been specially demurrable, the name of the engineer was not called for, and it is certain from the allegations of the petition that he was neither Turner nor Hagan.

We have referred to these two latter matters in order that upon another trial the jury may be properly instructed as to these points. But upon the main issue involved the court was not in error in awarding a new trial.

Judgment affirmed.

On Rehearing.

The motion for rehearing invokes the exercise of this court's power to make a final disposition of a cause. It now is asked that this court direct the judge of the city court to dismiss the case as to Turner and Hagan,

and let the verdict stand as against the defendant company, and that the judgment be reformed accordingly. The motion for rehearing is based upon the allegation that the court overlooked the case of *Irwin v. Riley*, 68 Ga. 605. We assume that the learned counsel for plaintiff in error intended to say that the court, perhaps, misconceived the decision in that case, for it is cited in the original opinion. In passing upon this case we dealt at some length with the question of the Court of Appeals' directory power, and think we made clear that this court possesses, in any proper case, the power to give final disposition to a case. We did not lose sight of the fact that it was within the power of the court to give the present case the disposition now sought by the plaintiff in error in his motion for rehearing, and while incidentally to our discussion of the subject, we quoted from the request of the plaintiff in error, as embodied in the brief, we did not mean to hold nor can it be inferred that the court did hold, that in giving direction to a cause the exercise of its power is limited to the request of either or both of the parties. The direction to be given should be that which is right and proper in the particular case.

After a careful consideration of the motion for rehearing this court reiterates its opinion, and holds that there is not only no reason why this court should direct a final disposition of the case, but manifest reasons why it should not overrule the discretion of the trial judge in granting a new trial. As heretofore pointed out, it appears that the judge of the city court exercised his discretion in passing upon the motion for new trial. The new trial ordered is the first grant of a new trial. We have not held, and cannot hold, upon review of the evidence adduced upon the trial, that a verdict is demanded against any of the defendants. We can only say, as we have previously said, that the evidence might have authorized a verdict against the Southern Railway Company, and did not authorize a verdict against the other two defendants. However, the testimony was not undisputed even as to the defendant that we held might have been liable, and in this view of the case how could this court hold, as a matter of law, that the trial judge was satisfied with the verdict, even as to the defendant the Southern Railway Company? We do not think it can be assumed from the judge's order granting a new trial that he was satisfied with the verdict, either in the conclusion reached or in the amount of the finding. The judgment of a trial court is to be measured by its correctness, rather than by the reasons assigned for its rendition. We cannot say that the verdict rendered against the Southern Railway Company was demanded by the evidence, and that the judge would have erred in granting a new

trial if he had possessed the power (which this court has) to eliminate the other two defendants Hagan and Turner from the judgment. If we could say this, we would feel it our duty to direct that Hagan and Turner be stricken from the judgment, and that judgment be entered up in the city court against the defendant railway company in accordance with the finding of the jury against it. As we cannot say that the verdict was demanded as to any of the defendants in this case, to direct a judgment which would effect a final disposition of the case would be an arbitrary invasion and overruling of the discretion of the trial judge, which would not be proper on the part of this court, except in a case where the trial judge had palpably abused his discretion in granting a new trial, and where the finding reached was the only lawful conclusion from the evidence.

As we stated in the opinion, the judgment of a trial court granting a new trial will be affirmed, if it is right for any reason; and we cannot concur in the opinion that it is to be inferred, in a case where the jury finds contrary to the evidence, or contrary to the charge of the court (even though it transpires that the instructions of the court were erroneous), that for that reason the judge approves the verdict upon a particular part of the case or as to one of the parties to the cause. In the opinion of this court, regardless of the reasons which may have most influenced the trial judge in granting a new trial, and though this court has the power to finally dispose of any cause, we do not see (upon a review of the evidence in the record) that this case differs from any other in which there are issuable facts that a jury, and not this court, should determine; and certainly the rule is well settled that the first grant of a new trial, where issues of fact are involved, should not be disturbed by a reviewing court.

The motion for rehearing is therefore denied.

(6 Ga. App. 5)

FUDGE v. KELLY. (No. 1,614.)

(Court of Appeals of Georgia. March 23, 1909.)

APPEAL AND ERROR (§ 1176*)—DETERMINATION AND DISPOSITION OF CAUSE—REVERSAL WITH DIRECTION.

"Interest reipublicæ ut sit finis litium." This case has been to this court three times. There is error in the record. The judgment will be reversed, but the issues will be restricted, and direction given for the summary disposition of the question remaining in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4538; Dec. Dig. § 1176.*]

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action by J. Kelly against Judge Fudge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judgment for plaintiff, and Fudge brings error. Reversed, with directions.

W. I. Geer, for plaintiff in error. P. D. Rich, for defendant in error.

POWELL, J. This case has been here twice before. See *Kelly v. Fudge*, 2 Ga. App. 759, 59 S. E. 19; *Fudge v. Kelly*, 4 Ga. App. 630, 62 S. E. 96. It will be seen by reference to the previous decisions in the case that Fudge and Kelly swapped horses, and that Kelly claimed that Fudge committed a fraud on him by swapping him a horse which was subject to an execution under which it was subsequently seized. From the opinion of this court reported in 4 Ga. App. 631, 62 S. E. 96, it appears that the case was sent back because it did not affirmatively appear from the record that the process under which the horse had been seized was a valid lien thereon at the time of the seizure. In the trial now under review it appeared that Fudge bought the horse which was swapped to Kelly from one Williams, who in turn had bought it from Cowart, and that it was under a *fi. fa.* against Cowart that the property was seized after Fudge had traded it to Kelly. This execution would not have been an incumbrance against the property in the hands of Kelly, who was an innocent purchaser, unless there was a record of it on the general execution docket at the time of the trade. Whether it was so recorded or not does not appear from the record. The plaintiff, therefore, did not make out his case.

It appeared at the trial that the original *fi. fa.* had been lost. The proof on this question was sufficient to admit secondary evidence. Indeed, there seems to be substantially no question as to the existence of the *fi. fa.* The material question stands out: Was it duly recorded on the general execution docket? If it was, the verdict rendered by the jury in favor of the plaintiff should stand; if it was not, the verdict was wrong, for the horse which Kelly received in the swap is still his, wherever it may be, and is free from the incumbrance of the lien. Kelly has had two successive findings in his favor. There should be an end to the litigation. This court has power to give direction necessary to the focusing of the issues in the case and the ending of litigation. Civ. Code 1895, § 5586; *Finley v. So. Ry. Co.*, 5 Ga. App. —, 63 S. E. 312.

We reverse the judgment, but give direction that if, within 10 days after the remittitur of this court is filed in the office of the clerk of the court below, the plaintiff's counsel shall present to the judge, and cause to be filed as part of the record, a certified copy from the general execution docket, showing that at the date Kelly purchased the horse the *fi. fa.* in question had been duly recorded thereon, and that it was not dormant, the

judge of the city court of Miller county shall thereupon, without further trial of the case, enter judgment in favor of the plaintiff against the defendant, in accordance with the verdict of the jury at the last trial; but, if the plaintiff shall not file this additional record within the time prescribed, we direct that a judgment be entered dismissing the plaintiff's action. The cost of bringing up this writ of error is taxed against the defendant in error.

Judgment reversed, with direction.

(6 Ga. App. 90)

LEVERETT v. TIFT. (No. 1,632.)

(Court of Appeals of Georgia. April 15, 1909.)

1. CONTINUANCE (§§ 7, 29*)—APPEAL AND ERROR (§ 968*) — SURPRISE — DISCRETION OF COURT — REVIEW.

The court has full power to protect a party from surprises brought about by the production of papers by the opposite party under circumstances not reasonably to be expected, and, if necessary, may continue the case or suspend the trial in order to give the party so surprised an opportunity to present his case fairly. However, this right must be exercised with sound discretion, and, unless it appears that the continuance of the case would probably further the interests of justice, the court may decline either to suspend the trial or to continue the case. It does not clearly appear that the judge abused his discretion in the present instance.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 17, 97; *Dec. Dig. §§ 7, 29**; *Appeal and Error*, Cent. Dig. § 3837, Dec. Dig. § 968.*]

2. EVIDENCE (§§ 370, 372*)—DEEDS (§ 193*)—RECORDED DEEDS — ANCIENT DOCUMENTS — FORGERY — BURDEN OF PROOF.

If a deed is recorded on proper probate, it is admissible in evidence without further proof of its authenticity, unless the party against whom it is tendered files an affidavit of forgery. If the deed is more than 30 years old, and is otherwise entitled to admission as an ancient document, it needs no further *prima facie* proof of its execution, whether it be recorded or not. The party against whom the deed is tendered may attack the deed for forgery without filing the usual affidavit, even if it is admissible in evidence as an ancient document and is recorded on proper probate; but the burden of proof is upon him. Although a deed more than 30 years old is for any reason not admissible as an ancient document, yet, if it is recorded upon proper probate, the party against whom it is tendered must file the affidavit of forgery, before the burden of proving the authenticity of the instrument is cast upon the party tendering it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1571, 1614; *Dec. Dig. §§ 370, 372**; *Deeds*, Cent. Dig. §§ 563, 573; *Dec. Dig. § 193.**]

3. TRESPASS (§ 46*) — TRESPASS TO LAND — PRIMA FACIE CASE — DEFENSES.

In trespass cases, where the plaintiff has never been in possession and the action turns solely upon his title, the plaintiff may make a *prima facie* case by showing that both parties claim under a common grantor. The defendant may, however, defeat this *prima facie* case by showing paramount outstanding title in a third person, or by showing that the common

grantor parted with his title by a conveyance superior to the plaintiff's title.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 124; Dec. Dig. § 46.*]

4. *TRESPASS* (§ 46*)—*TRESPASS TO REALTY—DEFENSES.*

In trespass cases of the kind mentioned in the preceding headnote, the defendant is entitled to a verdict whenever he shows that the plaintiff was never in possession of the property and that the true title is in another. It is not necessary for him to show that he himself has the true title.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 124; Dec. Dig. § 46.*]

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

Action by B. F. Leverett, as administrator de bonis non of Elijah Munkus, against H. H. Tift. Judgment for defendant, and plaintiff brings error. Affirmed.

B. F. Leverett, as administrator de bonis non of Elijah Munkus, sued H. H. Tift in trespass for cutting the timber upon lot of land No. 3 in the Second district of originally Irwin (now Turner) county. The case turns upon the title of the plaintiff, as the cutting was admitted, and there was a verdict for the defendant. The plaintiff made a prima facie case, by showing plat and grant from the state of Georgia to Elijah Munkus, together with a certified copy of his letters of administration. This plat and grant were dated March 25, 1841. It was shown, also, that the defendant had cut the timber under a chain of title originating in a forged deed purporting to have been made by Munkus to James A. Green on December 4, 1846, though, so far as the defendant himself is concerned, he seems to have acted in good faith and innocently; there being no intimation that he knew or suspected the forgery. At the trial, however, the defendant introduced a deed from Elijah Munkus to A. Cobb, dated September 2, 1843. It was duly attested and had been recorded just a few days before the trial. It is stated in the record that this deed was offered as an ancient document. The defendant attempted to show a chain of title from A. Cobb into himself, obtained by him, however, since the pendency of this litigation; but this chain was defective, because one of the conveyances purported to have been made by the heirs at law of one of the grantees into whom the title had been traced, and there was no sufficient proof that these persons were in fact the heirs at law of that grantee. It seems that this deed from Munkus to Cobb was found just a few days before the trial, and prior to that time the defendant had claimed solely under the chain of title which originated in the deed mentioned above as having been proved at the trial to be a forgery. Further facts necessary to an understanding of the points decided will be stated in the opinion.

Haygood & Cutts, for plaintiff in error. Tulwood & Murray and Hal Lawson, for defendant in error.

POWELL, J. (after stating the facts as above). 1. When the defendant offered in evidence the deed from Elijah Munkus to A. Cobb, dated September 2, 1843, the plaintiff's counsel moved for a continuance on the ground that he was surprised, that he was for the first time confronted with this deed, and that the defendant had in signed writings filed in court admitted that he claimed title originating in a different manner. No statutory affidavit of forgery was filed, but the plaintiff's counsel stated in his place that he believed this deed also to be a forgery, and wanted further time in which to get proof of this fact. The judge, after inspecting the paper, and after comparing the signature of the official witness on this deed with the signature of the same witness on another deed contained in the chain of title and admitted to be genuine, declined to grant the continuance; and this action of the court is complained of in the motion for a new trial.

It was ruled in the case of *Williams v. Rawlins*, 10 Ga. 491, that either party in a case involving title to land is entitled to impeach by proof, and without making affidavit of forgery, the genuineness of any deed offered in evidence, and if the deed "be sprung upon the party by surprise, and he is not prepared with proof to assail it," a continuance may be granted upon suitable showing and necessary time given to procure testimony. That a continuance may be granted to either party by reason of surprises, brought about by the production of papers, the existence of which the movant for the continuance could not reasonably have anticipated, where the transaction smacks of surreptitiousness or unfairness, or there is reasonable ground to believe that the interests of justice require the continuance in order that the movant may have full and reasonable opportunity to prepare his case, is unquestioned. In addition to the case just cited, see *Trustees v. Blount*, 70 Ga. 779; *Maynard v. Cleveland*, 76 Ga. 52; *Crawford v. Hodge*, 81 Ga. 728, 8 S. E. 208.

Applications of this kind, however, are addressed to the sound discretion of the trial judge; and his action thereon will not be reversed, unless there has been an abuse of discretion. In passing upon such a motion the judge has a right to take into consideration all the facts and circumstances of the case. If the object sought through the continuance is to attack a paper for forgery, the movant should make it appear that there is at least some probability that his attack will be successful. There must be something more than a mere hope on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of the movant's counsel that he will be able to discover some testimony not available to him at the time of the trial.

We cannot say that the judge abused his discretion in the present case. It is true that counsel for the movant stated that to him the deed looked like a forgery; but the judge himself saw the deed, saw the indicia of its genuineness, and was in better position than we are to determine whether there was any reasonable prospect that the movant might be successful in an attack upon it, if he were given the additional time for which he asked. The judge, as it turned out, was probably correct; for, although about three months elapsed between the date of the trial and the date when the motion for a new trial was heard, and although any new evidence showing the deed to be a forgery could have been brought to the attention of the court in one of the grounds of the motion for a new trial, no such evidence was presented, nor was its existence suggested.

2. Objection was made to the introduction of the deed from Munkus to Cobb on the ground that it was tendered as an ancient document, and it was not shown that possession had been held consistently with this paper, and therefore it was necessary for the defendant who offered it to make additional proof of its genuineness. We have referred to the fact that this deed was properly attested and recorded. By Civ. Code 1895, § 3628, it is provided: "A registered deed shall be admitted in evidence in any court in this state without further proof, unless the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that the said deed is a forgery, to the best of his knowledge and belief, when the court shall arrest the cause and require an issue to be made and tried as to the genuineness of the alleged deed." No affidavit of forgery was filed. Therefore there was no error in admitting the deed in evidence.

If the deed is recorded upon proper probate, and is not admissible as an ancient document, the filing of this affidavit casts the burden of proof upon the party offering the deed. If no affidavit of forgery is filed, the party against whom the deed is offered may nevertheless attack it; but in that event he assumes the burden of proof. This is also the rule where the deed, though more than 30 years old, is for any reason not admissible in evidence, without further proof, as an ancient document. If the deed is an ancient document, and the preliminary showing is made which entitles it to introduction in evidence as such, the filing of an affidavit of forgery will have no effect; for, though the deed may be attacked as a forgery, the burden of proving the forgery is upon the attacking party, and cannot be shifted by the filing of an affidavit. These are the necessary deductions from the following cases:

Knight v. Suddeth, 126 Ga. 231, 55 S. E. 81; McArthur v. Morrison, 107 Ga. 796, 34 S. E. 205; Patterson v. Collier, 75 Ga. 419, 58 Am. Rep. 472; Sibley v. Haslam, 75 Ga. 493. Therefore, if the plaintiff in this case was correct in his proposition that the deed was not admissible as an ancient document, and he desired to shift the burden of proof to the defendant, it was necessary for him to file an affidavit of forgery, since it was recorded on proper probate, and this, as well as the ancient character of the instrument, afforded prima facie evidence of its authenticity.

An attentive reading of the case of McArthur v. Morrison, supra, sometimes considered as authority for the proposition that an affidavit of forgery cannot be tendered to a deed offered as an ancient document, will show that it is authority only for the proposition that this affidavit cannot be filed in the event it appears that the deed is in fact admissible as an ancient document. Of course if a deed is shown to be entitled to admission as an ancient document without the filing of the affidavit of forgery would be utterly useless and unavailable as a method of attack, and this much the McArthur Case clearly holds. On the other hand, this case is not authority for the proposition that an affidavit of forgery may not be filed to a registered deed more than 30 years old, if it is not accompanied by those other indicia of genuineness precedent to its admission in evidence as an ancient document. In other words, a party tendering a recorded deed more than 30 years old has two ways of getting it into evidence—as an ancient document, or as a registered deed—and the party objecting must close up both these routes; otherwise, the deed goes in, and the burden rests on him who assails its genuineness.

8. The record also presents the point that since the defendant claimed the right to cut the timber under a chain of title emanating from a forged deed purporting to have been executed by the plaintiff's intestate, and since it was thereby shown that the plaintiff and the defendant claimed under the same common grantor, the defendant should not have been allowed to defeat the plaintiff's right of recovery by showing that the plaintiff's intestate had parted with his title; that, where the plaintiff and the defendant claim under a common grantor, the defendant cannot defeat a recovery by showing paramount outstanding title without connecting himself with it. Until the decision of the Supreme Court in the case of Garbutt Lumber Co. v. Wall, 126 Ga. 172, 54 S. E. 944, was rendered, it was doubtful in this state whether the rule of estoppel, often applied in ejectment cases where both parties claim under the same common grantor, was applicable to trespass cases. The decision in that case very clearly and satisfactorily shows that the rule is applicable to the extent that the

fact of the defendant's holding under the plaintiff's grantor is equivalent to a rebuttable admission of the fact that in this common grantor the true title once reposed, and that this admission is sufficient to make a prima facie case in behalf of the plaintiff, and to throw upon the defendant the burden of proving that the plaintiff who traces title to this same source by superior deed is not in fact the true owner of the land, or to show by some other means that he is not entitled to recover in the action. It is not authority for the proposition that the defendant may not show that the plaintiff is not the owner of the land, and therefore not entitled to recover, although he and the plaintiff claim under the same grantor, and the plaintiff's apparent title, as emanating from the common grantor, is the superior. The admission implied against the defendant when it is shown that he holds under a common grantor with the plaintiff binds him to no broader proposition than that the true title once reposed in this common grantor. It does not bind him to the proposition that the true title still remains in that common grantor or in his estate at the time of the bringing of the suit.

In the case of *Morris v. McCamey*, 9 Ga. 160, the defendant had caused a fl. fa. in his favor to be levied on the land upon which the trespass was alleged to have been committed, as the property of T. McCamey, and the plaintiff had become the purchaser of the property at that sale. The plaintiff, therefore, contended that the action of the defendant in causing the property to be levied upon as the property of T. McCamey was an admission on his part that the title was in T. McCamey, and that this admission estopped the defendant from insisting that there could be a paramount title in another as against the plaintiff who had bought at that sale. The court rejected the proposition and held that since in the proof it appeared that paramount title was in another, although the defendant did not connect himself with it, the plaintiff could not recover. That case is very analogous to the case at bar.

It would be an absurd proposition to say, if A. took a defective title emanating out of B., that B. or his administrator could part with that title and nevertheless recover in trespass from A. for injury or damage done to the property. Reduced to its last analysis, the plaintiff's proposition amounts to this: That although Elijah Munkus sold this land

nearly 70 years ago, and parted with all his title and interest in it, the plaintiff, who has recently taken out letters of administration on his estate, can nevertheless sue and recover damages for the trespass committed upon this property, as to which neither Munkus nor his estate has had the slightest right or title for nearly three-score years and ten, simply because the deed by which Munkus sold the property was not recorded, and the defendant bought under a forged chain of title purporting to have emanated from the same source. Of course, the true owners, the subsequent grantees from Cobb, could sue for the trespass, and the defendant would be liable to them (unless he was able to show that the title which he produced at the trial connected with Cobb's title), and yet Munkus' administrator says he must be paid, too, as a penalty for the defendant's having bought a defective title purporting to have originated in his intestate. The law imposes no such penalty for buying even a forged title.

The position of the defendant is entirely consistent with the proposition promulgated in the case of *Garbutt Lumber Co. v. Wall*, supra. He admits that the true title once reposed in Munkus. He now says, to the complete defeating of the plaintiff's action, that it no longer reposes there. We do not understand the rule to be, even in ejectment, that the defendant may not defeat a recovery by showing that the common grantor parted with his title by a conveyance superior to the plaintiff's title, as well as superior to his own, though he may be forbidden to show that the true title never came into the common grantor.

4. The court fairly submitted to the jury the question as to whether the deed from Munkus to Cobb was genuine or not, and their verdict necessarily declared it to be genuine. The plaintiff's right of recovery, therefore, failed at this point, and alleged erroneous rulings made in admitting deeds by which the defendant attempted to connect himself with the title which Munkus conveyed to Cobb were wholly immaterial. In trespass, the defendant need not show title in himself, where the plaintiff has never been in possession and his action depends solely on his title. The defendant succeeds whenever he shows that true title was not in the plaintiff at the time of bringing suit. We see no reason for granting a new trial.

Judgment affirmed.

(132 Ga. 516)

BEATY v. SEARS & BENNETT.

(Supreme Court of Georgia. April 19, 1909.)

1. SALES (§§ 69, 465*)—ACKNOWLEDGMENT (§ 59*)—EVIDENCE (§ 25*)—CONDITIONAL SALES—DESCRIPTION OF PROPERTY.

Where a written contract of conditional sale described the property sold as "one sorrel horse six years old, and one sorrel horse seven years old," on the trial of an action of trover by the seller to recover the one referred to as seven years old, brought against one who purchased such horse from the original buyer, *held*:

(a) It was not error to overrule a demurrer to the petition, to which was attached a copy of such written contract upon which plaintiff alleged that he relied to show title, nor to overrule an objection by the defendant to the admission in evidence of such written contract, on the ground that the property sued for was not sufficiently described therein. *Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 879, 48 S. E. 333; *Farkas v. Duncan*, 94 Ga. 27, 20 S. E. 267; *Nichols v. Hampton*, 46 Ga. 253.

(b) Where such contract purported to have been executed at "Buford, Ga.," but it did not appear from the writing or attestation where the attesting notary resided or received his appointment, this court will take judicial notice of the fact that Buford is an incorporated town in this state in Gwinnett county (*Perry v. State*, 113 Ga. 938-938, 39 S. E. 315), and it will be presumed that this attesting notary resided and received his appointment therein, where he had the right to attest such writings. *Booker v. Bass*, 127 Ga. 133, 56 S. E. 283; *Connolly v. Atlantic Contracting Co.*, 120 Ga. 213, 47 S. E. 575; *Truluck v. Peeples*, 1 Ga. 3.

(c) It appearing that the contract was in fact executed and attested in Gwinnett county, it was entitled to record by the clerk of the superior court.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. §§ 69, 465; * *Acknowledgment*, Cent. Dig. § 322; Dec. Dig. § 59; * *Evidence*, Dec. Dig. § 25.*]

2. REVIEW ON APPEAL.

There was no error in the charges complained of, nor in the failure or refusals to charge, nor other rulings of which complaint is made, requiring a new trial. The evidence supported the verdict, and the court did not abuse its discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by Sears & Bennett against J. W. Beaty. Judgment for plaintiffs, and defendant brings error. Affirmed.

D. K. Johnston, for plaintiff in error. I. L. Oakes, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 440)

A. J. DUNN & BRO. v. MORRIS.

(Supreme Court of Georgia. April 16, 1909.)

NEW TRIAL (§ 70*)—GROUNDS.

In an action brought by a laborer who had been engaged in digging a ditch for laying a sewer, the plaintiff contended that he was injured by reason of the fall of a scaffold erected

over the place where he was at work, and on which it was his duty to throw dirt from the bottom of the ditch, in order that it might be thrown to another point by a laborer on the platform; that the platform, which was constructed under the direction of the master or his alter ego, was negligently constructed, nails of insufficient size being used for that purpose; and that this was known to the master, or should have been known by the use of ordinary care, and was not known to the plaintiff, who did not have equal opportunity with the master for knowing it, and could not discover it by the use of ordinary care. There was no complaint of any ruling of law made by the court during the trial; and, the evidence being sufficient to support the verdict found for the plaintiff, there was no error in overruling a motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Daniel Morris against A. J. Dunn & Bro. Judgment for plaintiff, and defendants bring error. Affirmed.

C. F. Dodd and Dodd & Dodd, for plaintiffs in error. Jas. L. Key, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 408)

BRUMBY v. CITY OF MARIETTA et al.

(two cases).

(Supreme Court of Georgia. April 14, 1909.)

1. MUNICIPAL CORPORATIONS (§ 918*)—ISSUE OF BONDS—VALIDITY OF ELECTION.

Where two elections were held in the city of Marietta for the purpose of determining whether issues of bonds should be authorized, and no complaint was made of lack of authority to hold the elections, or want of any of the prerequisites for so doing, but it was contended that certain provisions of the charter of the city were violated, which prohibited persons, other than the voters or managers, from being allowed to be within 50 feet of the polling place, and prohibited electioneering or seeking to influence voters, or following or accompanying them for the purpose of influencing them, or seeing how they should vote, or seeing that they should vote in any particular way, and declared that a violation of such provisions should be a misdemeanor, *held*, that these provisions of the municipal charter were directory in their nature, and a violation of them by some persons and a failure to enforce them by the election managers did not operate to invalidate the entire election; it not appearing that the result would have been otherwise, had there been a compliance with such provisions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

2. MUNICIPAL CORPORATIONS (§ 918*)—BONDS—ELECTION—VALIDITY.

If there was some irregularity in the manner of registering a few voters, but it did not appear that such persons voted in the election, or that they were in fact not qualified to register, or that such irregularity affected the result, this furnished no cause for declaring the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

election void and refusing to validate bonds authorized thereby.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

8. MUNICIPAL BOND ELECTION.

The rulings announced in the preceding headnotes apply to and govern both cases.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Actions by the Solicitor General against the City of Marietta and others to validate certain bonds. T. M. Brumby intervened. Judgment validating the bonds, and intervenor brings error. Affirmed.

D. W. Blair, for plaintiff in error. B. F. Simpson, Sol. Gen., E. H. Clay, J. Z. Foster, and Geo. F. Gober, for defendants in error.

ATKINSON, J. On August 18, 1905, an act of the Legislature was approved to authorize the mayor and council of Marietta to order and have held an election to determine whether or not bonds should be issued for the purpose of establishing and maintaining a system of sewerage. Acts 1905, p. 983. On August 20, 1906, a separate act was approved, authorizing an election to be held to determine whether bonds should be issued for the establishing and maintaining of a system of waterworks. Acts 1906, p. 846. In pursuance of these acts both elections were held on November 16, 1908, being conducted by separate managers and with separate boxes, though in the same room. The vote was canvassed and declared by ordinance to have been carried in each case in favor of the issuance of bonds by two-thirds of the qualified voters of the city. Notice was given to the Solicitor General, and he instituted proceedings in each case to validate the bonds under the act of 1897 (Acts 1897, p. 82; Van Epps' Supp. Code, §§ 6074-6081). The city answered, admitting the allegations of the petition filed, and alleging that the necessary steps had been taken to make the issue of bonds legal in each case. T. M. Brumby intervened, and objected to the validation of each proposed issue of bonds. On the hearing evidence was introduced, and the presiding judge entered a judgment of validation in each case. The intervenor excepted. The two cases were argued together in this court, as they involved the same questions.

There is no doubt that, in order for a municipal corporation to be authorized to issue bonds, there must be a compliance with the essential provisions of the law. Without this there is no legal authorization. But there is a distinction between the mandatory provisions of the law, without a compliance with which no legal election can be held, and directory provisions in regard to the manner of conducting an election which is legally held, or in regard to the conduct of persons thereat. If an election is held without au-

thority of law, or if prerequisites to the valid holding thereof are not complied with, it is void, and can confer no authority; but if there is lawful authority for the election, and the prerequisites to its being held have been complied with, and it is held at the proper time and place by persons qualified to hold it, mere irregularities in the manner in which it is conducted will not render the election void, or defeat it, if it is not shown that by that noncompliance the result is different from what it would have been had there been proper compliance with the law. Pol. Code 1895, § 112; *Coleman v. Board of Education*, 131 Ga. 643, 63 S. E. 41.

Section 378 of the Political Code provides that such an election "shall be held by the same persons, and in the same manner, under the same rules and regulations that elections for officers of said county, municipality, or divisions are held." The act of August 15, 1904 (Acts 1904, p. 519), establishing a new charter for the city of Marietta, provided that no persons, except voters approaching the polls for the purpose of voting, election managers and clerks, and county or municipal officers called in to preserve order, or persons passing along the highway on business, should be permitted to be within 50 feet of any polling place. It was also declared to be unlawful for any person to electioneer or in any way influence or try to influence any voter, or to speak to him on the subject of voting, within 50 feet of the voting place, except that managers in discharge of their duty might speak to a voter, provided they did not electioneer or seek to influence him; and it was made unlawful for any person to lead or carry a voter to the polls, or to accompany or follow him, either to influence his vote, or to see how he voted, or to see that he voted in any particular way; and it was declared that any person who should in any manner violate any of these provisions should be guilty of a misdemeanor, and upon conviction should be punished as prescribed in section 1039 of the Penal Code of 1895. Evidence was introduced to show that these provisions of the charter of Marietta were disregarded and violated by partisans on both sides of the contest; that the election was held in the council chamber, which was located in the courthouse, and that persons who favored one bond issue or the other, or who were opposed to both, acted in disregard of the statute referred to. Some evidence was also introduced tending to show that on some occasions, while the clerk of council, who was the regular registrar, was absent, some voters came to the office and were allowed by the city marshal to register. Only one name was mentioned as probably having thus registered; but there was some evidence indicating that a few additional persons had done the same thing, and also that on one occasion the marshal had gone to the store

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of a resident and permitted him to register there. It was not shown whether the person last mentioned favored the bond issues or not; or whether he voted in the election. It appeared that the other person named favored one of the issues and opposed the other; but it did not appear that he voted, though it was stated that he was present at the courthouse, taking an interest in how others voted. If there were others whose registration was irregular, it did not appear that they voted, or that they were disqualified from registering.

The intervener did not allege the absence of any of the prerequisites for the holding of the elections, but contended only that matters of the character above indicated rendered the elections void. Applying the rule which has been above stated, this contention cannot be sustained. If it were conceded that persons desirous of having the issues of bonds authorized or opposing such issues acted in violation of the provisions of the charter of the city of Marietta, and made themselves subject to prosecution for a misdemeanor, that alone would not render the election void. The act provides punishment for disobedience of its provisions, but does not provide that the entire election shall be nullified thereby; nor would this follow, at least unless it were shown that the result would have been otherwise save for such conduct. If it were held that a violation of the charter provisions by any person would of itself invalidate the entire election, this would put it in the power of any person who was opposed to the issuing of bonds to defeat the will of the qualified voters lawfully expressed by himself merely disobeying the law. Even a failure on the part of the managers to protest against such conduct, or to call upon proper authorities to suppress it, would not suffice to overturn the entire election, and defeat the will of the qualified voters, where it did not appear that the result would have been otherwise, had the directions of the statute been properly observed. See *Cole v. McClendon*, 109 Ga. 183, 34 S. E. 384; *Chamlee v. Davis*, 115 Ga. 266, 41 S. E. 691; *Jossey v. Speer*, 107 Ga. 823, 33 S. E. 718. The matters of which complaint was made were violations of directory provisions of the charter, but were not so mandatory or essential as *ipso facto* to render the election a nullity; and it is not shown that any harm was done, or that the result would have been different, had the directions contained in the charter been observed.

It was contended in the argument before this court that inasmuch as section 378 of the Political Code provided that elections must be held "under the same rules and regulations" as were provided by law for the holding of elections for officers of the municipality, and section 379 only authorized the val-

idation of bonds when the provisions of section 378 had been complied with, this would require strict observance of the provisions of the charter of the city of Marietta regarding elections, hereinbefore recited, before the court would be authorized to validate the bonds. We think the reasoning already stated is a sufficient reply to this contention. The statute contemplates that an election for the issuance of bonds should be valid if held in such manner as that it would be valid if it were being held for municipal officers. Whatever be the law requiring strict conformity with mandatory rules governing elections for the issuance of bonds, there is no reason why a bond election should be invalid on account of a disregard of merely directory provisions of election laws, where such would not render an election for municipal officers invalid. The ruling here made does not conflict with the ruling with regard to "strict construction," as made in *Bowen v. Greensboro*, 79 Ga. 709, 4 S. E. 159, Mayor of Athens v. Hemerick, 89 Ga. 674, 16 S. E. 72, City of Dawson v. Waterworks Co., 106 Ga. 732, 32 S. E. 907, *Davis v. Dougherty County*, 116 Ga. 491, 42 S. E. 764, *City of Thomasville v. Thomasville Light Co.*, 122 Ga. 401, 50 S. E. 169, and other similar cases, which did not involve a failure to observe merely directory provisions of the law.

Judgment affirmed. All the Justices concur.

(132 Ga. 371.)

GROOVER v. ASH.

(Supreme Court of Georgia. April 14, 1909.)

EXECUTORS AND ADMINISTRATORS (§§ 33, 498*)

—DISCHARGE OF SURVIVING ADMINISTRATOR

—OBJECTIONS—LIABILITY TO ESTATE OF DECEASED ADMINISTRATOR—VENUE.

Where the surviving administrator of an estate makes to the ordinary final returns, which the latter approves, and in such returns full commissions are charged and allowed for all services rendered such estate by the surviving administrator and his deceased coadministrator, and makes application for his discharge as such administrator, the representative of the estate of the deceased coadministrator has no right to maintain a caveat to such application and prevent such discharge because the surviving administrator has not paid to the estate of the deceased coadministrator the proper amount of such commissions for services rendered by the latter.

(a) The liability of such surviving administrator to the estate of the deceased administrator for such of the commissions as may be due such estate for services rendered by the deceased administrator is a personal liability.

(b) Where the proceedings on such application and caveat were pending on appeal in the superior court of the county wherein the surviving administrator did not reside, an application by the representative of the deceased coadministrator to enjoin such pending proceedings, and to recover from the former the amount of commissions due for such services rendered by the latter, was properly dismissed on demurrer.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. §§ 33, 498.*]

(Syllabus by the Court.)

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action by S. C. Groover, administrator, against J. A. Ash, administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

Brannen & Booth, for plaintiff in error. Travis & Travis, for defendant in error.

HOLDEN, J. The plaintiff in error is the present representative of the estate of J. L. Oliff, deceased, and as such seeks, in an equitable petition in Bulloch superior court, to collect from the defendant, a resident of Effingham county, certain commissions alleged to be due the plaintiff's intestate for services rendered the estate of W. M. Foy, on which his intestate and the defendant were coadministrators. After the death of the plaintiff's intestate, the defendant, as surviving administrator, made final returns on the estate of which these two were joint administrators, which returns were allowed by the ordinary. In these returns the defendant credited himself with commissions amounting to several thousand dollars, and credited the plaintiff's intestate with only a small amount, and then he filed his application for discharge as administrator. To this application a caveat was filed by the representative of the deceased administrator, alleging that the bulk of the services rendered the estate was rendered by the plaintiff's intestate, and that he was entitled to two-thirds of the commissions charged by the defendant in the final returns, which caveat proceedings are now pending on appeal in the superior court of Bulloch county. The present petition set up the grounds stated in the caveat, and sought to enjoin the proceedings thereunder until the defendant made a final settlement with the petitioner for the amount due his intestate, and prayed that he be awarded a judgment for two-thirds of the commissions shown and allowed in the said final return. To the order of the court sustaining a demurrer and dismissing the petition, the plaintiff filed exceptions.

It will be seen from the foregoing statements that the plaintiff, who is seeking to enjoin the proceedings wherein the defendant made application to be discharged as administrator, and to which the plaintiff filed a caveat on the ground that the defendant owed the plaintiff's intestate two-thirds of the amount of commissions charged by the defendant in his final return, is endeavoring to obtain a judgment therefor in the injunction proceeding. The plaintiff made no application to the ordinary to award to the estate of the deceased administrator compensation out of the estate for services rendered, as was the case in *Owen v. Walker*, 26 Ga. 347. The plaintiff makes no complaint that the proper amount of compensation has not been awarded for

services rendered by both administrators. The meaning of his allegations is that full and proper compensation has been awarded for all services rendered by both administrators, and his only complaint is that the amount of \$4,088.14 claimed by the defendant for himself and the amount of \$191.75 allowed to the estate of plaintiff's intestate by the defendant in his final returns, as their respective shares of the commissions, are out of proportion to the amount of services respectively rendered by them, and that, as the plaintiff's intestate performed two-thirds of the services rendered the estate by the administrators, the plaintiff should recover two-thirds of the total commissions allowed, in view of Civ. Code 1895, § 3486, wherein it is provided that, "If there are more administrators than one, the division of the commissions allowed them, among themselves, shall be according to the services rendered by each." It does not appear that the plaintiff, or his intestate, were parties to any proceeding to award any specified amount of commissions to plaintiff's intestate and a specified amount to the defendant. It does not appear that the plaintiff is barred from suing the defendant and setting up a claim against him for a part of the amount awarded the defendant for services rendered by him. The fact that the return made by the defendant charges a certain amount as due the plaintiff's intestate for services rendered by such intestate and a certain amount to the defendant does not serve to bar the plaintiff from suing the defendant to recover from him such part of the amount awarded to the defendant as may be a just proportion due the plaintiff's intestate according to the amount of services rendered by him.

It appears from the allegations of the plaintiff's petition, and from the final returns made by the defendant attached thereto, that the estate has been fully administered. The commissions due for all services rendered the estate by both administrators have been charged in the returns, and the accounts between the administrators and the distributees of the estate in this final return are balanced. The division of the commissions between the two representatives of the estate is a matter of no further concern, either to the creditors or to the heirs. After commissions have been allowed by the ordinary in the final return of the surviving administrator for all services rendered by him and his deceased coadministrator, the court of ordinary is not the proper forum for the surviving administrator and the representative of the deceased coadministrator to settle their disputes over a proper division of the commissions allowed. The commissions allowed have been detached or separated from the corpus of the estate, and cease to be assets of the estate, so far as concerns the parties entitled to such commissions. The estate has no more concern or interest in

what division is made of such commissions between the two representatives than has a debtor, who pays to one member, or the surviving member, of a partnership, a debt which he owes the partnership, in a dispute between the partners as to how such amount should be divided between the partners. Where the proper amount of commissions for services rendered by all the representatives of an estate has been charged in the final returns by the surviving administrator, and allowed by the ordinary, such amount is not thereafter held in trust for the estate. The parties at interest should settle the matter justly among themselves, and if they cannot, and litigation is necessary, the court of ordinary is not the proper forum in which to litigate.

Under the allegations of the petition, where such surviving administrator and the representative of his deceased coadministrator cannot settle among themselves the amount which each should receive, the latter has the right to sue the former for the amount that should be paid to him out of the commissions allowed. In *Wickersham's Appeal*, 64 Pa. 67, it was held: "One of two executors filed an account in which were charged full commissions. He was cited in the orphans' court to pay the other executor his proportion. Held, that the orphans' court had no jurisdiction." And on pages 68, 69, it was said in the opinion: "The money claimed was not in the orphans' court, but in the hands of one over whom the orphans' court had no jurisdiction as to the matter in controversy. It is not the money of the estate the appellee holds. His coexecutor is not a distributee of the estate on account of commissions earned. His compensation does not stand on the same footing as a creditor's. If it did, it would be subject to abatement, like other debts, in case the estate were insolvent. This is never the case, as we all know. I will not say that the orphans' court might not apportion the commissions allowed between coexecutors and administrators; but if it be not done, and one receives all, the remedy of the other is in the common-law courts on the implied assumpsit raised by the possession of the money. It would be a novelty to witness a contest between the executors in the orphans' court in regard to mutual claims against each other, for money jointly earned and received, after the whole estate has been settled and the money all distributed to those entitled as distributees. That would be legal, although novel, if we were to sustain the principles of this appeal. Of course, if this were the law, then one executor would be obliged to file an account in the orphans' court, not with the estate, but with his coexecutor, and it would have to go through every process that executors' accounts are liable to." In *Re Carter's Estate*, 132 Cal. 113, 114, 64 Pac. 123, 124, the following language was used: "The appellant's first claim is to the effect that he had a contract with his coexecutor and the

devisees, whereby he was to receive all the commissions allowed to the executors. There is some evidence on both sides of this claim; but the court holds the matter to be one of no importance. What particular contracts may have been entered into between these parties as to the apportionment of the executors' commissions is a matter which should be heard in another forum. The hearing of a final account by the probate department of the court is not the place to settle disputes of this character. These parties are not entitled to litigate a question of that kind upon the hearing of the settlement of a final account. The existence of that character of a contract, or its validity after being made, are matters of no interest to the estate, and must be heard and determined at some other time and in some other proceeding." In this connection, see, also, *Huff v. Thrash*, 75 Va. 546, 549, 550; *Bellamy v. Hawkins*, 16 Fla. 733; *Mount v. Slack*, 39 N. J. Eq. 230.

Under the allegations of the plaintiff's petition it appears that the estate has been fully administered and the full amount of commissions has been awarded in the final returns of the surviving administrator for all services rendered by both representatives of the estate, and the plaintiff has no right to prevent the discharge of the surviving administrator, which should be granted in order to finally close up the administration of the estate. Where there are two administrators, and they have the estate in hand in cash, and the commissions for services rendered by both are charged and audited in the final return, and allowed by the ordinary, the commissions due both are paid by the estate; and the fact that one of the joint administrators has in hand the money which pays the commissions due both only creates an individual liability on his part to his coadministrator for the latter's part of the commissions. The surviving administrator had the entire estate in his hands, and had the right in his final returns to charge up the full amount of commissions due him and his deceased coadministrator. When he did this the amount retained and charged as the full and proper amount of commissions due him and his deceased coadministrator ceased to be assets of the estate; and the surviving administrator was liable as an individual, and not as an administrator, to the estate of plaintiff's intestate for the latter's share of the commissions. For this reason, the sureties on the bond of the surviving administrator would not be liable for the commissions due the estate of the deceased administrator by the surviving administrator.

The plaintiff's remedy to obtain a share of the commissions properly belonging to the deceased administrator is to bring suit against the surviving administrator in his individual capacity. It follows, from what has been said, that the plaintiff has no right to enjoin the trial of the case wherein the surviving administrator is seeking a discharge, because

no sufficient reason is offered why such discharge should be blocked. The only grounds claimed why the superior court of Bulloch county should take jurisdiction being based on the plaintiff's alleged right to enjoin the caveat proceeding pending in that court on appeal from the court of ordinary, and as no such right exists, the superior court of that county has no jurisdiction of a suit to recover the commissions alleged to be due the plaintiff's intestate by the defendant in error, who resides in Effingham county; and the court committed no error in dismissing the plaintiff's petition on the demurrer filed.

Judgment affirmed. All the Justices concur.

(132 Ga. 412)

WINN et al. v. WRIGHT et al.

(Supreme Court of Georgia. April 14, 1909.)

REFUSAL OF INJUNCTION.

Under the pleadings and evidence in this case there was no abuse of discretion in refusing the injunction to the extent to which it was refused by the presiding judge.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by Thomas E. Winn, administrator, and others against John W. Wright and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Park & Park, for plaintiffs in error. Jas. Davison and Samuel H. Sibley, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 426)

SCANDRETT v. EVANS.

(Supreme Court of Georgia. April 15, 1909.)

NEW TRIAL (§ 70*)—GROUNDS—SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize the verdict, and therefore the court did not err in overruling the motion for a new trial based solely on the general grounds.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 142; Dec. Dig. § 70.*]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between R. A. Scandrett and A. J. Evans. From the judgment, Scandrett brings error. Affirmed.

Hall & Hall and Olin J. Wimberly, for plaintiff in error. Lane & Park, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(132 Ga. 455)

CITY OF VALDOSTA v. SOUTHERN PAVING & CONSTRUCTION CO.

(Supreme Court of Georgia. April 17, 1909.)

DIRECTING VERDICT.

Under the pleadings and evidence there was no error in any of the rulings on demurrers or admission of evidence made during the progress of the trial, or in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by the Southern Paving & Construction Company against the City of Valdosta. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Thomas and Woodward & Smith, for plaintiff in error. Denmark, Ashley & Smith, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 457)

GILLIS et al. v. SNOW et al.

(Supreme Court of Georgia. April 17, 1909.)

1. QUO WARRANTO (§ 62*)—REFUSAL—REVIEW.

A party to an application for the writ of quo warranto, or an information in the nature of a writ of quo warranto, desiring to except to the decision of the judge of the superior court thereon, shall, if the Supreme Court be in session, within 10 days after such decision carry the same to the Supreme Court by bill of exceptions. Civ. Code 1895, § 4381; Hardin v. Swann, 66 Ga. 244.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 73; Dec. Dig. § 62.*]

2. CERTIFICATION OF BILL OF EXCEPTIONS.

Accordingly, where the decision of the judge of the superior court refusing to grant an order for leave to file an information in the nature of a quo warranto was rendered on October 30, 1908, and the bill of exceptions was certified on November 16, 1908, the Supreme Court being continuously in session in the meantime, the writ of error must be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Application by E. L. Gillis and others for a writ of quo warranto to W. B. Snow and others. From a judgment denying the writ, petitioners bring error. Dismissed.

Hal B. Wimberly, for plaintiffs in error. Underwood & Talmadge, for defendants in error.

FISH, C. J. Dismissed. All the Justices concur.

(132 Ga. 459)

BRANTLEY et al. v. McARTHUR.

(Supreme Court of Georgia. April 17, 1909.)

EXCEPTIONS, BILL OF (§ 58*)—SERVICE—PROOF.

The only proof of service of a bill of exceptions, when it was filed and transmitted to this

court, was an entry stating that a copy had been served upon one of the attorneys of record for the defendant in error, signed by a member of the bar who did not appear to be an attorney of record in the case. When the case was called for argument, a motion was made to dismiss the writ of error for want of proper service of the bill of exceptions. Thereupon the attorney who had made the entry on the bill of exceptions made an affidavit stating that he had served a copy of it upon one of the attorneys for the defendant in error on a day named, which was within 10 days from the date of the judge's certificate; and a motion was made on behalf of the plaintiffs in error to be allowed to attach such affidavit to the bill of exceptions as proof of service. *Held*, that the latter motion must be denied, and the writ of error dismissed. *Plummer v. Moore*, 63 Ga. 626; *Akerman v. Neel*, 70 Ga. 723; *Cloud v. State*, 50 Ga. 369; *Crow v. State*, 111 Ga. 645, 36 S. E. 858; *Goodwin v. Kennedy*, 99 Ga. 123, 24 S. E. 975.

[Ed. Note.—For other cases, see *Exceptions*, *Bill of*, *Cent. Dig.* § 105; *Dec. Dig.* § 58.*]

(Syllabus by the Court.)

Error from Superior Court, Dekalb County; L. S. Roan, Judge.

Action between L. G. Brantley and others and John McArthur. From the judgment, Brantley and others bring error. Dismissed.

R. W. Wilner, for plaintiffs in error. Gleaton & Gleaton, for defendant in error.

LUMPKIN, J. Writ of error dismissed. All the Justices concur.

(132 Ga. 444)

CURTIS et al. v. TOWN OF MANSFIELD et al.

(Supreme Court of Georgia. April 16, 1909.)
APPEAL AND ERROR (§ 511*)—DISMISSAL—BILL OF EXCEPTIONS—TIME OF TENDER.

Where a bill of exceptions to a judgment refusing an interlocutory injunction recites that it was presented within 30 days from the date of the rendition of such judgment, and the certificate of the judge is dated more than 20 days from such date, and it does not appear from either the record or the bill of exceptions that the latter was tendered within 20 days from the date of such judgment, this court is without jurisdiction to entertain the writ of error. *Crawford v. Goodwin*, 128 Ga. 134, 57 S. E. 240; *Sweat v. Georgia Naval Stores Co.*, 129 Ga. 571, 59 S. E. 273.

[Ed. Note.—For other cases, see *Appeal and Error*, *Dec. Dig.* § 511.*]

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by W. A. Curtis and others against the Town of Mansfield and others. Judgment for defendants, and plaintiffs bring error. Writ of error dismissed.

Doyle Campbell and Middlebrook, Rogers & Knox, for plaintiffs in error. R. W. Milner, for defendants in error.

HOLDEN, J. Writ of error dismissed. All the Justices concur.

(132 Ga. 441)

CURTIS et al. v. TOWN OF MANSFIELD et al.

(Supreme Court of Georgia. April 16, 1909.)

JUDGMENT (§ 489*)—COLLATERAL ATTACK.

A judgment confirming and validating an issue of bonds by a municipality cannot be attacked collaterally for want of jurisdiction in the court to render the judgment, unless the want of jurisdiction appears on the face of the record.

[Ed. Note.—For other cases, see *Judgment*, *Dec. Dig.* § 489.*]

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by W. A. Curtis and others against the Town of Mansfield and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Doyle Campbell and Middlebrook, Rogers & Heath, for plaintiffs in error. R. W. Milner, for defendants in error.

HOLDEN, J. The plaintiffs filed their application against the defendants for an injunction, which was refused, and to this order the plaintiffs filed their bill of exceptions, in which it is recited that an injunction was prayed against "the town of Mansfield from paying out, and the Mansfield Lumber & Construction Company from receiving, the proceeds of the sale of \$6,000 of bonds of said town, upon the grounds that the issue of said bonds was illegal and void, and that the judgment of the court validating the same was void, for the reason that the court which validated said bonds had no jurisdiction of the subject-matter. There were other grounds than these set out in plaintiffs' petition, but they were abandoned on the hearing of the case by plaintiffs' counsel, as stated in the order of the court refusing the injunction." The following also appears in the bill of exceptions: "To this judgment of the court plaintiffs in error excepted, and now except and assign the same as error, upon the ground that said judgment was contrary to law, inasmuch as the court which validated said bonds was without jurisdiction of the subject-matter and said judgment was void, and the election for issuing said bonds, as well as the issuing of the same, was ultra vires and void, and in violation of the Constitution of Georgia (section 5909 of the Civil Code of Georgia of 1895); and for these reasons the court committed error in not granting the injunction as prayed for." It is stated, in the judgment of the court refusing the injunction, "that every question made by the pleadings in the case had been covered and passed upon by former judgments of this court in cases between the same parties, to wit, by a judgment rendered August 8, 1908, and by a judgment of September 3, 1908; plaintiffs' counsel not

now insisting upon these same questions in this case, and having abandoned all questions except the sole question of the jurisdiction of the court, the superior court of Newton county, to render a judgment validating the \$6,000 of bonds mentioned in plaintiffs' petition. Plaintiffs' counsel contended that said judgment of validation was void for want of jurisdiction of the subject-matter by said court, in that and because there was no recommendation by the corporate authorities of Mansfield for a special act to hold this election, and no special law was passed by the Legislature authorizing the holding of an election to issue these bonds as provided in section 5909. Plaintiffs' counsel conceded that the proceedings for the validation of the bonds, with respect to all matters of notice, service of notice, and other requisites to a proper judgment of validation, were regular, and that an election was had, but insisted that the election was illegal for want of a law authorizing the election, and for that reason alone the court was without jurisdiction of the subject-matter in validating said bonds."

One of the defenses set up by the defendants was as follows: "Defendant has complied with every requirement of that act [validation act of 1897 (Laws 1897, p. 82)], and the bonds are legal and binding and cannot be attacked by the plaintiffs, having been duly validated as alleged by plaintiffs." It appears from the record that an election was held and declared to have resulted in favor of the issuance of the bonds, and that thereafter the bonds were confirmed and validated by the judgment of the court in proceedings which were admitted to have been regular in every respect and to have conformed to all the requirements of the validation act of 1897. It has been held that the judgment of a superior court validating an issue of bonds by a municipality is conclusive, as to the city, its citizens, and every one else, "that the city has the legal right to incur a debt of the amount and for the purposes indicated in the notice of the bond election, that the assent of the qualified voters has been obtained for issuance of bonds in the manner required by law, and upon all other questions which the Constitution and laws require to be determined before authority is conferred upon a municipality to incur a debt." *Baker v. Cartersville*, 127 Ga. 221, 58 S. E. 249. The court rendering the judgment complained of in this case is the court which, under the general validation act of 1897, has authority to validate any proper issuance of municipal bonds by the town of Mansfield. If a recommendation by the municipal authorities and a special act of the Legislature were necessary before an election for bonds could be legally had, whether or not such a recommendation was made and such act passed

were matters to be determined by the court, in the exercise of its jurisdiction under the general act above referred to, upon the hearing of the validation proceedings, before rendering a judgment on the question as to whether or not the bonds should be validated. In the present case the plaintiffs are seeking, in a collateral attack, to have that judgment declared void for lack of jurisdiction of the court rendering it over the subject-matter. The pleadings in the validation proceeding nowhere appear in the record, and therefore it cannot be said that the judgment of validation, or the record upon which it was founded, shows on its face that there was any want of jurisdiction in the court to render that judgment. This court has no jurisdiction to have the pleadings in that case sent up for examination, as they do not constitute any part of the record in the present case. In making the present collateral attack on the judgment of validation, it is essential to its maintenance that the plaintiffs affirmatively show, either from the judgment itself or the record upon which it was founded, that the court lacked jurisdiction to render it. In the absence of such affirmative showing on the part of the plaintiffs, it will be presumed that the court had jurisdiction to render the judgment. In the case of *Medlin v. Downing Co.*, 128 Ga. 115, 57 S. E. 232, it was held: "The court of ordinary is a court of general jurisdiction; and, unless the want of jurisdiction appears on the face of the record, its judgments cannot be collaterally attacked." Also see *Jones v. Smith*, 120 Ga. 642, 644, 48 S. E. 134, 135, where it is said: "Where the record is silent, the presumption is that all necessary jurisdictional facts appeared, and no collateral attack can be made upon the judgment." Also see *Dunagan v. Stadler*, 101 Ga. 474, 479, 29 S. E. 440. Even if an act of the Legislature authorizing the election was essential to its validity, and the court had no jurisdiction to validate the bonds when no such act existed, the judgment of the court validating the bonds cannot be attacked collaterally, when it does not appear on the face of the judgment, or the record of the proceedings for validation, that the court was without jurisdiction to render the judgment.

Judgment affirmed. All the Justices concur.

(132 Ga. 435)

SWIFT FERTILIZER WORKS v. PEACOCK.

(Supreme Court of Georgia. April 16, 1909.)

1. SALES (§ 359*)—ACTION FOR PRICE.

The evidence demanded a verdict for the plaintiff for the full amount for which suit was brought, and the court erred in refusing to grant a new trial.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 359.*]

2. DEMURRER TO PLEA.

The plea of the defendant was not subject to the demurrer filed thereto.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action by the Swift Fertilizer Works against L. N. Peacock. Judgment for plaintiff for a part of its claim, and it brings error. Reversed.

J. P. Highsmith and Tye, Peeples, Bryan & Jordan, for plaintiff in error. D. M. Roberts & Sons, for defendant in error.

HOLDEN, J. The plaintiff brought suit against the defendant on notes given for the purchase money of guano, bought from the plaintiff at \$21.25 per ton, alleging that the defendant owed it the full amounts appearing on the face of the notes, less a credit of \$255 for 12 tons of guano at the contract price, which the plaintiff failed to accept and receive upon its arrival. The defendant in his plea admitted the giving of the notes; but he contended that he should have credit thereon for \$425, the contract price for 20 tons at \$21.25 per ton, instead of \$255, the contract price of 12 tons, which latter amount was credited on the notes; that these 20 tons were shipped to one Walker and received by him too late for use, of which fact he notified the plaintiff, and that he could not accept the goods, and requested it to return "his notes for correction"; and that "plaintiff, after receiving defendant's notice, took charge of the goods and actually sold them out." Upon the trial the jury allowed a credit on the notes for the contract price of 20 tons, and found for the plaintiff the balance sued for. A motion for a new trial was overruled, and the plaintiff excepted.

1. It appears from the testimony that the defendant bought from the plaintiff 40 tons of guano at \$21.25 per ton, and gave his notes therefor. He ordered 20 tons to be shipped to one Walker. There is no evidence that the defendant did not deliver the guano to the carrier in time for it, in the ordinary course of transportation, to have reached Walker in ample time for use on the crops for the year for which it was intended. The notes were dated May 2, 1904. It appears from letters from the defendant to the plaintiff that he mailed the notes to the plaintiff on May 14, 1904. The shipment, which, according to a statement of Walker, was made March 26, 1904, did not arrive until May 9, 1904, and Walker wrote to the defendant he could not use the guano. The defendant sent the plaintiff a copy of this letter, and wrote as follows: "Eastman, Ga., May 14, 1904. Swift Fertilizer Works, Atlanta, Ga.—Gentlemen: Enclosed find letter received from J. L. Walker in regard to car of fertilizer I ordered from you some months ago.

I mailed you three notes this morning, and since mailing same I received Mr. Walker's letter. I expect you to make claim against road for same, as it got to Mr. Walker too late for any use. Hoping that you will rectify this matter at once, I am very truly yours, L. M. Peacock." Walker used six tons of the guano on his crops, and sold two tons. The plaintiff took possession of the remaining 12 tons. The plaintiff having credited the defendant with the purchase price of 12 tons, and he contending for a credit of the price of 20 tons, it will be observed that the difference between the amount claimed by the plaintiff and that admitted by the defendant to be due consists of the purchase price of 8 tons, the amount which Walker used or sold. Walker was the person to whom the defendant ordered the 20 tons shipped, and to whom it was shipped and delivered. Walker took possession and disposed of 8 tons of the guano, and after this the plaintiff took possession of the remaining 12 tons and gave the defendant credit for the contract price thereof. As Walker, the person to whom the defendant ordered the goods shipped and delivered, and to whom they were shipped and delivered, put it out of the power of the plaintiff to get the 8 tons, the defendant cannot complain that the plaintiff does not give him credit for the purchase price thereof. When Walker disposed of the 8 tons and put it out of the power of the plaintiff to get possession of the same, it was the same thing as if the defendant had done this; and when the defendant, through the consignee, disposed of the 8 tons, and the plaintiff took possession of the remaining 12 tons, the proper and only legal adjustment of the matter between the parties is that the defendant should only have credit for the purchase price of the 12 tons returned, and is liable to pay for the remaining 8 tons. The complaint of the defendant in his letter to the plaintiff was that the guano reached Walker "too late for any use." It appears, however, it did not reach Walker too late for the use of 8 tons. The defendant, through the consignee to whom he directed the goods shipped, received and used the 8 tons of guano; and, if he is indebted therefor to any one, we see no reason why he is not thus indebted to the defendant, instead of the plaintiff. The plaintiff did not consent for Walker to use any of the guano after receiving the letter herein copied. After this letter was received, Walker stated in writing to the plaintiff that he had disposed of 8 tons, and notified the plaintiff where the remaining 12 tons were stored. The plaintiff found only 12 tons, which it took. The other 8 tons it could not take, because Walker, the person to whom it was delivered by direction of the defendant, had disposed of that amount, and the plaintiff should not be held responsible therefor. The court committed error in refusing to grant a new trial.

2. The plea filed by the defendant was not subject to the demurrer filed thereto, and the court committed no error in overruling such demurrer.

Judgment reversed. All the Justices concur.

(132 Ga. 508)

KENNEDY v. HAGANS et al.

(Supreme Court of Georgia. April 19, 1909.)

1. APPEAL AND ERROR (§ 302*) — REVIEW — GROUNDS OF MOTION FOR NEW TRIAL.

A ground of a motion for new trial, which selects several fragments of sentences from different parts of the charge of the court, which are incomplete and unintelligible as set out in such ground, is not sufficiently definite to present any question for determination by this court. *Holland v. Williams*, 126 Ga. 617, 55 S. E. 1023.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1748; Dec. Dig. § 302.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence which was introduced without objection was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action between D. L. Kennedy and J. S. Hagans and others. From the judgment, Kennedy brings error. Affirmed.

Brannen & Booth and H. B. Strange, for plaintiff in error. J. J. E. Anderson and R. Lee Moore, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 387)

HOLLOWAY v. MACON GASLIGHT & WATER CO.

(Supreme Court of Georgia. April 14, 1909.)

WATERS AND WATER COURSES (§ 206*)—WATER COMPANIES—LIABILITY FOR LOSS BY FIRE.

A waterworks company, operating under a franchise which gives to it the right to use the streets, etc., of a city for the purpose of laying its mains, etc., and carrying on its business, and which enters into a contract with the municipality to supply it, in its corporate capacity, with a sufficient supply of water from the city hydrants to extinguish fires, and to furnish private consumers, at fixed tolls, with water for domestic and manufacturing purposes, is under no public duty to a resident of the city to furnish the municipality with water to protect his property from loss by fire, and consequently cannot be held liable to him, in an action of tort, for fire loss sustained by him by reason of its failure to supply the city with water with which to extinguish the fire which consumed his property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. § 206.*]

(Syllabus by the Court.)

Case certified from Court of Appeals.

Action by J. D. Holloway against the Macon Gaslight & Water Company. Judgment for defendant, and plaintiff brings error to the Court of Appeals, which certified the case to the Supreme Court. Judgment rendered.

The question in this case was certified to this court by order of the Court of Appeals, which is as follows:

"J. D. Holloway v. Macon Gaslight & Water Company.

"In the foregoing case, pending in the Court of Appeals, said court desires the instruction and decision of the Supreme Court as to the following question of law necessary to the proper determination thereof, to wit: Does a petition set out a good cause of action which alleges: That the defendant is the Macon Gaslight & Water Company, which is a public service corporation engaged in furnishing water to the city of Macon and to the inhabitants of that city for toll, and which has a monopoly of such business in said city. That the city itself and the inhabitants thereof are now and for the past four years have been utterly and entirely dependent on the defendant for water supply. That on November 26, 1891, the defendant entered into a contract with the city of Macon respecting the furnishing of water to said city for a period of 20 years, which has not expired. (A copy of said contract, omitting certain immaterial parts, is hereto attached as a part hereof and marked 'Exhibit A.') That by the terms of said contract the defendant agreed to furnish water to said city for its benefit and for the benefit of its inhabitants for fire protection and for other purposes, it having therein been agreed by the defendant as follows: 'The party of the second part [the defendant herein mentioned] agrees to supply the party of the first part [the mayor and council of the city of Macon] with water in sufficient quantities and at all times for fire protection.' That the city of Macon has continuously paid the defendant, from revenues derived from the taxation of its citizens, for the services so contracted to be performed by the defendant. That on November 19, 1907, petitioner was a citizen and taxpayer of the city of Macon, and owned and possessed a certain described house and contents, all of the value of \$2,100, in said city, located in the area which defendant undertook to supply with water under said contract, and on said date a neighboring dwelling house caught fire from causes unknown, but through no fault of petitioner. That said fire spread and was communicated to petitioner's house and the contents thereof, so that they were burned

and destroyed, to his loss in the sum of \$2,100, despite petitioner's best efforts to prevent the spread of said fire. That before the fire was communicated to petitioner's house the fire alarm had been given, and the city fire department had responded and reached the scene of the fire. After they reached the scene of the fire they connected the hose with the water plug of the defendant, with the view of extinguishing the fire and preventing damage to petitioner's property, which could easily have been accomplished if the defendant had maintained at that time in its supply pipes the pressure it had agreed at all times to maintain. That at said time there was no appreciable pressure of water in defendant's pipes, and not sufficient supply of water to enable the fire department to employ a steamer to extinguish or confine the fire. That despite the presence, willingness, and efficiency of the fire department, the house and contents burned. The defendant knew that neither the petitioner nor the fire department had any other supply of water than that the defendant had agreed to furnish. That the petitioner was without fault in the matter. That during all the times mentioned the defendant was enjoying valuable franchises in its corporate existence and business, notably the occupancy of the public streets with its water mains, on condition that it should perform the services undertaken under the contract. That the said contract was entered into by the defendant with the city of Macon by virtue of an act of the General Assembly approved September 29, 1891, amending the charter of the city of Macon, and said contract was designed for the service and protection of the taxpayers of the city of Macon, as well as of the city itself. That by reason of said act of the General Assembly and of said contract defendant was obliged to perform a public duty and an express statutory duty toward the inhabitants, property owners, and taxpayers of Macon, and this duty the defendant did not perform, as averred above, to the special hurt, injury, and damage of petitioner. That defendant's negligence and breach of duty to petitioner consisted in its failure to have in any of the plugs near petitioner's said property an adequate supply or pressure of water for fire protection, and in failing to have the supply and pressure called for by said contract. That there was not at said plugs, and in the mains leading to said plugs, sufficient water to cause a flow at the plugs, and defendant did not have at its plant a sufficient head of steam to give a flow of water. It is therefore ordered that a copy hereof, together with a transcript of the record, be certified to the Supreme Court."

Exhibit A, being the contract between the city of Macon and the Macon Gaslight & Water Company, is as follows:

"State of Georgia, County of Bibb.

"This indenture, made and entered into this 25th day of November, A. D. 1891, by and between the mayor and council of the city of Macon, Ga., party of the first part, and Macon Gaslight & Water Company, a corporation duly incorporated under the laws of the state of Georgia, party of the second part, witnesseth: That for and in consideration of the agreements and stipulations hereinafter set forth, and for certain sums of money to be paid as hereinafter provided, and by the authority conferred upon the said city of Macon by an act of the General Assembly which became a law on the 29th day of November, 1891, the following mutual agreements are entered into:

"Section 1. The party of the second part agrees to furnish the party of the first part with water in sufficient quantities and at all times for fire protection, sprinkling streets, flushing sewers, and the various other purposes in the city offices, police barracks, market, and engine houses, and to supply the citizens of Macon for domestic and manufacturing purposes, during the continuance of this contract, at prices not to exceed the following rates: To the city in its corporate capacity, 200 fire hydrants similar to those already in use, at the rate of \$40 per hydrant per annum. For each additional hydrant \$37.50 per annum until the number rented by the city shall reach 300, when the price for all shall be reduced to \$37.50 per hydrant per annum. * * * The citizens for domestic or mechanical purposes shall be charged not more than the following rates: Private dwellings for domestic purposes only, through a single opening of one-half inch diameter, per annum, \$6. * * *

"Sec. 2. It is mutually agreed that the said party of the first part shall pay for such water so supplied only as it is received, equal quarterly payments in the months of January, April, July, and October of each and every year, and that no indebtedness is incurred by said city of Macon by this contract, other than that which may arise from failure on the part of the said mayor and council to comply with their contract. * * * And for any failure on the part of the party of the second part to furnish the water for the purposes herein specified it shall forfeit the rentals for double the time during which said failure have occurred: provided the temporary failure of supply in a portion only of the city, caused by breaks, repairs, or extensions, shall not be considered a failure as above, nor for failure caused by the act of Providence.

"Sec. 3. The party of the second part agrees to furnish water as clear and as pure as can be obtained in sufficient quantity in practicable reach of the city; and, if any part or all of such supply is taken from the Ocmulgee river, it shall be taken from a point well above the sewerage pollution, and shall be thoroughly filtered.

"Sec. 4. It is hereby agreed by the parties hereto that, at any time during the continuance of this contract, the mayor and council of the city of Macon shall have the right to purchase the system of waterworks used in supplying the city, together with all rights, franchises, and good will, at a price to be agreed on at the time of sale. * * *

"Sec. 5. Since the present works of the party of the second part have not the capacity to supply more than the present demand, the said party of the second part agrees to increase the pumping capacity to 5,000,000 gallons per day, and to increase the capacity of its mains by reinforcing those already in use by connecting with them larger pipes at various points, so as to secure better pressure and distribution, or erect filters of modern pattern and ample capacity to supply the needs of the city, and so arranged that they can be increased in the future as the demand increases.

"Sec. 6. It is further agreed between the parties hereto that, as the population and territory to be protected increases, the said party of the second part shall extend its mains and erect hydrants along such streets as may be demanded by the party of the first part: provided the guaranteed income from consumers shall equal 6 per cent. upon the cost of such mains, and the said party of the first part agrees to rent a fire hydrant in addition to those already rented for 500 feet of main so extended; it being understood that the extensions so to be demanded must be along continuous lines of streets, and not more than 10,000 feet or two miles of such extension shall be demanded in any one year, except with the consent of the said party of the second part.

"Sec. 7. For the purpose of carrying out the terms of this contract, it is agreed by the parties hereto that the use of the streets, lanes, alleys, and public grounds, as they now exist or hereafter may be altered, opened, or extended, shall be granted to the party of the second part during the continuance of this contract, for the purpose of excavating trenches and laying down or changing mains, valves, pipes, and conduits: provided, always, that in so excavating trenches and laying down or changing pipes, etc., that the grade of the street shall be adhered to, that the public work shall not be unnecessarily impeded or obstructed, and that the roadway shall be left in practically as good condition as it was before such excavating. * * *

"Sec. 8. As the safety of the property of the citizens is largely dependent upon the proper and efficient management of the waterworks, and to that end rules and regulations are necessary to be observed, it is hereby agreed by the parties hereto that the right of the party of the second part to enter into the premises of the citizens, by its authorized agents, during the business hours of the day, for the purpose of inspecting the

water fixtures used by its customers, is recognized, and its right to shut off the water from any section of the city to make repairs and extensions, after notice, where practicable, but without notice in emergency, as well as its right to refuse to supply customers who neglect to pay for their supply, or who refuse to have fixtures repaired to prevent waste, or who persistently waste the water after five days' notice, and in accordance with the published rules of the party of the second part. And it is agreed that the said rules made for the management of said works from time to time, as are usual in waterworks management, and not in conflict with the city's ordinances or the laws of the state, must be observed. And to the end that the property and rights of the waterworks may be protected and waste of water prevented, the following ordinances shall be passed by the party of the first part and become a part of this contract."

Here follow a number of penal ordinances protecting the property and franchises of the company.

The act of the General Assembly approved August 29, 1891 (Acts 1890-91, vol. 2, p. 566), referred to in the petition and exhibit as certified by the Court of Appeals, was, by its title, "An act to amend the charter of the city of Macon and the several acts amendatory thereof, so as to authorize the mayor and council of the city of Macon to construct a system of waterworks in said city at a cost not to exceed \$412,000, to issue bonds to the amount of \$350,000 for the purpose of constructing said system of waterworks for said city, and to provide for the construction of a portion of said system of waterworks from the revenues derived from the sale of water therefrom, and to authorize the said mayor and council to make a contract with the Macon Gaslight & Water Company for the furnishing of water to said city, with the privilege of purchasing the waterworks used by said Gaslight & Water Company in supplying said city; to provide a commission for the negotiation and sale of said bonds, and for the construction and management and control of said waterworks; to grant certain powers and rights to said commission; * * * to provide for an election for the purpose of procuring the assent of two-thirds of the qualified voters of the city of Macon to the issuing of said bonds; to prescribe a method of registration for said election, and for other purposes." The act, after conferring authority upon the city of Macon to construct a system of waterworks and to issue bonds, if authorized by the result of the election, as provided in the title of the act, toward payment for the same, and after creating "the Water Commission of the City of Macon" and prescribing the powers of such commission, among them being authority to sell the bonds if they should be issued in accordance with an election as

provided for, in its fourteenth section contained the following provisions:

"That at any time after the passage of this act, and before the election herein provided for shall be held, the mayor and council of the city of Macon shall have authority to make and enter into a contract with the Macon Gaslight & Water Company, for supplying the city with water for a period not to exceed twenty (20) years. * * * There shall be embodied in said contract the privilege to the mayor and council to purchase the system of waterworks used in supplying the city, at any time during the period for which said contract is made, at a price to be agreed upon at the time of sale between the parties to said contract. * * * [And] before said purchase shall be made, the assent of two-thirds of the qualified voters of the city of Macon shall be obtained, in the manner now or which may hereafter be provided by law, to the incurring of the indebtedness for the purchase of said waterworks. When such contract is made, * * * there shall be embodied in said contract a scale rate, showing the price to be paid by private consumers of water; and the mayor and council shall require a bond with good security, in the sum of one hundred thousand dollars, for the faithful carrying out of said contract by the Macon Gaslight & Water Company; provided, that while said contract shall be made by the said mayor and council of the city of Macon with said Gaslight & Water Company, in the event that the provisions in this act to issue bonds for the erection of a system of waterworks by a commission, as herein provided for, shall receive the assent of two-thirds of the qualified voters of the city of Macon, as provided in section 13 of this act, then said contract shall no longer be of force and effect, but shall discontinued and be inoperative as though never made. If the provisions of this act, as to the issue of bonds, shall not be ratified by the said votes as required, then said contract shall still remain and continue in full force and effect."

The act then provides that if no contract be entered into prior to the election for bonds, or if such election should not result in favor of the issuance of bonds, then the mayor and council shall have authority to make a contract with the water company for the period of 20 years for supplying the city with water, under the same terms and conditions and stipulations as contained in the act in reference to a contract made prior to such election.

T. J. Cochran and Hall & Hall, for plaintiff in error N. B. & W. A. Harris, for defendant in error.

FISH, C. J. (after stating the facts as above). The great weight of authority is to the effect that a resident of a city cannot recover of a waterworks company damages

for loss by fire occasioned by the failure of such company to furnish, in accordance with its contract with the city, a sufficient supply of water to extinguish the fire. *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. Rep. 313; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. St. Rep. 1; *Atkinson v. Newcastle & Gateshead Waterworks Co.*, L. R. 2 Ex. D. 441; *Foster v. Lookout Water Co.*, 3 Lea (Tenn.) 42; *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185; *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Beck v. Kittinging Water Co.*, 8 Sadler (Pa.) 237, 11 Atl. 300; *Mott v. Cherryvale Water Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Howseman v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Eaton v. Fairbury Waterworks Co.*, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Wainwright v. Queens Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *Bush v. Artesian, etc., Water Co.*, 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161; *Akron Waterworks Co. v. Brownless*, 10 Ohio Cir. Ct. R. 620; *Stone v. Uniontown Water Co.*, 4 Pa. Dist. R. 431; *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; *Boston Safe Dep., etc., Co. v. Salem Water Co.* (C. C.) 94 Fed. 238; *Wilkinson v. Light, Heat & Water Co.*, 78 Miss. 389, 28 South. 877; *Britton v. Green Bay Waterworks Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290; *Town of Ukiah v. Ukiah Water, etc., Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; *Allen & Cunry Mfg. Co. v. Shreveport Water Co.*, 113 La. 1091, 37 South. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525; *Metropolitan Trust Co. v. Topeka Water Co.* (C. C.) 132 Fed. 702; *Blunk v. Dennison Water Supply Co.*, 71 Ohio St. 250, 73 N. E. 210; *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 41 South. 76, 6 L. R. A. (N. S.) 429; *Peck v. Sterling Water Co.*, 118 Ill. App. 533; *Metz v. Cape Girardeau Waterworks Co.*, 202 Mo. 324, 100 S. W. 651; *Thompson v. Springfield Water Co.*, 215 Pa. 275, 64 Atl. 521; *Hone v. Presque Isle Water Co.* (Me.) 71 Atl. 769; *Blenville Waterworks Co. v. Mobile*, 112 Ala. 260-266, 20 South. 742, 33 L. R. A. 59, 57 Am. St. Rep. 28; *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Smith v. Great South Bay Water Co.*, 82 App. Div. 427, 81 N. Y. Supp. 812.

The reason for the doctrine is given in most, if not all, of these cases. This doctrine has not been adhered to in Kentucky, North Carolina, and Florida. *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; *Gorrell v. Water Supply Co.*, 124 N. C. 828, 32 S. E. 720, 46 L.

R. A. 513, 70 Am. St. Rep. 598; *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207. The Kentucky and North Carolina cases have been criticised in many of the cases wherein the doctrine above announced has been recognized and applied, and the reasoning in the *Mugge* Case and that of the majority of the court in *Guardian Trust Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, which seems to have been followed in *Mugge's Case*, is criticised in the editorial note on the last-mentioned case in 6 L. R. A. (N. S.) 1171. There is nothing new to be added on the subject, and it would be supererogatory to set forth the reasons given by the various courts in sustaining the doctrine and of those repudiating it. Moreover, the question certified must, in our opinion, be solved by following a former decision of this court in *Fowler v. Athens City Waterworks Co.*, supra, where it was held: "Against a water company which is under a contract obligation with the municipal government (but no legal duty otherwise) to furnish a supply of water for use by the municipality in extinguishing fires, a citizen and taxpayer, whose property has been consumed by reason of a breach of such contract obligation, has no right of action; there being no privity of contract between the citizen and the water company, and mere breach (by omission only) of a contract entered into with the public not being a tort, direct or indirect, to the private property of an individual."

In that case, as we have ascertained from an examination of the original record of file in this court, the mayor and council of the city of Athens entered into a contract with one Robinson in 1882, whereby Robinson undertook that he would furnish at all times, for a consideration mentioned in the contract, all the water necessary for fire purposes; that he would establish fire hydrants to the number of 55, and would guarantee at all times a sufficient pressure to throw from any of these hydrants, through a 1-inch nozzle and 50 feet of 2½-inch hose, five streams of water to the height of 65 feet. He further agreed to furnish consumers other than the city with pure and wholesome water at a rate not exceeding that in a list appended to the contract and made a part thereof. By the terms of the contract the city was to have the right to purchase Robinson's waterworks when the same should be completed, or at the end of each 10 years thereafter, at a price to be fixed by arbitrators to be selected as provided in the contract. The city in the contract expressly granted to Robinson and his successors or assigns the exclusive right to erect and maintain waterworks as contemplated in the contract, "and also the free and unrestricted right and privilege at any and all times to lay, construct, maintain, repair, and tap all mains, pipes, hydrants, and other fixtures

and appurtenances in, upon, under, and through any and all streets, avenues, lanes, alleys, roads, and bridges within said city." It was also stipulated in the contract "that it [the city] will pass, and at all times during the continuance of this contract maintain and enforce, such ordinances as may be necessary and proper to enable said contractor to construct and control his works and protect the same."

It will be seen, therefore, that the decision in that case, when construed in the light of the facts upon which it was predicated, is controlling in the present one; for the court there not only held, treating the plaintiff's action as being one *ex contractu*, under the contract between the city and the waterworks company, that he could not recover, as there was no privity of contract between him and the company, but it also clearly and distinctly held that he could not recover if his action against the company were treated as being one *ex delicto*—that is, upon an alleged tort arising from a breach of a public duty which the company, under its contract with the city, owed the plaintiff. What was said by Chief Justice Bleckley in denial of the right of the plaintiff to recover, upon the facts alleged in his petition, if his action were treated as one sounding in tort, was by no means obiter; for it is clear, from reading the statement of the case by him and the opinion which he delivered therein, that the court did not undertake to determine whether the petition was intended to set forth a cause of action arising *ex contractu* or a cause of action arising *ex delicto*. But the court, without construing the petition the one way or the other, simply but decisively determined that, whether the petition sounded in contract or in tort, it failed to state a cause of action, as the plaintiff could not recover on contract, because he was no privy to the contract which the city made with the waterworks company, and he could not recover in tort, because, under the facts alleged, there was relatively to him no breach of a public duty by the water company. With reference to this last-mentioned view or construction of the petition, the learned Chief Justice said: "There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against destruction of property by fire. *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256; *Am. & Eng. Enc. Law*, vol. 7, p. 997 et seq. We are unable to see how a contractor with the city to supply water to extinguish fires

commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law."

As will have been seen, the material facts in the case at bar are practically the same as those in the Fowler Case. While Robinson, the contractor in the Fowler Case, was an individual, and his successor and assignee, the Athens City Waterworks Company, does not appear to have been incorporated, and the contractor in the case now in hand was a corporation, this difference certainly would not alter the principle to be applied in the present case; nor would such principle be affected by the fact that in the case before us the contract between the city of Macon and the waterworks company was expressly authorized by the act of 1891, amending the charter of the city of Macon, whilst in the Fowler Case it does not appear that express legislative authority was given to the city of Athens to enter into the contract therein involved. Such city did not need express authority to make the contract; for it is well settled that under the "general welfare clause," usually found in the charters of towns and cities, such municipalities have the authority to enter into contracts and to exercise the power of taxation, within the limits fixed by the Constitution, for the purpose of providing their inhabitants with water for domestic use, as well as to provide the city with water to protect its inhabitants from loss by fire. City Council of Dawson v. Dawson Waterworks Co., 106 Ga. 696, 32 S. E. 907, and cases cited. The "general welfare clause" was contained in the charter of the city of Athens. The same right to use the streets of the city for the purpose of laying water mains, etc., was given to Robinson, under the contract he made with the city of Athens, as was given to the waterworks company in the case in hand, under the contract it entered into with the city of Macon, and the obligations to be performed by the contractors in each of the cases were of the same character. To our mind, therefore, the Fowler Case is, as we have already said, absolutely controlling in the present case, and requires that the question certified to this court by the Court of Appeals shall be answered in the negative; that is, that Holloway's petition set out no cause of action against the Macon Gaslight & Water Company. Here, as there, there was a "violation of a contract entered into with the public, the breach being by mere omission or nonfeasance," which "is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government."

The plaintiff in error relies upon Freeman v. Macon Gaslight & Water Co., 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917. It was there held: "When a private corporation,

in the exercise of a franchise granted by a municipality, pursuant to a statute which confers upon it the right to use the streets of the city on condition that it will therein lay its mains and furnish the municipality and its inhabitants with a supply of water at fixed tolls, engages in the business of supplying the general public with water, it becomes liable as a public service corporation for its wrongful act in cutting off the supply of water which it is under the duty to furnish one of its patrons as a member of the public at large." This ruling, when applied to the facts of that case, is not contrary to what was held in the Fowler Case. Indeed, Mr. Justice Evans, who delivered the opinion, expressly states therein: "What we have said in no way conflicts with the principle decided in Fowler v. Athens City Waterworks Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 318. There the water company was sought to be held liable to a private citizen because of a failure to perform a duty owing to the municipality, under a contract with it to furnish it an adequate supply of water for fire protection. The city, in the exercise of its governmental functions, undertook to afford its citizens adequate fire protection—not by itself laying mains and maintaining a water supply plant, but by hiring one Robinson to do so." The ruling in the Freeman Case was to the effect that when the water company, under the franchise which it had accepted and the contract which it had made with the municipality, engaged in the business of supplying the public at large with water for certain purposes, it became a public service corporation, and, as such, was under a public duty to Freeman, one of its customers, and a member of the public at large served by such company, to furnish him, as a private consumer, a sufficient supply of water in accordance with the contract, and that the breach of such duty, by wrongfully cutting off his supply of water, was a tort, for the commission of which it was liable to him in damages.

It will be readily seen that the facts in the Fowler Case and those in the case with which we are now dealing are quite different from the facts in the Freeman Case, and involve the application of different principles of law. In the Freeman Case the duty which the water company assumed, by accepting its franchise, entering into the contract with the municipality, and engaging, as a public service corporation, in the business of supplying the inhabitants of Macon with water for domestic purposes, was a public one, which it owed to Freeman as a member of the public at large. As a public service corporation, operating under a franchise which gave to it the right to occupy and use the streets, etc., for the purpose of laying therein its mains, etc., and carrying on its business, and engaging in the business of supplying the public at

large with water at fixed tolls, it owed certain public duties to Freeman and every other member of the community standing in the same relations to it, the breach of which constituted a tort. While the contract between the city and the water company in the present case is the same as the one involved in that case, the breach of duty relied on here is not the same as the breach of duty relied on there. The water company, as a public service corporation, did not, under its contract with the city of Macon, nor, so far as appears in this case, in the conduct of its business, undertake to supply the public at large with water from the city hydrants for the purpose of extinguishing fires, nor did it undertake to supply Holloway, the plaintiff in error, with water for fire protection. As to a supply of water from the city hydrants for fire protection, all that the water company undertook to do was to furnish such water to the city in its corporate capacity; and whatever breach of duty it may have committed by its failure so to do upon the occasion of the fire in question was a breach of the duty which it owed to the city, and not a breach of any public duty which it owed to Holloway and other members of the public at large of the city of Macon.

(6 Ga. App. 80)

THOMPSON v. WALKER et al.

WALKER v. THOMPSON. (Nos. 1,583, 1,649.)

(Court of Appeals of Georgia. April 15, 1909.)

1. LANDLORD AND TENANT (§ 125*)—DUTY TO HAVE PREMISES IN CONDITION FOR WHICH RENTED.

It is the duty of the landlord, when he rents a tenement at full price for a term to begin in the future, to have it, on the day when the term is to begin, in a condition reasonably suited for the purposes for which it is rented, unless the circumstances surrounding the transaction are such as to indicate a contrary intention in the minds of the contracting parties.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 441-443; Dec. Dig. § 125.*]

2. LANDLORD AND TENANT (§ 125*)—TENANT'S OBLIGATION OF PREMISES.

A landlord leased to four persons a tenement for a period of three years, and took from them a joint covenant to redeliver the property in good condition of repair at the expiry of the lease. On the same day he executed another lease to three of the same persons that were the tenants under the first lease for a term to begin immediately after the termination of the first lease. By reason of the failure of the tenants under the first lease to comply with their covenant to keep it in repair, the tenement was not in suitable condition on the day when the second lease was to begin. *Held*, that the tenants under the second lease could refuse to enter and could claim a rescission of the contract; that they would not be estopped from taking this action by the fact that they were parties to the broken joint covenant made by them

themselves and another in the first lease; that the landlord's right of action was upon that covenant; and that in an action thereon he could recover, not only the value of the repairs, but also for the damage done through the destruction of the second lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 125.*]

(Syllabus by the Court.)

Error from City Court of Atlanta.

Action by J. B. Thompson against B. F. Walker and others. Judgment for defendants, and plaintiff brings error, and defendant Walker assigns cross-error. Affirmed on the main bill, and cross-bill dismissed, with direction.

Westmoreland Bros. and Horton Bros. & Burress, for Thompson. E. V. Carter and E. M. & G. F. Mitchell, for Walker and others.

POWELL, J. On April 8, 1901, Thompson leased a certain tenement in the city of Atlanta for the purpose of a livery and feed stable to Booth, Walker, Wilson, and Harper for the term of three years, commencing on May 1, 1901, at the price of \$300 per month, payable monthly. On the same day he executed a lease to the same persons, with the exception of Booth, for the same tenement from the date on which the first lease ended, namely, May 1, 1904, to May 1, 1906. These leases were under seal and were signed by the landlord and the tenants. Rent notes under seal were also taken for monthly payments. In each of the leases it was provided that the tenants should keep up the repairs and should deliver the tenement back at the end of the respective terms in the same good order and repair as when first received. The notes and the leases all appear to be joint undertakings of the tenants, there being no words showing a several undertaking in any of the instruments. On May 1, 1904, at the expiry of the first lease, Walker, Wilson, and Harper, the tenants under the second lease, declined to take the tenement on the ground that it was untenable. When two of the rent notes became due, those for May and June, 1904, Thompson sued upon them. The jury found in favor of the defendants. It was issuable whether the building was untenable on May 1, 1904; but the verdict will be taken as settling as a fact that it was untenable.

The contention of the plaintiff is that it was the duty of the tenants to keep the premises in repair; that if the premises were untenable on May 1, 1904, it was not his fault, but the fault of these defendants, together with their joint promisor, Booth; that the present defendants, being parties to the covenant in the first lease, could not set up their failure to have the building in repair as a reason for not taking the premises under the second lease. The judge charged the jury in substance that it was the duty of the

landlord to have the premises in tenantable condition on May 1, 1904, and that if he did not do so it was not obligatory upon the defendants to enter or take possession under the second lease, and that the plaintiff could not, as against the defendants, set up the failure of the previous tenants to comply with their covenant to keep the premises in repair. If he was right in this instruction, the verdict should stand; otherwise, it should be set aside.

Walker, one of the present defendants, signed the note sued on "B. F. Walker, Agt." In the lease set up in the pleadings and in the proof he is described as agent for Charles E. Walker. He attempted to plead that he is not individually bound on the contract, but that Charles E. Walker is bound. The court struck the plea. He excepted *pendente lite*, and has filed a cross-bill, which is also before us for consideration.

1. In legal contemplation the two leases, being joint, and not severable, or joint and severable, were separate, distinct, and independent contracts. The covenant of the three defendants and another was juridically distinct from the covenant of the three alone. If the plaintiff had sued for a failure to keep the premises in repair, in accordance with the covenant in the first lease, and had failed to make Booth a party to the suit, he could have excused his failure only by showing that Booth was dead, or that he could not be found and served. *Gill v. Mizell*, 43 Ga. 589; *Graham v. Marks*, 95 Ga. 38, 21 S. E. 986; *Rogers v. Burr*, 105 Ga. 432 (3, 4), 446, 31 S. E. 438, 70 Am. St. Rep. 50. In other words, the joint liability of A. and another is, as against A., a different liability from the liability of A. alone, and the one cannot be used as the legal equivalent of the other, though ultimately, at the end of some particular case the practical liability may turn out to be the same. Joint promisors are not, by virtue of the relation, agents of each other, and even if they, as among themselves, are equally liable upon the promise, there is no real community of interest; for by enforced contribution each may be made to answer for his respective share. Per Lord Mansfield, in *Whitcomb v. Whiting*, Douglas, 652; *Rogers v. Burr*, 105 Ga. 448, 31 S. E. 438, 70 Am. St. Rep. 50.

2. On May 1, 1904, it was the duty of the landlord to have the tenement suitable for the purposes for which it had been rented, or at least as suitable as it was on the day the lease was executed; and the defendants had a right to refuse to enter under the lease if the landlord failed in this respect. *White v. Montgomery*, 58 Ga. 204. As a means of complying with this duty on his part he had taken a covenant from the four

joint promisors—the tenants under the lease expiring that day—that they would leave the premises in that condition. This was an independent covenant on the part of these four joint promisors. *Lewis v. Chisolm*, 68 Ga. 40. Now, if this covenant had been the covenant of the three present defendants, they would not be heard to set up, in an action by the landlord against them, that the premises were not in suitable condition; for to allow them to assume such a position would be to allow them to take advantage of their own wrong. But the wrong of these three and another as joint promisors is not the wrong of these three disassociated from the fourth man.

Whatever appearance of injustice may arise from the application of this rule is dissipated when we look a little further into the resulting position in which the judgment in the present action places the parties. As against the present defendants, their successful assertion of the proposition that the tenement was not suitable for occupancy on May 1, 1904, creates an estoppel to deny these facts in any future suit. The landlord has his right of action against these three and the other joint promisor upon the broken covenant in the first lease. They (at least, all of them but Booth) will not be permitted in an action upon the covenant to say they did not fail in keeping it. *Haber-Blum-Bloch Co. v. Friesleben*, 5 Ga. App. 123, 62 S. E. 712. Whatever damages the landlord may have sustained by reason of the fact that the breach of this covenant caused a destruction of the first lease are recoverable in the action upon the covenant. Hence it seems to us that so far as Thompson is concerned it matters little apart from the question of costs, whether the present judgment be affirmed or reversed. Whatever natural justice there may be in the plaintiff's contention that the defendants cannot take advantage of their own wrong is preserved to him, notwithstanding the result reached by this court in the present case is that the verdict in favor of the defendants is allowed to stand. If the action had been in the superior court, equitable pleadings might have been filed, making Booth a party, and the whole matter thus might have been ended in one action; but the jurisdiction of the city court is so limited as to prevent this being done. The judgment on the main bill of exceptions will be affirmed.

We will not inquire into the merits of the cross-bill, but will dismiss it, with direction that the action of the court complained of shall not hereafter operate as a *res adjudicata* or an estoppel upon the parties.

Judgment affirmed on main bill of exceptions; cross-bill dismissed, with direction.

(6 Ga. App. 22)

LOEB v. STATE. (No. 1,686.)

(Court of Appeals of Georgia. April 15, 1909.)

1. CRIMINAL LAW (§ 59*)—PARTIES TO OFFENSES—"PRINCIPALS"—MISDEMEANORS.

There are no accessories in misdemeanors. All who procure, counsel, command, aid, or abet the commission of a misdemeanor are regarded by the law as principal offenders and may be indicted as such. The indictment may be joint against all those connected with the criminal enterprise, or it may be several against any one of them.

(a) Whether the indictment is joint or several, any particular defendant accused therein of having committed the misdemeanor may be convicted by proof either that he directly and personally enacted the criminal transaction, or that he procured, counseled, commanded, aided, or abetted the criminal transaction as to another, who was the direct and immediate actor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 74; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5552-5557; vol. 8, p. 7763.]

2. CRIMINAL LAW (§ 1129*)—WRIT OF ERROR—EXCLUSION OF EVIDENCE—NECESSITY OF OFFER.

An assignment of error upon the court's refusal to allow counsel to ask of a witness a question is not in form, unless it shows that the judge was informed at the time of the ruling of the nature of the answer anticipated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2957; Dec. Dig. § 1129.*]

3. CRIMINAL LAW (§§ 814, 829, 830*)—TRIAL—REQUESTS TO CHARGE.

Written requests to charge may be refused, where they have been fully covered by the general charge, or where they are not pertinent to the case, or where they are not wholly correct in stating the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 2011, 2012, 2017; Dec. Dig. §§ 814, 829, 830.*]

4. INTOXICATING LIQUORS (§§ 167, 168*)—CRIMINAL RESPONSIBILITY—PERSONS RESPONSIBLE.

The defendant was indicted for the illegal sale of liquor. There was no proof that he himself had made any sales in the county of the prosecution; but there was testimony from which the jury was authorized to find that he had hired another person to sell for him in that county, and also that he had sold to another person liquors knowing that the latter was buying them for the purpose of illegal resale, and that he (the defendant) had otherwise aided and abetted this person in running a place of business where liquors were illegally sold in that county. *Held*, that the defendant was properly convicted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 182, 189; Dec. Dig. §§ 167, 168.*]

5. NO ERROR.

The defendant was fairly tried and legally convicted.

(Syllabus by the Court.)

6. WORDS AND PHRASES—"AID"—"ABET."

"Aid" and "abet" together comprehend all assistance given by acts, words, or encouragement, or by presence, actual or constructive.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 15, 289-293.]

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

D. C. Loeb was convicted of a violation of the local option law, and he brings error. Affirmed.

Loeb was indicted by the grand jury of Morgan county for a violation of the local option liquor law which was in effect in that county in the year 1906. The case was transferred to the county court for trial, and was heard before Hon. Samuel H. Sibley, judge of the county court of Greene county, presiding on account of the disqualification of the local judge. The indictment charged that the defendant "did sell and barter for valuable consideration alcoholic, spirituous, malt, and intoxicating liquors, and intoxicating bitters and other drinks which, if drunk to excess, will produce intoxication." The defendant was convicted and he applied for a certiorari. The judge of the superior court refused to sanction the petition, and to this ruling the defendant brings error.

The testimony of the state was to the effect that Loeb, who was general manager of an incorporated liquor business, carried on in Atlanta under the name of the Lomax Distilling Company (the only persons connected with the business being himself, one Teitlebaum, who performed the services of a bookkeeper, and certain porters and other menial employes), went to the house of a negro named Martin Wyatt, residing in the lower portion of Morgan county, and employed him to sell liquor in that county. According to Wyatt, who was sworn as a witness, the exact language used by Loeb was: "I want to get you to sell some liquor." Wyatt had never met Loeb before, and suggested to him that the sale of liquor was against the law. Loeb replied that he would fix that so Wyatt would not be hurt; that he would get a license which would protect him; and Wyatt consented to sell the liquor. A few days later the negro received a barrel of whisky, a cask of cased whisky, and also a case of rye liquor. With this he set up a bar in his home and began regularly the business of selling liquor. Loeb promised to make it right with the negro as to what he should receive as compensation, promising, among other things, to get him a suit of clothes, and told him to send the money to him in Atlanta. During the short while the business was carried on, several hundred dollars worth of liquor was shipped out to the negro. It was sent to him, not at Rutledge, which was his nearest railroad station, but to Covington or Social Circle, points considerably distant from his home. The proceeds from the sale of this liquor, with the exception of about \$130, which was on the defendant's person when he was arrested, was either sent or carried

to Loeb in Atlanta. Prosecutions were instituted against the negro, and when he was arrested he asked the officers to notify Loeb. Loeb came and got the unsold portions of the liquors which still remained at the negro's house. Loeb procured and sent to the negro, about the time the first shipment of liquor was sent him, a United States internal revenue license. This liquor was shipped out in the name of the Lomax Distilling Company. The negro on one or more occasions had gone to the place of business of the Lomax Distilling Company at Atlanta and left instructions as to what liquors were to be sent out and also had made payments of money there.

The defendant denied that he was in any wise responsible for the sales made by the negro. He set up that the only transactions he had with the negro were that he from time to time, as agent of the Lomax Distilling Company, sold him liquor, the sales being made in Atlanta, where at that time it was lawful to sell it; that his trips to the negro's home in Morgan county were for the purpose of collecting money from him, and that when the negro was arrested he seized the remainder of the stock on hand merely to protect his house for the unpaid balance of the purchase price; that the negro was in no sense his agent; that he was not instrumental in procuring him to sell liquor.

Teitlebaum, the bookkeeper of the Lomax Distilling Company, testified for the defense that the negro, Martin Wyatt, came to Atlanta and stated that he wanted to buy some liquor, and that he (Teitlebaum) told him that he would have to wait and see Mr. Loeb; that the negro arranged with Loeb to buy a certain amount of whisky and paid \$30 in advance on it; and that afterwards, from time to time, the negro ordered whisky from the Lomax Distilling Company as any other customer would have done. He denied that Loeb, or the Lomax Distilling Company, procured a federal license for the negro, but admitted that he knew Loeb furnished the negro money with which to pay for the license, stating at one place in his testimony that the license was mailed to the negro, and in another that the negro went to the office of the internal revenue collector and procured the license. The cash advanced to him for this purpose was charged to him on the books of the Lomax Distilling Company.

The negro testified that Loeb furnished, not only the liquor, but also the drinking glasses and the other paraphernalia with which the business was carried on; but Loeb denied this. The testimony of the negro as to his original conversation with Loeb, and as to several other material facts in the case, was corroborated by the testimony of a negro woman who lived at his (Wyatt's) house. There was also testimony as to an admission by Loeb that he had bought and sent the revenue license to Wyatt for the reason that,

if the revenue officer should inspect his books and see the amount of whisky that Wyatt was handling, it would get him into trouble.

The defense introduced testimony tending to impeach Wyatt by proof of his general bad character; and the state introduced proof in reply showing his good character and worthiness to be believed on oath. The further facts necessary to an understanding of the points presented will be stated in the opinion.

E. H. George and Middlebrook, Rogers & Knox, for plaintiff in error. Jos. E. Pottle, Sol. Gen., A. G. Foster, Sol., and F. C. Foster, for the State.

POWELL, J. (after stating the facts as above). When the negro, Martin Wyatt, was about to testify for the state that the defendant had employed him to sell whisky, beer, etc., and that he, in pursuance of this arrangement, had sold the liquors for the defendant, the defendant's counsel objected to the testimony, on the ground that the indictment alleged that the defendant himself sold the liquors personally, and did not allege that he sold them by an agent or employé; that to prove a sale through an agent or employé would show a fatal variance from the manner in which the offense is charged in the indictment. The court overruled the objection, and in the petition for certiorari this is made a ground of error. In the argument counsel has strenuously stressed upon us the proposition than an indictment should set forth the offense with such particularity that the defendant will be informed with reasonable certainty of the nature of the charge against him, and will be protected from surprise brought about by the fact that the state on the trial will offer testimony to convict him by proof of a transaction not naturally indicated by the language of the indictment; that a defendant charged directly with the sale of liquor would hardly expect the state to attempt to make out this crime by proving that some other person made the actual sale, while he (the defendant), though many hundred of miles away, procured, counseled, commanded, aided, or abetted it to be done. The insistence, however, is not a new one. It has been presented to the courts before a number of times, and, despite its plausibility and its apparent reasonableness, has been almost uniformly rejected.

In the case of *Kinnebrew v. State*, 80 Ga. 236, 5 S. E. 56, in which the defendant was charged with the illegal sale of liquor and the proof was that the sale was made by his clerk in his absence, the same proposition now asserted by the plaintiff in error was there contended for, and Chief Justice Bleckley, speaking for the court, said: "The reply we make to the learned historical argument with which the able counsel for the plaintiff in error favored us is that, had we been here 'in the beginning,' and had he been here to

make it, we should probably have yielded to it; but a contrary construction has so long prevailed, and so many hundreds, if not thousands, of cases have in the superior court practice been rested upon it, nothing but the clearest light of truth would now justify a repudiation of the common-law rule."

In the case of *Hately v. State*, 15 Ga. 346, it was held: "He who procures, counsels, commands, or incites his clerk or agent to commit a crime, in his absence, is guilty as an accessory before the fact, and cannot be convicted on an indictment which charges him with having jointly with his clerk committed the offense as principal." In the *Kinnebrew Case*, supra, this holding is declared to be obiter and unsound, and it is held that the common-law rule that there are no accessories in misdemeanors, but all are principals, is still of force in Georgia, and that the defendant may be convicted of a misdemeanor, under an indictment charging him with committing the act, committing it as principal, though the proof shows that he did not personally commit it, but was connected with it in some relationship which would make him an accessory if the offense had been a felony. This rule has been applied in a large number of cases. See *Mims v. State*, 88 Ga. 458, 14 S. E. 712; *Parmer v. State*, 91 Ga. 152, 16 S. E. 937; *Forrester v. State*, 63 Ga. 350; *Rooney v. Augusta*, 117 Ga. 709, 45 S. E. 72; *Statham v. State*, 84 Ga. 25, 10 S. E. 493; *Kessler v. State*, 119 Ga. 301, 46 S. E. 408.

Hardship may sometimes come from the operation of this rule. It is nevertheless the law. We may say, in passing, however, that the trial judges can largely guard against injustice being done under the operation of the rule; and we have no doubt that if, on the trial of a case, it should appear that the defendant had honestly and earnestly attempted to inform himself of the particular transaction for which he was being prosecuted, and the state's counsel had declined to let him know specifically what transaction he would be called upon to defend, and that the defendant was really taken by surprise at the nature of the testimony introduced against him, the judge would, by some means—postponing the trial, continuing the case, or otherwise—give him an opportunity to get his proof. In the present case there is not the slightest suggestion that the defendant did not know what transaction he would be called upon to defend. Indeed, it is candidly admitted that he did know.

2. There is also an assignment of error complaining that the court sustained an objection to a question asked by the defendant's counsel of a witness for the state. Since the question on its face does not appear to have related to a matter relevant to the investigation, and since the court was not informed at the time of what testimony counsel expected to elicit in answer to the question, according to repeated rulings of

this court and of the Supreme Court, the exception is not meritorious.

3. Exception is taken to the refusal of the court to give to the jury a number of instructions duly requested in writing. We have examined all of these requests, and have compared them with the full charge of the court, which is also contained in the record. In our opinion they do not require discussion at length, but may be disposed of by the general statement that they are not meritorious, for one or the other of two reasons—either that the judge fairly and fully covered them in the general charge, or else that they were not sound as propositions of law applicable to the case.

4. Exception is taken to the following charge of the court to the jury: "If you find, under the evidence in the case, that illegal sales of liquor were made in Morgan county by some other person than the defendant, but that the defendant did knowingly aid and abet these sales, or that, being absent at the time they were made, he did yet procure, counsel, or command another to make them, he would be held responsible as a principal, and would be guilty under this presentment for selling liquor in Morgan county." We think that this was a pertinent apposite charge, stating the law applicable to the case under investigation. There was no evidence that Loeb himself personally sold liquor in Morgan county; but it was not necessary that this should be shown, in order for the defendant to have been lawfully convicted. If the jury believed the testimony of the negro, Martin Wyatt, that Loeb hired him to run the business and to sell the liquor as a mere employé, the defendant should have been found guilty on the theory that he procured or commanded the sale. If Loeb induced Wyatt to sell liquor illegally, whether as his agent or on his own account, he was guilty on the theory that he counseled the crime. More than this, if he knew that the negro was engaged in selling liquor illegally in Morgan county, and nevertheless gave him, loaned him, sold him, or otherwise furnished him liquor, or glasses, or other paraphernalia with which to carry on the business (and a substantial portion of this is practically admitted by the defendant's own testimony), he was guilty on the theory that he aided and abetted the crime. Indeed, we can accept the contention of the defendant that the negro Wyatt, the state's chief witness, is the veriest liar in all the land, and yet the conclusion that the defendant is guilty is almost irresistible.

Loeb, seeing and knowing of the large amount of liquor that this negro was buying and having shipped to him, seeing and knowing that he had procured a federal license as a retail liquor dealer in the county of Morgan, naturally knew therefrom, as a man of ordinary intelligence, that the negro was violating the law—that he was engaged

in the illegal sale of liquor; and one who knowingly furnishes the proprietor of a "blind tiger," or other place where liquors are illegally sold, the liquors with which to run that business, whether such furnishing be by sale, gift, or in any other manner, bears to the illegal act of the proprietor of the place a relationship which, if the offense were a felony, would make him an accomplice, and which, since the offense is a misdemeanor, makes him a principal.

The fact that the defendant acted as the agent of the Lomax Distilling Company made no difference. The law does not look to the civil relations existing between the parties, in determining criminal responsibility in such cases. The defendant had no larger immunity from criminal responsibility for aiding and abetting Wyatt's act, by reason of the fact that he did the acts of aiding and abetting as the agent of a corporation, than he would have had if he had done so on his own behalf. All who knowingly participate in criminal transactions are, in misdemeanor cases, equally guilty, whether they participate as chief or principal actor, or as a mere accessory in the broader sense of the word—whether on their own behalf or as agent or employé of another. The aiding and abetting is what counts.

"Aid" is a plain, homely word, with a meaning well and generally understood. "Abet" smacks more of technical terminology; but it is almost synonymous with "aid." The two words together "comprehend all assistance given by acts, words, or encouragement, or by presence, actual or constructive." *Ralford v. State*, 59 Ala. 106, 108. "The word 'abet' includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime." *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50. As Judge Sibley so succinctly expressed it in his charge to the jury: "The law in criminal cases does not take accurate note of the civil relations of principal and agent. Many of the principles relative to that relationship which are applied in civil transactions do not apply in criminal matters; for instance, it would not be a defense for a man, in doing any act for which he would be criminally responsible, that he did it simply as the employé or representative of some other person, if at the time he was of sound mind and of an age capable of committing a crime, and acting under no compulsion or coercion. In this case it would not be a defense that the defendant was simply acting as the representative or employé of some other person. The law does not undertake to weigh nicely and precisely a civil relation that may be shown to exist between the defendant and that other person, but puts it under the rule of law I have just stated."

It is wholly immaterial whether Wyatt was Loeb's agent, or whether Wyatt was the

principal and Loeb merely knowingly assisted him. We recall what Judge Bleckley said in *Forrester's Case*, 63 Ga. 350, where the defendant declined to sell liquor himself, but allowed his negro servant, Mary, to sell it in his kitchen: "In the defendant's kitchen, by his servant, in his presence, and with his co-operation through the responses, 'Go to Mary,' and 'Give the money to Mary,' the traffic was carried on. There is little doubt that the defendant is the deity of this rude shrine, and that Mary was only the ministering priestess; but if she was the divinity, and he her attending spirit to warn thirsty devotees where to drink, and at whose feet to lay their tribute, he is amenable to the state as the promoter of forbidden libations. Whether in these usurped rights he was serving Mary, or Mary him, may make a difference with gods and goddesses, but makes none with men."

5. There are a number of assignments of error in addition to those which we have discussed in terms. We do not deem it profitable to set them out in extenso. None of them raise points that would be especially valuable as precedents. We have given them all careful consideration. None of them present any reversible error. The defendant was fairly tried and legally convicted.

Judgment affirmed.

RUSSELL, J., concurs specially.

(6 Ga. App. 31)

SOUTHERN EXPRESS COMPANY v.
STATE. (No. 1,272.)

(Court of Appeals of Georgia. April 15, 1909.)

1. CRIMINAL LAW (§ 59*)—PARTIES TO OFFENSES—"PRINCIPALS"—MISDEMEANORS.

In misdemeanors, all who perpetrate, aid, or abet the offense are principals.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 74; Dec. Dig. § 59.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5552-5557; vol. 8, p. 7763.]

2. INTOXICATING LIQUORS (§ 159*)—FURNISHING TO MINOR—EXPRESS COMPANY.

If a person sells intoxicating liquor to a minor and ships it to him by a common carrier, and the carrier or its agent has information as to what is contained in the package and delivers it to the minor, the person selling, the carrier transporting, and the agent delivering, and all others who actively aid or abet the transaction, are guilty, as principals, of a violation of Pen. Code 1896, § 444, which forbids the selling or furnishing of intoxicating liquors to minors. If, however, the carrier, or its agent, does not know that the package contains intoxicating liquors, and there is in the circumstances nothing from which the jury would be authorized to infer guilty knowledge against them, a verdict finding the carrier guilty of the offense is as a matter of law contrary to the evidence.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 172; Dec. Dig. § 159.*]

(Syllabus by the Court.)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Error from City Court of Quitman; J. G. McCall, Judge.

The Southern Express Company was convicted of furnishing a minor intoxicating liquor without the consent of his parent or guardian, and it brings error. Reversed.

Stanley S. Bennet and McDaniel, Alston & Black, for plaintiff in error. J. W. Edmondson, Sol., for the State.

POWELL, J. The indictment was returned by the grand jury of Brooks county jointly against H. J. Sandlin, a saloon proprietor, the Southern Express Company, a common carrier, and Hewitt, its agent at Dixie, Ga., charging them with furnishing or causing to be furnished to one Curtis Crane, a minor, certain intoxicating liquors without the written consent of his parent or guardian. The case was transferred to the city court of Quitman, and the express company alone was put upon trial. Many exceptions of law are taken, but we think it is necessary to reverse the judgment for lack of evidence to support the conviction. Crane, the minor, sent the money for the liquor to Sandlin at Valdosta, and Sandlin in turn delivered the liquor to the express company in a plain package, without anything to indicate its contents and paid the charges thereon. Hewitt, the agent at Dixie, without knowing what was in the package, and so far as the record shows without suspecting it to be whisky, delivered it to the minor.

Under these circumstances Sandlin was guilty of furnishing liquor to the minor at Dixie, the place at which the delivery took place. *Newsome v. State*, 1 Ga. App. 790, 58 S. E. 71. The express company, if it had delivered the liquor knowing it to be liquor, or under such circumstances as to imply guilty knowledge against it, would have been guilty also, having aided and abetted the unlawful act of Sandlin; for in misdemeanors all who aid and abet the commission of the offense, as well as those who immediately perpetrate it, are principals, and may be severally or jointly indicted as such. *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67; *Loeb v. State* (this day decided) 64 S. E. 338. We pointed out in the *Newsome* Case, *supra*, that, on account of the fact that the minor cannot appoint the express company directly or by implication as its agent to receive and transport the liquor for him, the relation of that company to the transaction is that of aider or abettor to the act of the barkeeper, if what was done by the express company was knowingly done.

While a person may be guilty, either as actual perpetrator or as aider or abettor, of selling liquor to a minor, although he does not know the person to whom it is sold or furnished is a minor, yet we know of no rule by which he can be convicted upon such a

transaction, where he was ignorant of the fact that what was being sold or furnished was liquor. To this extent, at least, guilty knowledge is necessary. Knowledge of the agent of the express company would be its knowledge. In this case no such knowledge is shown. We do not say, nor does able counsel for the plaintiff in error contend, that knowledge may not be implied by the jury from circumstances, such as the character of the package or the particular marks upon it or other similar things. In this case, so far as the record shows, neither the express company nor its agent had guilty knowledge as to the contents of the package, and the verdict is therefore, as a matter of law, contrary to the evidence.

Judgment reversed.

(109 Va. 476)

WILLIS et al. v. KALMBACH et al.

(Supreme Court of Appeals of Virginia. March 18, 1909.)

1. CONSTITUTIONAL LAW (§ 38*)—CONSTRUCTION—VALIDITY OF STATUTORY PROVISIONS.

Nothing short of a plain and palpable repugnancy between the Constitution and a statute will warrant the courts in holding the statute void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. § 38.*]

2. CONSTITUTIONAL LAW (§§ 26, 48*)—OPERATION OF CONSTITUTION—LIMITATION OF POWER—STATE CONSTITUTIONS.

As to matters not delegated by the state to the federal government, the legislative power of the General Assembly is without limit except in so far as it is restricted, expressly or by strong implication, by the state Constitution; every presumption being in favor of the constitutionality of a statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 80, 46; Dec. Dig. §§ 26, 48.*]

3. INTOXICATING LIQUORS (§ 25*)—LOCAL OPTION ELECTIONS—RIGHT OF SUFFRAGE—CONSTITUTIONAL PROVISIONS—"ALL ELECTIONS."

The Constitution of 1776 permitted persons having certain interests in real estate to vote for delegates to the General Assembly. The Constitution of 1830 permitted any white male citizen 21 years old or more, who was entitled to vote under the previous Constitution and laws, and every such citizen having a certain estate, to vote for members of the General Assembly. The Constitution of 1850 permitted every white male citizen having a certain residence to vote for members of the General Assembly and all officers elective by the people, and the Alexandria Constitution of 1864 contained a similar provision (article 3, § 1). Const. 1869, art. 3, § 1, authorized every male citizen resident for a certain time to vote upon all questions submitted to the people, which by the amendment of 1876 was changed to authorize such persons to vote for members of the General Assembly and all officers elective by the people, and Const. 1902, art. 2 (Code 1904, p. cxxi), relating to the elective franchise, by section 18 (Code 1906, p. cxxi), authorized every male citizen 21 years old resident for a certain time to vote for members of the General Assembly and all officers elective by the people; some of the provisions of the article

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

not being self-executing. Const. Schedule, § 18 (Code 1904, p. cclxxviii), provides that in all elections held after this Constitution becomes effective, the qualifications of electors shall be those required by article 2 of the Constitution. The Ward act (Act Gen. Assem. Feb. 25, 1908; Laws 1908, p. 83, c. 73) provides that at any local option election held on or before the second Tuesday in June any person shall be qualified to vote who is otherwise qualified and has personally paid all state poll taxes assessable against him during the next preceding three years. *Held*, in view of the history of the constitutional provisions relating to suffrage, especially of the change in the Constitution of 1869, giving a right to vote upon all questions submitted to the people and the subsequent elimination of that provision, and in view of the principal purpose of the constitutional convention of 1902 which was to eliminate ignorant suffrage, and of the purpose of a constitutional schedule, that section 18 of the Schedule making the qualifications of electors in "all elections" those of article 2 meant all elections ordained by the Constitution or mentioned in the Schedule itself, which did not include local option elections provided for by the Ward act, so that that act did not contravene section 18 of the Schedule; the General Assembly having power to fix the suffrage qualifications in such election.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 31; Dec. Dig. § 25.*]

4. STATUTES (§ 188*)—CONSTRUCTION—LANGUAGE—ORDINARY MEANING.

In interpreting writings, the words must be construed with reference to their plain and ordinary meaning, giving every word its due effect, if possible.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 266; Dec. Dig. § 188.*]

5. STATUTES (§ 206*)—CONSTRUCTION—CONSTRUCTION AS WHOLE.

Every part of an instrument, such as a statute, must be construed with reference to the whole instrument so as to make it harmonious and sensible as a whole.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 268; Dec. Dig. § 206.*]

6. CONSTITUTIONAL LAW (§ 10½*)—CONSTITUTIONAL PROVISIONS—CONSTITUTIONAL SCHEDULE—PURPOSE.

The office of a constitutional schedule is to provide for a transition from the old to the new Constitution and obviate inconveniences which would otherwise arise from a change in government, its purpose not being to cure defects or supply omissions in the Constitution, though, if it plainly shows an intention to place any of its provisions beyond legislative control, such provisions are as binding as the Constitution itself.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 8; Dec. Dig. § 10½.*]

7. ELECTIONS (§ 11*)—SUFFRAGE—PROVISIONS OF FEDERAL CONSTITUTION.

The object of Const. U. S. Amend. 14, so far as it relates to the right to vote, was, by its express provisions, to secure the right to vote at any election for President and Vice President, the executive and judicial officers of the state, or the members of its Legislature, and the purpose of the fifteenth amendment was to secure the right of citizens to vote in the elections enumerated in the fourteenth amendment, which did not contemplate an election such as a local option election; these provisions being the only limitation upon the state's power to regulate the right of suffrage.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 8; Dec. Dig. § 11.*]

Harrison, J., dissenting.

Error to Corporation Court of Fredericksburg.

Petition by Kalmbach and others against Willis and others. Judgment for petitioners, and defendants bring error. Reversed.

R. E. Byrd, Wm. H. Mann, F. M. Chichester, and B. P. Willis, for plaintiffs in error. St. Geo. R. Fitzhugh, A. T. Embrey, and C. O'C. Goolrick, for defendants in error.

KEITH, P. Upon the petition of the requisite number of persons, an election was ordered by the corporation court of the city of Fredericksburg to take place on the 5th day of May, 1908, upon the question "for licensing" or "against licensing" the sale of intoxicating liquors within the limits of the said city. At the election held in obedience to this order 351 ballots were cast against and 320 in favor of licensing.

On May 14, 1908, a petition, signed by 24 persons, was filed, praying that the election be declared illegal, null, and void, upon the following grounds:

"(1) Because the persons petitioning for the election had not paid their poll taxes, as required by law, six months prior to the presentation of the said petition to the corporation court of Fredericksburg, and none of them were exempt from the payment of capitation taxes as a prerequisite to voting, and hence none of them were qualified voters authorized to sign said petition.

"(2) Because about 80 per cent. of the persons voting at the election were not qualified voters, none of them having paid their poll tax six months prior to the date of the election; they not being exempt from such payment.

"(3) Because the act of the General Assembly approved February 25, 1908, known as the 'Ward Act' (Lays 1908, p. 83, c. 73), is unconstitutional and void, inasmuch as the said act provides that at any local option election held on or before the second Tuesday in June any person shall be qualified to vote who is otherwise qualified to vote and has personally paid at least six months prior to the second Tuesday in June of that year all state poll taxes assessed or assessable against him during the three years next preceding that in which such special or local option election is held."

A number of citizens who had voted against license were made parties defendant, and filed their answer, denying all the material allegations of the petition; and, the case coming on to be heard upon the petition, the answer, and the testimony of witnesses, an order was entered holding the Ward act passed February 25, 1908, to be in plain conflict with the Constitution of Virginia, and that the election held on May 5, 1908, was null and void.

To that judgment a writ of error was allowed by this court.

The only question insisted upon in the argument before us, and the only one which we shall consider, is as to the constitutionality of the act of Assembly approved February 25, 1908, and commonly known as the "Ward Act."

Counsel for plaintiffs in error have warned us of the evils which must flow from an affirmation of the judgment of which they complain, while counsel for defendants in error forebode consequences no less mischievous should the judgment be reversed. In this dilemma we cannot do better than to concede that the case is one of grave importance, and that any conclusion we may reach will be attended by serious results to the interests involved.

To pass upon the power of the Legislature and determine whether a statute which it has enacted is a valid exercise of its power, or is to be deemed null and void on account of its repugnancy to the Constitution, is a duty of the utmost delicacy. From the earliest exercise of this power by the courts down to the latest expression upon the subject they have with one voice declared that while the power was essential in a government in which the people, who are the source of all power, have seen fit to restrain the various governmental agencies, which they have established, by an organic act or Constitution emanating directly from themselves, nothing short of a plain and palpable repugnancy to the Constitution of the statute whose validity is called in question can warrant a court in holding a statute to be null and void.

Another principle of equal authority is that: "As to matters not ceded to the federal government, the legislative powers of the General Assembly are without limit, except so far as restrictions are imposed by the Constitution of the state in express terms or by strong implication. The state Constitution is a restraining instrument only, and every presumption is made in favor of the constitutionality of a state statute. No stronger presumption is known to the law. In order to warrant the courts to declare a state statute unconstitutional, the infraction must be clear and palpable." *Whitlock v. Hawkins*, 105 Va. 242, 53 S. E. 401.

As is said in *Prison Association of Virginia v. Ashby*, 93 Va. 667, 25 S. E. 893: "The Legislature of the state has plenary legislative power, except where it is restricted by the Constitution of the state or of the United States, and the courts have no power to declare its acts invalid merely because they regard the legislation as unwise or vicious."

And in *Button v. State Corporation Commission*, 105 Va. 634, 54 S. E. 769, it is said that acts of the Legislature "are always presumed to be constitutional, and can never be declared otherwise, except where they clearly and plainly violate the Constitution.

All doubts are resolved in favor of their validity, and, in resolving doubts, the legislative construction put upon the Constitution is entitled to great consideration, though it will not be given a controlling effect." See, also, *Eyre v. Jacob*, 14 Grat. 422, 73 Am. Dec. 367.

The principles enunciated in these decisions are fully recognized and firmly established.

By article 2, § 18, Const. 1902 (Code 1904, p. ccxi), it is provided that: "Every male citizen of the United States, twenty-one years of age, who has been a resident of the state two years, of the county, city, or town one year, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his state poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people. * * *

The remaining sections of that article merely serve to provide the means by which the voter may be secured in the exercise of his right, and the public may be protected against fraudulent and illegal voting.

This article prescribes the qualifications for voters for members of the General Assembly and all officers elective by the people. That, and none other, is its purpose and extent.

It will be well to consider the suffrage provisions of former Constitutions of this commonwealth.

In the Constitution of 1776 it was provided that "the right of suffrage in the election of members to both houses shall remain as exercised at present"; and, turning to *Hening's Statutes at Large*, vol. 8, at page 306, we find that "every person shall have a right to vote at any election of burgesses, for any county, who hath an estate of freehold for his own life or the life of another, or other greater estate" in land as therein prescribed—thus incorporating into the Constitution the right of suffrage as it was at that time exercised by virtue of the statute law.

By the Constitution of 1830 (article 3, § 14) "every white male citizen resident therein aged 21 years and upwards being qualified to exercise the right of suffrage according to the former Constitution and laws, and every such citizen being possessed or whose tenant for years or at will or at sufferance, is possessed of an estate of freehold of the value of \$25 * * * shall be qualified to vote for members of the General Assembly."

Under the Constitution of 1850 (article 3, § 1) "every white male citizen of the commonwealth who has been a resident of the state for two years, and of the county, city or town where he offers to vote for twelve months next preceding an election—and no other person—shall be qualified to vote for members of the General Assembly and of all officers elective by the people."

A similar provision occurs in the Alexandria Constitution of 1864 (article 3, § 1) and by that of 1869 (article 3, § 1), known as the "Underwood Constitution": "Every male citizen of the United States who shall have been a resident of this state twelve months and of the county, city or town in which he shall offer to vote three months next preceding the election shall be entitled to vote upon all questions submitted to the people at such election."

It is to be observed that down to 1850 the qualification of voters applied only to the election of members of the General Assembly. At that time, however, the number of officers to be chosen by direct vote of the people was greatly increased, and provision was then made that the electorate created by the Constitution should be qualified to vote for members of the General Assembly and for all officers elective by the people. It is a striking circumstance that the Constitution of 1869 provided that the electorate which it created should be "entitled to vote upon all questions submitted to the people at such election," and that within seven years after its adoption that Constitution was amended and the language of the Constitution of 1850 upon this subject was restored. Acts 1875, p. 82, c. 87; Acts 1876, p. 87, c. 88.

We think it plain that, if the question before us were to be determined by reference to the second article of the Constitution, there could be no doubt that the Legislature, following the precedents that had been established from the foundation of our government, would have had the right to prescribe the qualifications of voters at all elections except those for members of the General Assembly and officers elective by the people, the only elections which are mentioned or referred to in that article, or indeed in any part of the Constitution, until we come to the Schedule, the effect of which we shall now consider.

The eighteenth section of the Schedule provides (Code 1904, p. cclxxviii) that: "In all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article two of this Constitution." And the contention is that the phrase "all elections" embraces, not only all elections provided for by the Constitution, but elections of every kind and description, that it fastens itself upon, regulates, and controls the power of the Legislature with respect to all elections which it may see fit to order, and confines the electorate to those having the qualifications required by article 2 of the Constitution (Code 1904, p. cxxi).

It is true that in the interpretation of all writings words must be construed with reference to their plain and ordinary meaning, and, if possible, every word must be given its due force and effect; but in the effort to give to words their due force, we must not

lose sight of other parts of the instrument, but each part must be construed with reference to the whole, so as to make it harmonious and sensible as a whole.

As was said by Judge Moncure in the Richmond Mayoralty Case, 19 Gratt. 712: "The office of a schedule is to provide for a transition from the old to the new government, and to obviate inconveniences which would otherwise arise from such transition." Elsewhere in the same opinion it is said that, "if a convention in framing the Schedule should plainly show an intention to place any of its provisions beyond the control of the Legislature, such provisions, being the act of the representatives of the sovereignty of the state without any constitutional restrictions, would be as effectual and binding as if they were embodied in the Constitution itself."

The general principle, however, is that the office of a schedule, as this Schedule discloses, is not to cure defects or provide for omissions in the Constitution; not to introduce new and substantive provisions into the Constitution. There was no occasion for that. The whole subject, the entire instrument, was within the breast of the convention and subject in all its parts to be altered and amended as to the convention seemed best. Is it to be supposed that under such circumstances a provision which was to limit the power of the Legislature over a numerous and important class of subjects, a power which had existed in and been exercised by all preceding Legislatures, would have been postponed to the Schedule? To do so would be to suggest doubt and to invite controversy, when, if such was the purpose of the convention, it could have been placed beyond the pale of question or debate by its insertion where it properly belonged.

But it is urged upon us that the convention was called and the Constitution was adopted in order to purge the electorate of ignorant and undesirable voters, and that, unless all elections of whatever description are to be confided to the electorate thus established, the convention to that extent fell short of discharging its duty.

We have seen that in the several Constitutions of this state down to that of 1869, and under it after the amendment of 1876, the General Assembly, without question in numerous instances and in furtherance of various objects, exercised its power and discretion in submitting questions to an electorate of its own choosing with qualifications different from those prescribed by the Constitution. We have seen that the Constitution of 1869 provided in express terms that the electorate which it established should vote "upon all questions submitted to the people"; and we have seen that this provision was stricken out, and the phrase, "for members of the General Assembly and all officers elective by the people," was inserted, thereby

bringing the Constitution of 1869 into harmony with the long-established policy of the commonwealth.

This circumstance seems to us to be one of the utmost importance. From 1776 to 1869 the power had been exercised by the General Assembly, when dealing with elections not provided for in the Constitution, to prescribe the qualifications for an electorate as to such elections. By the Constitution of 1869 this power was taken away, and the people of Virginia, with their attention directed to the specific question, voted to strike this provision from the Constitution and restored the power to the General Assembly.

It is true that the convention of 1901 was assembled in order to purge the electorate of ignorant and undesirable voters. When the convention met, the chief difficulty encountered in the performance of their duty was found in the limitations upon their power contained in the fourteenth and fifteenth amendments to the Constitution of the United States.

The object of the fourteenth amendment, so far as it bears upon the question before us, was to secure "the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the Legislature thereof."

The fifteenth amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Code 1904, p. civl.

We think that it may fairly be said that the fifteenth amendment is intended to secure the right of citizens to vote in the elections enumerated in the fourteenth amendment; that, with respect to the right of suffrage, the two amendments cover and embrace the same objects.

These amendments imposed the only limitations that existed upon the power of the convention to deal with the question of suffrage, and certainly the fourteenth amendment never contemplated an election such as we are now considering.

So far as the history of the times throws light upon the situation, there is nothing to suggest that any part of the evil with which the convention had to deal grew out of or was in any degree referable to the improper exercise of the power which the Legislature had theretofore possessed to provide an electorate other than that created by the Constitution for the determination of elections for which the Constitution itself did not provide.

The exercise of the power having been the subject of no complaint, it may well be supposed that the convention felt that, having purged the electorate by which the General Assembly was to be chosen, that body

would be in the future entitled to the same confidence and respect which it had theretofore enjoyed.

It is said, however, that, unless the construction contended for by defendants in error be given to the eighteenth section of the Schedule, it would be meaningless and inoperative.

The Schedule provided for convening the Legislature within five days after the Constitution went into effect. The eighteenth section of the Schedule provides that in all elections held after the Constitution goes into effect the qualification of electors shall be those required by article 2 of the Constitution; that is, with respect to all elections which were intended to be embraced by this section of the Schedule all the requirements of article 2 should apply, not this or that section of article 2, but article 2 as an entirety. Some of the sections of that article are not self-executing and require legislative action to render them operative. The Schedule refers in terms to many, if not all, the elections, state, county, and municipal provided for by the Constitution, and it is a reasonable construction of the eighteenth section of the Schedule to make it apply either to all elections ordained by the Constitution or to all such as are mentioned in the Schedule itself, if any election provided for by the Constitution be omitted; or, to put it more accurately, is such a construction so manifestly contrary to, unwarranted by, and so plainly at war with the Constitution that it must be condemned by the courts?

The word "all" is without doubt one of very comprehensive meaning, but the meaning to be given to it in any particular case must be determined by its context. It may have its broadest signification, or it may be limited in its meaning to all of a particular kind or class. This phrase "all elections" has been frequently construed by the courts of other states.

In *Birchmore v. State Board of Canvassers*, 78 S. C. 461, 59 S. E. 145, the Supreme Court of South Carolina held that an election to determine whether or not intoxicating liquor may be sold in a precinct is within a constitutional provision that all elections shall be by ballot. This case is reported in 14 L. R. A. (N. S.) p. 850, and is the subject of an elaborate note, in which it is said "that the position of the court that the phrase 'all elections,' as used in the Constitution, was sufficiently broad to include, not only elections for the selection of officers, but also elections to determine any particular or special question which might be submitted to the electors, seems to be contrary to the weight of authority, as the general rule appears to be that the words 'election' or 'all elections' imply merely elections for the selection of officers, and that elections for the decision of some stated proposition need not

be conducted under the formal and prescribed rules for elections for the selection of officers." In support of this criticism many cases are cited.

In *Valverde v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208, the Constitution in question provided that "every male person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections." The court said: "In our opinion the word 'elections' thus used does not have its general or comprehensive signification, including all acts of voting, choice, or selection without limitation, but is used in a more restricted political sense,—as elections of public officers."

In *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742, article 503 of the Revised Statutes of 1879, reads as follows: "Whenever a majority of the inhabitants qualified to vote for members of the state Legislature of any territory adjoining the limits of any city accepting the provisions of this title, to the extent of one-half mile in width, shall vote in favor of becoming a part of said city, any three of them may make affidavit to the fact, to be filed before the mayor, who shall certify the same to the city council of said city." Under this law the court held that a petition signed by a majority of the qualified voters within a certain district was a sufficient vote to determine the question of annexation, although the Constitution said that in all elections by the people the vote should be by ballot; the court holding that this provision of the Constitution did not provide that the will of a limited number of people on any subject in which they might be interested should be ascertained in no other way than by ballot.

In *Porter v. Crook*, 126 Ala. 600, 28 South. 745, the Constitution provided that all elections by the people should be by ballot, and that the General Assembly should pass laws to regulate and govern elections in the state, and all such laws should be uniform throughout the state, and that no classes of qualified voters should be excluded from participating in the elections. The Legislature passed a law providing for an election to establish a county seat, which law required ballots to be numbered, and that the election be restricted to voters within the county. The court said that it might well be doubted whether the provisions of the article of the Constitution cited above did not relate exclusively to elections held to select public officers; but that it was unnecessary to decide that question, as the power to locate or change a county seat was exclusively in the Legislature, and it could prescribe any method for selecting a location that it chose.

In *Pritchard v. Magoun*, 109 Iowa, 364, 80 N. W. 512, 46 L. R. A. 381, a statute contained the following provisions: "That in all elections to be held after November 1st,

1892, in the state, for public officers (except those elected at school elections), the voting shall be by ballots, printed and distributed at public expense as hereinafter provided; and no other ballot shall be used." "The term 'city election' shall apply to any municipal election held in a city or incorporated town." The court held that the latter provision was not intended to apply to a special election, although held within the limits of a city, and the provisions, taken together, did not require that an election to decide the question of raising money to build a bridge should be by ballot.

And the same laws were held not to apply to a special election held for the purpose of raising money to support a railroad. *Bras v. McConnell*, 114 Iowa, 402, 87 N. W. 290.

See, also, *Buckner v. Gordon*, 81 Ky. 665; *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24.

In *Hanna v. Young*, 84 Md. 179, 35 Atl. 674, 34 L. R. A. 55, 57 Am. St. Rep. 396, the Supreme Court of Maryland construed a provision of the Constitution of that state which reads as follows: "All elections shall be by ballot and every male citizen of the United States of the age of twenty-one years or upwards, who has been a resident of the state for one year, and of the legislative district of Baltimore city, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district in which he resides, at all elections hereafter to be held in the state." "It is contended," said the court, "that this section of the Constitution plainly comprehends and includes within its express terms all elections, whether state, federal, county, or municipal. Yet there is but one municipality mentioned in this section of the organic law, and, in fact, Baltimore city is the only municipality mentioned eo nomine in any part of the Constitution. This court in *Smith v. Stephan*, 66 Md. 381, 7 Atl. 561, 10 Atl. 671, Mr. Justice Bryan, delivering the opinion of the court, said: 'It is sufficient to say that no municipal elections except those held in the city of Baltimore are within the terms or meaning of the Constitution.' Whilst the Constitution of Maryland (article 3, § 48) authorizes and empowers the General Assembly to create corporations for municipal purposes, it nowhere prohibits the Legislature from imposing upon the qualified voters residing within the corporate limits of a town any reasonable restrictions it may deem proper, when seeking the exercise of the right of elective franchise in the selection of its officers. In this respect the power of the Legislature is unlimited."

The contention before the Maryland court was, as here, that the act in question was void because the Constitution had conferred the right and prescribed the qualifications of electors at all elections, and the Legislature was therefore without authority to change

or add to them in any manner. Speaking to this proposition, the court said: "The Constitution of this state provides for the creation of certain officers, state and county, which are filled, either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections held within the state (outside the corporate limits of Baltimore city) can be properly termed elections under the Constitution, such as state and county elections, or that the framers of the Constitution ever contemplated that article 1, § 1, of that instrument, was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment." The court then refers with approval to the case of *State ex rel. Atty. Gen. v. Dillon*, 32 Fla. 545, 14 South. 383, 22 L. R. A. 124, where it was held that the suffrage provision in the Constitution of that state, prescribing the qualifications of voters at all elections under it, does not apply to elections for municipal officers, but such elections are subject to statutory regulation; and further, that it is competent for the Legislature to prescribe the qualifications of voters at the same. Continuing, the Maryland court says: "It is only at elections which the Constitution itself requires to be held, or which the Legislature under the mandate of the Constitution makes provision for, that persons having the qualifications set forth in said section 1, art. 1, are by the Constitution of the state to be qualified electors." See, also, *McMahon v. Savannah*, 66 Ga. 217, 42 Am. Rep. 65.

We have freely used the notes to cases in *Lawyers' Reports Annotated*, and cheerfully acknowledge our obligation.

To recapitulate the case made by the record: We find that the power which the order appealed from denies to the General Assembly has been exercised by that body under every Constitution of this commonwealth from 1776 down to that of 1902. Down to the Constitution of 1830, the right to vote was expressly given by the Constitutions only as to members of the General Assembly. By the Constitution of 1850, the right was extended by adding the phrase "all officers elective by the people." The Constitution of 1864 used the same expression. In 1869 the constitutional provision was extended to "all questions submitted to the people," which was by direct vote of the people stricken out in 1876, and the right "to vote for members of the General Assembly and all officers elective by the people" was substituted for it. As we have seen, the principal object of calling the convention of 1901 was to purge the electorate of undesirable and ignorant voters, and the chief difficulty in accomplishing that object was found in the fourteenth and fifteenth amendments to the Constitution of the United States. The provision of the second article of the state Constitution confers a right of suffrage which is practi-

cally commensurate with these amendments. The Constitution of the state, exclusive of the Schedule, it is conceded, does not make the act of Assembly here called in question unconstitutional; but, if it be so, it is by virtue of the eighteenth section of the Schedule. The office of a schedule is to "provide for the transition from the old to the new government," and not to introduce independent and substantive provisions of law into the Constitution, though it is conceded that it may be done if such purpose plainly appears. When the Schedule was prepared, the whole of the Constitution was still within the control of the convention to alter and amend as it deemed proper, and, had such been the purpose, a provision so important as that under consideration would have been inserted in its appropriate place in plain and unequivocal language, as was done in the Constitution of 1869, and not in an unusual and inappropriate place and expressed in undecided and ambiguous terms, certain to cause doubt and to invite controversy. The phrase "all elections," as must have been known to the learned lawyers in the convention, had in many states been held to refer only to such elections as had been prescribed by the Constitution itself, and, indeed, at the time the Schedule was adopted, there was no decision to the contrary; the case of *Birchmore v. State Board of Canvassers*, supra, having been decided since that date.

We have seen that article 2 was not self-executing as to some of its features, and that the Schedule provided for the assembling of the Legislature within five days after the Constitution went into effect. Many, if not all, of the elections mentioned in the Constitution are referred to in the Schedule, and it was a natural and proper thing, under all the circumstances, to insert a mandatory clause in the Schedule which made it imperative upon the General Assembly to provide at once that "all elections" within the purview of the Constitution and Schedule should be held in accordance with article 2.

When all these facts are recalled, and the rules of construction to which we have referred are applied to them, when we reflect that all legislative power may be exercised by the General Assembly, except as restrained by the Constitution, that it is only in cases of plain and palpable repugnancy to the Constitution that we can declare the statute to be unconstitutional, and that to doubt is to affirm the validity of the statute—we are led to the conclusion that the statute in question is a valid expression of legislative power.

Bull et al. v. Read, 13 Grat. 78, is a leading case in this state, and beyond its limits with respect to the power of the Legislature to make the operation of a statute dependent upon a vote of the people thereafter to be taken, or other future contingency, and in the course of his opinion, Judge Lee speaks

as follows: "As to the wisdom and expediency of this kind of legislation, this is not the place to express an opinion. To say that it is liable to be abused is but to affirm what is equally true of every mode of legislation. Whilst there may be occasions on which it may be adopted with advantage to the public interest, it may also be resorted to upon others to enable the representative to escape from his just responsibilities. Yet, however profoundly impressed the judicial mind may be in any given instance with its impropriety and inexpediency, it will not do to say that for that cause the law may be set aside. This would but be for the judiciary to set itself up as a revisory body upon the acts of the General Assembly, and would be a plain usurpation upon the powers conferred upon that body. * * * How great soever the evil may be, the security against it must be sought in the wisdom and integrity of the legislative body, or, failing these, the corrective will be found in the virtue and intelligence of the people."

No matter how ingeniously arranged may be the checks and limitations imposed by Constitutions, the point will at last be reached where confidence must be reposed, and wherever that occurs there is danger of its abuse. It is impossible in a Constitution, however elaborate, to provide for every contingency. Something must be left to the discretion of those intrusted with the conduct of government. The General Assembly, the direct agent and representative of the sovereignty of the people, is the natural and necessary repository of power, to be exercised at its discretion for the general good, except as the people have seen fit, in express terms or by necessary implication, to impose limitations and restraints. Any other conclusion is founded upon distrust of the people and their representatives.

We are of opinion that the act under which the election was held is not repugnant to the Constitution of the state, but is a valid exercise of legislative power, and that the judgment of the corporation court of the city of Fredericksburg must be reversed.

Reversed.

HARRISON, J. (dissenting). I cannot concur in the opinion of the majority of the court in this case.

A great jurist has said that in construing Constitutions "every word employed in the Constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are not designed for metaphysical or logical subtleties; for niceties of expression; for critical propriety; for elaborate shades of meaning; or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use,

and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." *Dwarris on Statutes and Constitutions*, p. 675, quoting from Judge Story.

The constitutional convention performed the paramount work for which it was assembled when it reformed and defined the electorate of Virginia. In the preparation of article 2 of the Constitution the mind of the convention was addressed to and absorbed with the responsible duty of determining upon the character and qualifications of those who should constitute our future electorate. After this work had been satisfactorily accomplished, the convention turned its attention to a consideration of the elections to which the new electorate should apply, and this important question was settled by the adoption of section 18 of the Schedule, which provides that: "In all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article two of this Constitution."

There is no ambiguity about this language. It has no recondite meaning. The convention expresses its purpose in terms that cannot be misunderstood when it declares that, in all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article 2 of this Constitution.

This court has said that "all" is the most comprehensive word in the English language. I am aware of no canon of construction which authorizes any meaning to be given to this provision other than that which its plain and simple language imports. Section 18 of the Schedule is conceded to be a part of the Constitution. It must, therefore, be given the same force and effect that is attributed to any other provision of the instrument. When it is read in connection with article 2 and other provisions of the Constitution, the conclusion is to my mind irresistible that the convention did not intend to leave the Legislature with power to prescribe the qualifications of the electorate in all special elections held in this commonwealth.

It is said that section 62 of the Constitution is authority for the Legislature to provide an electorate in local option elections with other qualifications than those prescribed by article 2 of the Constitution.

Section 62 (Code 1904, p. cccxlii) is as follows: "The General Assembly shall have full power to enact local option or dispensary laws, or any other laws controlling, regulating, or prohibiting the manufacture or sale of intoxicating liquors."

The expression "local option laws" employed in this section necessarily implies local option elections; the purpose of a local option law being to provide for holding

local option elections. The convention had already determined upon the qualifications that the future Virginia electorate should possess, and there is, in my opinion, nothing in this section that warrants the view that the convention intended thereby to leave the Legislature with unrestrained power to create any electorate, with or without qualifications, that to it might seem proper in local option elections. The purpose of the provision was merely to emphasize the fact that the convention did not intend to restrict the power the Legislature had always possessed to control and regulate the manufacture or sale of intoxicating liquors. The language employed I think excludes the idea that it was intended to ingraft upon the provision already adopted, which prescribed the qualifications of the electorate, an exception in favor of local option elections. What reason could there have been for not having as pure an electorate to determine the question of local option as was required to settle any other question that might be submitted to the voters of a community?

The General Assembly of 1904, which put the Constitution into operation, as to all special elections, provided that the qualifications of voters in all special and local option elections should be those prescribed by article 2 of the Constitution, thereby placing upon the Constitution the meaning so plainly pointed out by section 18 of the Schedule. Acts 1904, p. 213, c. 115 (Code 1904, § 62). The Legislature of 1908, by the act now under consideration, amended the act of 1904 so as to reduce the measure of qualification from the standard prescribed by the Constitution in the case of special and local option elections. After prescribing what the qualifications of voters should be at any special election or any local option election, the act proceeds to define its meaning as follows: "The term 'special election,' as used in this section, shall be construed to include such elections as are held in pursuance of a special law as well as such as are held to fill a vacancy in any office, whether the same be filled by the qualified voters of the state, or of any county, corporation, magisterial district or ward." So that under this act, the constitutionality of which is attacked, the Legislature assumes the power to prescribe a different qualification for voters from those prescribed by the fundamental law, not only in local option elections, but in all special elections, including such as may be held to fill vacancies in office. Acts 1908, p. 83, c. 73.

By section 30 of article 2 of the Constitution of 1902 (Code 1904, p. ccxiv), the Legislature is given power under stated circumstances to enlarge the qualifications of the electorate by adding a property qualification of \$250; but not in line or word do we find an intimation that it can, under any circumstances, diminish the qualifications prescribed by the Constitution.

Special elections are, in most cases, of much greater interest and importance to those immediately concerned than are elections involving the selection of public officials, and there was, at least, as much reason and necessity for throwing the protection of a purified electorate around the interests involved in those elections as there was to prescribe limitations and restrictions for the qualification of voters who were to participate in the election of public officers.

It is insisted that the act in question was necessary to avoid inconvenience as to the time of holding special elections; that without the act, under the constitutional provision requiring the six months' prepayment of poll tax, special elections could not be held except during a portion of the year.

I do not so understand the present laws on the subject. The right of suffrage, under our Constitution, is a privilege. It is not compulsory. Every citizen who possesses the prescribed qualifications has the right to cast his ballot, but he must first qualify himself, and that is a matter that rests with him, depending upon his own voluntary act. One of the essentials of his qualification as a voter is that he shall have personally paid, at least six months prior to the election, all state poll taxes assessed or assessable against him under the Constitution during the three years next preceding that in which he offers to vote. The three years next preceding that in which he offers to vote plainly refers to the three tax years preceding that in which he offers to vote. The tax year commences on February 1st and ends on February 1st of each year. By section 491 of the Code of 1887 (Code 1904, p. 252), it is made the duty of the commissioner of the revenue to ascertain and assess all male persons of full age and sound mind residing in his district on the 1st day of February in each year. It is to my mind clear that under existing tax laws any voter who pays his poll taxes on any day prior to the 1st day of August in any year can vote in every election held on any day in the next succeeding year, beginning on the 1st day of February and ending the following February. For example, if the poll tax is paid before the 1st day of August, 1908, the voter so paying is entitled to vote in any election held in any month or on any day of the month during the year beginning February 1, 1909, and ending the 1st day of the following February. Hence every voter can qualify himself to vote in all elections by paying his poll tax prior to the 1st day of August in each year.

But it is said the treasurer may not be ready to receive the poll taxes prior to the 1st day of August. No reason is perceived why he should not be. If, however, any such inconvenience should arise under the existing laws, the Legislature has the power to modify those laws so as to remedy the inconvenience. The laws should be made to

yield to the Constitution, and not the Constitution to the laws.

That the Constitution contemplates other elections than those held for the election of officers and members of the General Assembly fully appears from numerous sections of that instrument. I will advert to two by way of illustration.

Section 98 (Code 1904, p. cccxxiii) provides for special elections to determine the question of abolishing the corporation courts in cities of the second class by the qualified electors of such cities.

Section 127 (Code 1904, p. ccxlii) provides for an election to determine the issue of bonds by a city, by a majority of the qualified voters of such city, either at a general or special election for that purpose.

Can it be doubted that the qualified voters mentioned in these provisions for special elections means voters who are qualified in the manner prescribed by article 2 of the Constitution? And when the Constitution, in a subsequent provision, says, "In all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article two," is there room to doubt that it was intended to embrace the special elections which it expressly mentions and provides shall be submitted to the qualified voters?

Much is said of the provisions of former Constitutions of this state, and the powers that the Legislature had under them, as bearing upon the construction of our present Constitution. No former Constitution of this state was adopted under the conditions and circumstances that surrounded her people at the time of the adoption of the present Constitution. Cases are cited construing the Constitutions of other states as authority for the construction put upon this Constitution. I do not know the circumstances under which those Constitutions were framed, nor do I know the motives which impelled the action of the framers. These authorities can, therefore, have but little weight in determining the grave question now involved in the construction of our own Constitution.

As illustrative of the policy of the state in the past, much importance is attached to the circumstance that the Constitution of 1869 provided that the electorate which it established should vote "upon all questions submitted to the people," and that seven years afterwards that provision was stricken out, and the language, "for members of the General Assembly and all officers elective by the people," was substituted.

The Constitution of 1869, known as the "Underwood Constitution," was imposed upon an unwilling people by an alien and inimical body. It had established an ignorant and vicious electorate that was a menace to our

civilization. The amendment mentioned was the first effort of an oppressed people to do what they might to relieve the situation then confronting them. With that end in view they adopted the amendment referred to, because they preferred that a democratic white Legislature should prescribe the electorate which was to determine the important questions involved in special elections rather than have such questions settled by the corrupt electorate prescribed by the Constitution of 1869. The Legislature was all we had at that time, but since then the people of Virginia have framed their own Constitution and defined their own electorate, and are no longer confronted with the perils that made it necessary for them at the time to lodge that power in the hands of the Legislature.

The present decision is far-reaching in its effect and consequences. When I recall, as I must do, the history of the times, and remember that the purpose for which the recent convention was called was primarily and above all else to release the people of this commonwealth from the menace of a debased electorate, and to provide for them a reformed and purified electorate, I am unable to give my assent to the conclusion that those high purposes have failed, and that the right of suffrage has been left by the Constitution to the unrestrained power of the Legislature to create any electorate it may see fit in all that large, important, and rapidly increasing class of elections, other than general elections for members of the Legislature and officers elective by the people.

For these reasons I am of opinion that the judgment of the learned judge of the corporation court of the city of Fredericksburg is right, and should be affirmed.

(109 Va. 503)

TILTON et al. v. HERMAN, Treasurer, et al.
(Supreme Court of Appeals of Virginia. March 24, 1909.)

1. ELECTIONS (§ 83*)—QUALIFICATION OF VOTERS—PAYMENT OF TAXES—MANNER OF PAYMENT—"PERSONALLY PAY."

Const. 1902, § 20, art. 2 (Code 1904, p. ccxii), provides that male citizens who have personally paid poll taxes for three years shall be entitled to register, and section 21 (Code 1904, p. ccxiii), gives such person the right to vote if he has personally paid such poll tax at least six months prior to the election. *Held*, that the phrase, "personally pay," in section 21, does not require that the voter be physically and bodily present when he pays his tax, but only that his tax be paid by him out of his own funds, though the amount be sent by check or through an agent.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 80; Dec. Dig. § 83.*]

2. ELECTIONS (§ 98*)—REGISTRATION—PERSONS ENTITLED—PAYMENT OF TAX—MANNER OF PAYMENT—"PERSONALLY PAID."

The same construction applies to section 20, art. 2 (Code 1904, p. ccxii), requiring all persons

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to have "personally paid" their poll taxes in order to be entitled to register.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 93; Dec. Dig. § 98.*]

3. ELECTIONS (§ 19*)—STATUTORY PROVISIONS—POWER OF LEGISLATURE TO ENACT.

The Legislature has power to require a city treasurer to keep a record of the payment of poll taxes in order to show who had paid their poll taxes so as to be entitled to register and vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 14; Dec. Dig. § 19.*]

Error to Law and Chancery Court of City of Norfolk.

Mandamus by John G. Tilton and others against H. D. Herman, Treasurer, and others. Judgment awarding a writ directing defendants to include only certain names on the list of persons entitled to vote, and petitioners bring error. Reversed, and writ awarded in accordance with opinion.

R. R. Hicks and the Attorney General, for plaintiffs in error. N. T. Green and J. B. Jenkins, for defendants in error.

CARDWELL, J. This is a writ of error to the judgment of the court of law and chancery of the city of Norfolk, directing, by mandamus, H. D. Herman, treasurer of that city, to include in the list required of him by law to be made and filed five months before each regular election with the clerk of the corporation court of the city only those voters who were physically present and had paid, and not all voters in his city who had paid at least six months before such regular election, the state poll taxes required by the Constitution during the three years next preceding that in which such election is held; this case being a sequel to the case of *Tazewell et al. v. Herman*, Treasurer, 108 Va. 416, 60 S. E. 767, 61 S. E. 752, recently decided by this court, in which it was held that said list to be made up and filed by the treasurer should only contain the names of those persons who at least six months prior to the election had personally paid the poll taxes required of them as a prerequisite to their right to register and vote at an ensuing regular election. In denying a rehearing of that decision, the court said: "What constitutes a personal payment, therefore, within the meaning of article 2 of the Constitution of 1902 (Code 1904, p. ccxi), was not involved in the case (*Tazewell v. Herman*), was not argued by counsel for the defendant in error, and was not considered or passed upon by the court. A failure, therefore, to pass upon that question, furnishes no ground to grant a rehearing. When a case is before the court, where that question is involved, it will be considered and decided, but until then any expression of opinion on the subject would scarcely be proper, and, at most, would be mere obiter."

The question not involved in that case, and therefore not passed upon, is the precise

question presented in this; the lower court having held that the treasurer of the city of Norfolk, in making out and certifying to the clerk of the corporation court the list of persons who had paid their capitation taxes, etc., should include therein only the names of those voters "who were physically present when they themselves paid their poll-taxes to the treasurer, and should omit therefrom the names of such persons as were not bodily present when their poll taxes were paid on or before the 2d day of May, 1908." In other words, the learned judge below held that the words "personally pay" mean payment only in bodily person.

The learned Attorney General, considering the public interests involved in the case to be of great moment, on behalf of those interests, unites with counsel for plaintiffs in error in urging upon this court not only to review and reverse the ruling of the lower court in this case, but also to review and overrule its own decision in *Tazewell v. Herman*, supra.

Considering these questions in inverse order, we deem it only necessary to say with respect to the last mentioned that this court upon mature consideration of the reasons urged and ably argued in the present case why the decision in the case of *Tazewell v. Herman*, supra, should be abrogated and a ruling the reverse of that therein made should be made in this case, for the reasons stated in the former opinion, as well as others which will be incidentally, but necessarily, referred to in disposing of the remaining question now before us, is of opinion that the ruling of the court upon the question involved in the former case should be adhered to and be regarded as conclusive of that question.

Coming, then, to the remaining question: What is meant by the words "personally paid," as used in section 20 of article 2 of the present Constitution of 1902 (Code 1904, p. ccxii), and "personally pay," as used in section 21 of the same article (Code 1904, p. ccxiii)? In other words, does the use of these words in the Constitution, where the right of franchise is dealt with, mean that, in order to entitle a citizen of the State to register and vote, he must in person, in bodily presence, pay to the treasurer of his city or county the poll taxes required of a voter as a condition precedent to the right to register and vote, or do these words mean only that the tax must be paid by the voter out of his own estate or means, and not by another out of that other's estate or means?

To determine that question, we should look to the evil which the framers of the Constitution had in view, and then to the remedy intended to be applied.

As was said in the opinion in *Tazewell v. Herman*, supra: "It is manifest that one of the reasons for requiring that the voter shall personally pay his poll tax was to remedy a great evil which had prevailed at one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time under the Constitution of 1869. That evil was that political and other organization, candidates for office, and others paid or caused to be paid the poll tax of voters in order to improperly influence and control the votes of the persons whose tax they so paid."

That is a clear statement of the evil which our late convention sought to remedy when they came to frame article 2 of the present Constitution, which deals with elective franchise and qualification for office; and it was unquestionably the purpose of that article to exclude from the electorate of the state that class of citizens who are not entitled to have the right of franchise by reason of not "having sufficient evidence of permanent common interest with, and attachment to, the community" (section 6, Bill of Rights [Code 1904, p. cclx]); and clearly a citizen who permits the poll tax required of him as well as of all other citizens of the state over the age of 21 years, by section 173 of the Constitution of 1902 (Code 1904, p. cclxiii), to be paid by another for corrupt and illegal purposes, might reasonably expect to be excluded from the class of citizens declared in the Bill of Rights to be entitled to the right of franchise. And it is equally as clear to us that it was never the intent of that able body of men who framed our present Constitution to make it even possible that hundreds and thousands of the best citizens of our State might be deprived of their right of franchise, although they had paid out of their own estate or means, as contradistinguished from the means or estate of others, the poll taxes required as a prerequisite to their right to vote merely because they did not in bodily presence make the payment to the collecting officer. From such a lamentable result in thousands of instances there would be no escape, if the word "personally" used in the Constitution were restricted to "in propria persona."

It is true that the word "personally" may and often does, mean in person. It also often means "in propria persona"; but that is not its necessary and only meaning, and many instances could be cited in which it could not be given that meaning. Suffice it to say that the word is used in a number of our existing statutes in which it could not with any sort of reasonableness be given the meaning which is here contended for.

The principal definition of the word "personally" given by Webster and by the Century Dictionary is, "in a personal manner," and every one of ordinary intelligence understands that he does not personally or "in a personal manner" pay a debt he owes unless its payment reduces his estate or means to the extent of the payment; and that if this be not the case, but the debt be paid by another out of that other's means, such debtor could not claim that he had personally discharged the obligation. Where, however,

the debtor was the source of the payment and paid the debt because he desired to discharge the obligation out of his own funds, it is, as would seem clear, a personal payment, no matter by what method or avenue the money is made to reach the hand of the creditor.

So, as would seem equally clear, where it appears that a voter was the source of the payment of the poll taxes required of him, and paid them out of his own estate or funds because he wished to pay them, it is a personal payment by the voter, whether the money was handed by the voter to the treasurer or to one of his deputies or was sent by check drawn on a bank in which the drawer had funds to meet its payment, or by the hand of the taxpayer's clerk or duly authorized agent, and a payment by a voter of his poll tax in any of the methods mentioned other than the handling of the money himself to the treasurer would as effectually guard against the corrupt practices which article 2 of the Constitution is designed to prevent as would a manual delivery of the money to the treasurer, and the voter would stand on the same footing, so far as being free from influence is concerned, in the one case as in the other, since there would be in neither case the apprehended ground of improper influence or control of the voter.

Any other construction of the constitutional provision would no more effectuate the intentment of the provision than the one we think is required, and certainly would be much more unreasonable, when it is remembered that, if the ruling of the lower court be upheld, many of our best citizens would, as before stated, be deprived of their right to vote, although the taxes required of them had in good faith been paid within the required time out of their own means, and not out of the means of another, and that too merely for the reason that the voter, either by sickness or absence miles and miles away from his home on business or perhaps in search of health, could not appear in person, "in bodily presence," and himself hand the money to the treasurer or his deputy in due time.

The answer to the argument for defendants in error, that it would be no more unreasonable to require the voter to go in person to the treasurer and pay his poll tax than to require that he go in person to register as a voter and also when he casts his vote, is that, in order to become a registered voter, the person offering to register has to take and subscribe a required oath, and it may be to answer interrogatories propounded to him by the registrar, which oath cannot be taken and subscribed, nor answer be made to interrogatories propounded, by any one except the voter himself; and, as voting in this state is required to be by ballot—secret ballot—*ex vi termini* the voter must cast his ballot in person, in bodily

presence. With respect to registration and voting, the requirement of bodily presence is necessary, and therefore reasonable; while, with respect to the payment of a tax as a prerequisite to the right to vote, it would be not only unnecessary but unreasonable.

And the answer to the further contention, that the meaning of the words "personally pay" applied by the learned judge below would more surely effectuate the intention of the framers of the Constitution, is that the agent of the "political or other organization, candidates for office or others, spoken of by Buchanan, J., in *Tazewell v. Herman*, supra, would have only to stand on the outside and give to each voter whose vote is purchasable or could be controlled the amount of the poll tax as he enters the treasurer's office, and, upon the voter's handing the money to the treasurer, he would be qualified to vote.

We are aware that the ruling of this court in the former case places a power in the hands of the treasurers which may be greatly abused, but such is the mandate of the Constitution as it appears to us.

As was said by Keith, P., in *Willis et al. v. Kalmbach et al.*, 64 S. E. 342, handed down at the present term: "It is impossible in a Constitution, however elaborate, to provide for every contingency, something has to be left to the discretion of those intrusted with the conduct of government."

For this very reason, no doubt, the convention, recognizing that it might be found necessary to require further evidence than that of the treasurer's list as to the prepayment of capitation taxes, by section 88 of article 2 (Code 1904, p. ccxvi), left that duty upon the Legislature. By that section of the Constitution, as interpreted by this court in *Tazewell v. Herman*, supra, the treasurer is required to place on the list only persons who have "personally" paid the poll taxes required of them, and paid the same at least six months prior to the date of an ensuing regular election, which it is declared shall be conclusive evidence of the facts stated in the list for the purpose of voting; and, if for any reason a voter's name is improperly omitted from the list, a remedy is provided by the same section of the Constitution. If the treasurer should, for an illegal and corrupt purpose, improperly place on the list the name of any person or persons not entitled to have his or their names thereon, beyond question the general laws of the state provide adequate means for the punishment of such malfeasance in office.

The suggestion that, if the treasurer is not to put on the list the names of the persons who did not in person—in bodily presence—pay their poll taxes, the list would not afford the auditor the intended proof as to all who had paid, loses its entire force when it is remembered that the general

laws make ample provision for requiring a treasurer to account for all the state's revenues that he receives.

The question we are considering being one of first impression in this state, the adjudications of our court have afforded us no assistance; but the authorities from without the state sustain the view we have taken.

In *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 14 South. 383, 22 L. R. A. 124, 139 (a well-argued and considered case), the question involved was very similar to the one we have under consideration. The Florida law provided that the voter should qualify himself "by registering and himself paying his own poll taxes" for the requisite years more than two weeks before the election, and the precise question was whether the voter was required to pay those taxes in his own person, which question was decided in the negative; the opinion of the Supreme Court of Florida saying: "Our consideration of the provisions mentioned is that they do not deprive the voter of his right to pay his poll taxes through an authorized agent, and that a payment made by such agent would be a valid payment under the terms of the act. A liberal construction should obtain in favor of the voter's right to make the payment through another, and the act does not in terms deny such right. It is true it says 'himself paying his own poll taxes' for the years mentioned, but the general principle, 'qui facit per alium facit per se,' should apply, and the payment through an authorized agent would be the payment by the voter himself." See, also, section 110, *McCrary on Elections*; 15 Cyc. p. 297.

In our view, the constitutional provision aimed at that class of voters who would not manifest enough interest in the government or the welfare of the community by qualifying themselves as voters in the prescribed mode, but would be willing to exercise the right to vote as any other citizen, although their right to do so were secured by permitting another illegally to pay the taxes required of them, and for corrupt purposes, and merely designed that the payment should be the personal act of the citizen—that it should be by him and with his means. If such was not the purpose, surely the real purpose would have been declared in clear, unmistakable language at the appropriate place, instead of leaving the purpose to depend upon construction.

Within this limitation the constitutional requirement would be met in the instances we have adverted to and also where the tax is paid with the citizen's money sent to the treasurer by a member of his family by his clerk, or other duly authorized agent, and perhaps there are also other ways in which the money could be paid to the treasurer which would justify and require him to include the name of the taxpayer in the list he is required to certify to the Auditor of

Public Accounts and to the clerk of his county or corporation.

It is also claimed that this view would put the burden upon the treasurer of having to determine in every case where the payment is not made by the voter in bodily presence whether the payment is out of the taxpayer's own means or out of means furnished by another, and that the burden could not be borne at all by a new treasurer coming into office, as he would not be able to tell who had and who had not personally paid their poll taxes for the two preceding years.

To the first of these contentions we can only repeat that the mandate of the Constitution requires the treasurer to include in his list all persons who have personally paid the required poll taxes at least six months next preceding an ensuing regular election, and to the other contention the answer is that if no record be made in the treasurer's office of the payment of poll taxes, and, when paid, the incoming newly elected treasurer would encounter the same difficulty in certifying these facts as he would in certifying who had personally paid the two preceding years. If a record in the treasurer's office sufficient to enable a newly elected treasurer to perform these duties be not kept, it is entirely within the power of the Legislature to require that such a record be kept, and the fact that this has not heretofore been required can have no sort of bearing on the determination of the question we have before us.

It follows that the judgment of the lower court complained of must be reversed and annulled, and this court will enter its judgment awarding plaintiffs in error a writ of mandamus, directed to H. D. Herman, as treasurer of the city of Norfolk, requiring him to make up, verify, and file with the clerk of the corporation court of said city a list, as provided for in section 38 of article 2 of the Constitution, not only of persons who in bodily presence paid, but also all persons who "personally paid" to him prior to May 2, 1908, the poll taxes required of them, as said words "personally paid" employed in said article of the Constitution are construed in this opinion. The said judgment, however, in favor of plaintiffs in error will be without costs against said H. D. Herman.

Reversed.

(65 W. Va. 346)

HURXTHAL v. ST. LAWRENCE BOOM & MFG. CO.

(Supreme Court of Appeals of West Virginia.
March 23, 1909.)

1. NEW TRIAL (§ 71*)—GROUNDS—VERDICT ON CONFLICTING EVIDENCE.

A verdict, depending wholly on conflicting oral testimony of witnesses in the presence of the jury, will not be set aside on the sole ground that it is against the weight and preponderance of such evidence. The jury's province to judge

the credibility of such witnesses cannot be so invaded.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

2. DAMAGES (§ 120*)—MEASURE—BREACH OF CONTRACT—CONTRACT TO FURNISH WATER POWER.

In the ascertainment of damages to a mill because of the breach of a contract to maintain dams, and do other things affording a supply of water essential to its operation, an appropriate standard is the rental value of the mill, under conditions that would have existed had the contract been kept, as compared with the rental value when the contract was not kept.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 120.*]

3. EVIDENCE (§ 498*)—OPINION EVIDENCE—AMOUNT OF DAMAGES.

In such case, the opinion of witnesses acquainted with the premises is admissible as to the amount of damages judged by the standard of rental value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2289; Dec. Dig. § 498.*]

4. DAMAGES (§ 184*)—EVIDENCE—SUFFICIENCY.

In the ascertainment of damages, absolute certainty is not required. The causes and probable amount of the loss may be shown with reasonable certainty. Substantial damages may be recovered, though the loss can be stated only approximately.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 502; Dec. Dig. § 184.*]

5. DAMAGES (§ 184*)—EVIDENCE—SUFFICIENCY.

A verdict for damages cannot be set aside upon the ground that the evidence afforded no basis for ascertainment of its amount, when the facts, circumstances, and data justify the inference that the amount found is a just and reasonable compensation for the injury suffered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 502; Dec. Dig. § 184.*]

(Syllabus by the Court.)

Error to Circuit Court, Greenbrier County.

Action by Josie M. Hurxthal against the St. Lawrence Boom & Manufacturing Company. Judgment for plaintiff. Defendant brings error. Affirmed.

John W. Harris, Henry Gilmer, J. A. Preston, and H. L. Van Sickler, for plaintiff in error. Williams & Dice, for defendant in error.

ROBINSON, J. This writ of error is a sequel to the decision of the case reported in 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954. An understanding of the facts is there disclosed. After that reversal, a new suit on the same cause of action was instituted. It was later consolidated with the old suit, by agreement, it seems. Trial of the case resulted in a verdict in favor of plaintiff for \$2,500. Upon that verdict judgment was rendered, over the motion of defendant to set aside the same and award a new trial. The defendant has brought the case here. It assigns as error the giving of certain instructions to the jury, and the court's refusal to set aside the verdict as being contrary to law

and the evidence. By a decision of this court on November 26, 1907, the judgment was affirmed. But a rehearing was granted upon the petition of defendant. The case was reargued, and a thorough review of it has since been made.

That review leads us unalterably to the opinion that the former conclusion is right. We find no error in the instructions. They embody law applicable to the case as presented. Nor is it true that plaintiff's cause of action is unsupported by the evidence. That cause of action is the alleged damage to plaintiff's mill by reason of the failure of defendant to perform the contract by which it was obligated to maintain dams, and do other things essential to the furnishing of a water supply for the operation of that mill. That contract is clear and specific; and, from the whole of the evidence adduced, the jury were justified in believing that it was not fulfilled by defendant, and that plaintiff's injury arose from such default. Were the dams maintained, and other things done by defendant to the extent stipulated in the contract? If not, did the failure of defendant to perform its obligations under that contract injure plaintiff's mill? These simple questions embrace that which the jury had for determination as to the fact of damage and the cause thereof. They are answered by the verdict against defendant. Neither is it conclusively shown that plaintiff's own negligence caused the damage, or contributed thereto. The jury were the judges in this regard also. Granting the evidence to be conflicting in the particulars aforesaid, we cannot say that the finding of the jury is unfounded. The finding, in its relation to these particulars, depending, as it does, on oral testimony and the credibility of witnesses, cannot be disturbed. It is not against the decided weight and preponderance of the evidence. It is not manifestly wrong. There is no preponderance for plaintiff, it is said. If such be true, it cannot avail to disturb the verdict; for, as held in *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385: "A doubtful case, a slight weight and preponderance of the evidence against the verdict, is not sufficient cause for setting it aside." And it would seem unnecessary to reiterate the well-known rule plainly stated in that case that "a verdict depending solely on conflicting oral evidence, given by witnesses in the presence of the jury, will not be set aside on the ground alone that the verdict is plainly against the decided weight and preponderance of such evidence, because to do so would invade the province of the jury in determining the credibility of such witnesses."

This brings us, then, to the really controverted feature of the case. It is the feature most strongly relied upon by defendant, and, in fact, the only one pressed in the argument upon this rehearing. It is this: Is there in the evidence a basis for ascertainment of the amount of damages? It is insisted that

there is nothing upon which the jury could arrive at the amount of \$2,500, or any other amount; in other words, that no money value of damages was proved. We find otherwise. An appropriate standard for the ascertainment of damages in such case is the rental value of the mill had the defendant kept its said contract as compared with its rental value when that contract was not kept. *Pickens v. Boom & Timber Co.*, 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813; *Winne v. Kelley*, 34 Iowa, 339; *Rogers v. Bemus*, 69 Pa. 432. True, in a case of this kind a party is not confined to a single mode of measurement for estimating his damages, but rental value is a certain measure. It is a surer criterion than the evidence of lost profits. Counsel on both sides concede that rental value of the mill under conditions when the contract was kept as compared with rental value under conditions when it was not kept was a proper basis for ascertainment of the amount of the damages sustained by plaintiff. But for defendant it is insisted that there is no evidence in the case to which this principle can be applied; that there are no certain or proper data of rental value. Yet we find absolute and specific statements by witnesses as to what the rental value of the mill was under each of the conditions aforesaid. Moreover, it is significant that not a word was offered in contradiction of these statements. Therefore they stand proved. Plaintiff bought the mill, and took with it the rights under defendant's said contract, on March 16, 1899. In May of that year she rented it to Pierpont and Ammonnette, at \$1,000 for the first year, \$1,200 for the second, and \$1,400 for the third year. On January 2, 1900, she took back the mill from her lessees, compelled to do so, it is shown, because of threats, on the part of those lessees, to sue her on account of an insufficient water supply—for the same insufficient water supply which plaintiff insists came about by defendant's breach of its obligations. Yet plaintiff testifies that with water any one would have given from \$1,800 to \$2,000 per year rental for the mill, and that she would not have rented it for that amount if there had been a sufficient water supply. Two other witnesses, peculiarly competent to speak in that behalf because of intimate acquaintance with the property and its milling business, also state what the rental value would have been had the water been furnished. And the evidence, though conflicting, justified the jury in believing that the water supply would have been sufficient had defendant kept its contract. White, who bid on the mill at judicial sale when plaintiff bought it, and who afterwards purchased it from her, says that from \$1,500 to \$1,800 per year "would have been right." Ammonnette, one of the aforesaid lessees, plaintiff's miller during this very time, puts the rental value at \$2,000 per year, provided the water supply had been good.

What do these witnesses say on the other hand? What do they say the mill was worth during the period for which damage is claimed? Plaintiff says that during the latter part of her ownership she did not make anything, but that she got in debt. One can understand, by natural sense, how delay and stoppage in the operation of a valuable mill, with a miller employed at \$75 per month, and other large expenses, continuing despite said stoppage, would destroy the usual profit in such business. Plaintiff says she thinks that she could not have rented it at any price, because of the conditions brought about by the breaches of defendant. The jury, as we have said, could find that there were such breaches, and that by them plaintiff was injured. White says that he would not consider the rental value "very much on account of water," and that "the annoyance to any one who owned it was about all it was worth." Yet he says that there was nothing the matter with the mill itself. Ammonette says that, taking into consideration the water supply, the mill had no rental value. True, the mill did run at times, but from this evidence must it not be known that it did not run with profit? Surely it was competent for the jury to ascertain the amount of damages from such evidence as all this. Plainly, by it, there was before the jury the fact that, because of defendant's violations of the contract, the mill possessed no annual rental value; and just as plainly was it proved that, under conditions such as would have prevailed had the contract not been violated, the rental value of the mill would have been from \$1,500 to \$2,000 per year. Would not reasonable men then be able easily to compute the amount of the loss caused by defendant? The jury had before them the evidence as to length of the period during which the breaches were made. That period of time covered a space of two years, nine months, and one day. We must not suppose that the jury could not make a computation upon such a plain arithmetical problem. The verdict is within any result obtainable by such computation. "The jury are the judges of the compensation to be paid in case of wrongful damage to real property, and the court will not disturb their finding, unless plainly unwarranted by the evidence." *Miller v. Shenandoah Pulp Co.*, 38 W. Va. 558, 18 S. E. 740.

It is complained that the aforesaid measure of damage, by comparison of the rental value under the different conditions of the property, is based on mere opinions of the witnesses. But those witnesses were acquainted with the property and the business, and were competent to give opinions in that regard. Such evidence is proper in ascertaining damages. "It is the settled law of this state that the opinions of witnesses are admissible as to the amount of damages done in cases of this character, to enable the

jury to arrive at a just verdict; and, while the jury are not bound by these opinions, they have the right to give them such weight as, taken together with other evidence, is justifiable." *Miller v. Shenandoah Pulp Co.*, supra; *Railroad Co. v. Forman*, 24 W. Va. 662. That which was said by Judge Brannon in *Pickens v. Boom & Timber Co.*, 58 W. Va. 11, 50 S. E. 872, is pertinent here: "Witnesses acquainted with the mill, practical millers, were permitted to give rental value and the earning capacity daily. Why do not these constitute a basis for estimation of damages, in connection with evidence of the number of days of stoppage, which was given for some months?" And this court has held: "In an action for damages for diverting water it is proper to ask a witness to state from facts within his knowledge what, in his opinion, was the amount of damages suffered by the plaintiff because of such diversion of the water; and, to authorize the giving of such opinion, it is not necessary that the party be an expert." *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121. In other words, laconic ones from the West, "It is not necessary to be an expert horse dealer to have some judgment as to the value of a horse." *Johnson v. Railway Co.*, 7 Utah, 351, 26 Pac. 926.

In the evidence above recited, concerning the matter of rental value, there is more than the usual certainty of proof in like cases. In the ascertainment of damages absolute certainty is not required. The causes and probable amount of the loss may be shown with reasonable certainty. Substantial damages may be recovered though the plaintiff can state his loss only approximately. *Hale on Damages*, p. 70; *Sedgwick on Damages*, § 171; *Joyce on Damages*, § 75. And the language of a court of high standing is in point: "The law does not require impossibilities, and cannot therefore require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive, proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." *Allison v. Chandler*, 11 Mich. 542. Nor is the evidence on which the jury herein acted objectionable as a basis for finding the amount of a verdict because the witnesses aforesaid differed in their opinions as to the rental value, or that they stated that value ap-

proximately. In a case growing out of a cause of action not wholly dissimilar to this one, and very similar as to character and extent of evidence, it was said: "We think it unsafe, in a case like the present, to approve a ruling which rejects a claim to damage, otherwise lawful and unexceptionable, on the ground that the party could only state the amount of his injury approximately, and his witnesses differed in their judgment." *Satchwell v. Williams*, 40 Conn. 371. Recovery in this case is not based on guesswork or inference, but is supported by facts, circumstances, and data justifying the inference that the damages awarded are a just and reasonable compensation for the injuries suffered. 13 Cyc. 218.

Because plaintiff rented her mill at the figures set forth in said lease, defendant contends that the other figures given by the witnesses aforesaid are overthrown. But from the evidence and circumstances the jury were justified in believing that such contract of rental was made by her because of the bad condition of the water supply. The contract of rental does prove that the property had rental value but for the insufficiency of the supply of water. The lease was actually made and existed until the deficient supply caused its surrender. We cannot assume that it would have been surrendered for other reasons had this reason not arisen. Is not this renting at fixed figures, at the inception of plaintiff's ownership, before the breaches of defendant had become notorious to the lessees, substantial proof of what the property could be rented for under normal conditions? Let us take the figures of that lease as a basis. The jury may have done so. Those figures are the ones most favorable to the defendant. And yet the verdict found is within them. Under this contract of rental, as we have stated, plaintiff was to receive \$1,000 for the first year, \$1,200 for the second, and \$1,400 for the third year. That rental lasted about 7½ months of the first year. This netted plaintiff \$625, if the rent was paid. Because of the surrender, which the evidence says was occasioned by defendant's acts, plaintiff lost the residue of the rent for the first year, or \$375. The next year she lost \$1,200, and for the 9 months of the third year that she owned the property she lost three-fourths of \$1,400, or \$1,050. So the total of the loss because of the compelled surrender of the lease amounted to \$2,625. Assuming that the jury believed, as the evidence warrants, that the defendant's acts caused the loss of this lease after it had existed for 7½ months, was it not a substantial and certain basis for computation of the damages, and is not the amount of \$2,500 only a little under that actually proved? Certainly it cannot be said that such basis was uncertain; that said proof was deficient. Nor can it be said that

the computation thereupon was erroneous or excessive.

There has been a fair trial of the case. The verdict is not manifestly wrong. The judgment is affirmed.

(65 W. Va. 379)

THORNBURG v. CITY & E. G. R. CO.
(Supreme Court of Appeals of West Virginia.
March 23, 1909.)

1. ELECTRICITY (§§ 14, 18*)—CASE REQUIRED OF ELECTRIC COMPANIES—CONTRIBUTORY NEGLIGENCE.

The rules and principles announced in *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217, respecting the duties of electric companies, and the care required of them in keeping their dangerous wires perfectly insulated at places where people have the right to go for work, business, or for pleasure, and their liability for negligence therein, considered, approved, and applied.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. §§ 7, 10; Dec. Dig. §§ 14, 18.*]

2. ELECTRICITY (§ 19*)—ACTIONS—QUESTIONS FOR JURY—NEGLIGENCE.

Ordinarily the question whether that degree of care required in the construction, inspection, and repair of wires carrying highly dangerous currents of electricity has been observed in a given case is one for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

3. ELECTRICITY (§ 19*)—ACTIONS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

And generally the question of contributory negligence of one injured by coming in contact with such wires is one also for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

(Syllabus by the Court.)

Error to Circuit Court, Ohio County.

Action by D. S. Thornburg, administrator of Ezra I. Blosser, deceased, against the City & Elm Grove Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Russell & Russell, for plaintiff in error.
Joseph Handlan, for defendant in error.

MILLER, P. This is an action by plaintiff, as administrator of Ezra I. Blosser, deceased, a boy of 14 years, against defendant, to recover damages for the death of deceased, the result of his coming in contact with a primary wire of defendant, heavily charged with electricity, suspended over Little Wheeling creek, in Ohio county, and along and near to the National Pike and the stone arched bridge over said creek and over which bridge, on the evening of January 7, 1907, the deceased with his mother, the janitress of a schoolhouse near by, and her two little girls, one nine and the other seven years of age, were passing on their way home from the schoolhouse. A side wall three feet high and two feet wide, with coping on the top, and beveled or tapering off at each side, but leaving a level surface

about 14 inches wide, guarded each side of the bridge. The top of this coping was constantly used by school children and others as a walk in crossing the bridge, although there was a sidewalk 4 feet wide on the inside and along the wall built over the bridge. The top of the coping had been so used, and used so long in this way, as to have become much worn by the feet. On one side of the bridge at about the top of the arch, where deceased was killed, there was a lamp or gas post with a bearing on the arch outside of and fastened to the wall and coping, bearing a gas pipe bent over the walk, with a lamp attached, to give light on the bridge. Besides the wire with which deceased came in contact, there was a second primary wire charged with the same voltage, also a signal wire carrying a lighter current of electricity. The two primary wires were suspended from horizontal brackets on poles set at each end of the bridge and on the same side as the gas post, but the signal wire was fastened to small upright brackets attached to the poles some 12 to 13 inches below the horizontal brackets. These wires opposite the lamp-post hung so low and close to the bridge that a boy of the height of young Blosser, standing on the coping of the wall, could, as some witnesses say, reach out and touch the first primary wire and the signal wire; but, as others say, they could be reached only by putting one arm around the lamp-post and reaching out in the direction of the wires with the other. The mother says that at the time her son was killed the inside primary wire was sagging down a few inches below the signal wire, and could easily be reached by one standing on the coping at the lamp post, without any support from it; and in this she is supported to some extent by some of the other witnesses, who were at the place either a few minutes after Blosser was killed or early the next morning. U. M. Hervey, president of the school board, a witness for plaintiff, who was there the following morning, says, on cross-examination, that a person could stand on the coping and reach either of the wires. Counsel endeavored to have him say that these wires could be reached only by swinging out from the post, as already indicated, but the nearest he came to it was to say, with reference to the fatal primary wire, that it could easily be reached in that way, "and it might be reached with safety without that. I wouldn't want to say yes or no." Another witness, R. H. Walter, who saw the wire sagging, made some measurements with his ruler that evening. He could not say he measured accurately, for he was afraid to get too close to the wires; but, as near as he could tell, the wire was between 4 and 5 feet from the wall, measuring, as he said on cross-examination, diagonally across from the top of the wall to the wire. He did not measure horizontally out from the post to the wire. Witnesses for

the defendant who testified that they made accurate measurements the following morning say that measuring vertically the inside primary wire hung 6 feet and 10 inches, and the signal wire 5 feet and 9 inches from the top of the coping; and that measured horizontally out the primary wire was 3 feet and 1¼ inches from the post. The fact is, however, that young Blosser, just before his death, was seen by his mother walking on the top of the coping and almost instantly afterwards, when she looked up, she found him standing upright on the top of the wall with the first three fingers of his right hand clutched under and around the inside primary wire, and, as she says, his head bent back, his knee slightly bent, and his hair standing out and waving as if the wind was blowing through it; and that when she caught hold of his coat and pulled him he fell over unconscious on the sidewalk, and was dead. She did not see him, and no one seems to have seen him at the moment when he caught hold of the wire. The mother, the only witness who testified as to the boy's height, says his height was five feet seven inches. All witnesses agree that the insulation of the wire, which did the deadly work, was worn off and hung down in shreds so as to furnish little, if any, protection to one coming in contact with it. The jury found a verdict for the plaintiff, and the court below pronounced judgment thereon for \$3,500, and defendant brings error.

Is the defendant liable? The defendant denies liability on two grounds: First, that the deadly wire was not in a place where it owed deceased any duty to keep it insulated and in good repair; and, second, because Blosser was guilty of contributory negligence in reaching out in the manner described and touching the wire. Appertaining to these questions the jury responded to three interrogatories, submitted by the defendant, as follows: "No. 1. Was the wire which caused the death of Ezra I. Blosser in such a position that children or other persons may reasonably have been expected to come in contact with it? Answer: Yes. No. 2. Was the manner in which Ezra I. Blosser acted in coming into contact with the wire negligent, taking into account his age and the circumstances surrounding him at that time? Answer: No. No. 3. Could Ezra I. Blosser while walking along the stone wall have unintentionally come in contact with the wire which caused his death? Answer: Yes." It is claimed: That the answer to the last interrogatory was not supported by any evidence; that the manner in which the deceased was shown to have had hold of the wire shows conclusively that he had not taken hold of it to save himself from a fall, because in falling he would naturally have taken an overhold, and not an underhold of the wire; and that inasmuch as he was found with his left arm around the post and the fingers of his right hand on the

wire, and, thus supported by the post, he must necessarily have reached out and intentionally and negligently taken hold of the wire, and thereby by his negligence contributed to his death. But assuming the fact to be as claimed we do not think the answer of the jury to this interrogatory destructive of their general verdict.

On the first proposition this court in *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395, 46 S. E. 217, in accordance with the decisions of many other states, has held it to be "the duty of electric companies to use very great care to keep the insulation of its dangerous wires perfect at places where people have the right to go for work, for business, or for pleasure," and that "when injury to a person comes from contact with a live electric wire from bad insulation at a place where there ought to be good, safe insulation for safety to persons, it is a case of negligence on the part of the electrical corporation rendering it prima facie liable." And on the second proposition the same case holds: "If one take hold of an electric wire at a place where it ought to be safely insulated for safety to persons, and is injured by reason of defective insulation, he not knowing its defect, he is not from so doing guilty of contributory negligence forbidding recovery of damages," and that, "in places where electric wires should be insulated for safety to the persons, one may assume that they are so insulated, if he know not to the contrary." In the *Thomas Case* these principles were applied in the case of a workman at work on a balcony of an opera house who came in contact with defendant's wires extending to a bracket on the wall of the opera house. In Virginia they were applied in the case of a boy 8 years old, who sitting upon a box along a street, and seeing, hanging through the limbs of a tree, in an adjacent yard, what he supposed to be a string, put his hand through and over the railing, grasped the wire, and was injured. *Lynchburg Tel. Co. v. Booker*, 103 Va. 594, 50 S. E. 148. In Connecticut, in the case of a boy 16 years of age who was killed by an electric shock from a wire strung along a highway bridge, and who at the time was on the truss of the bridge preparing to dive and caught the wire to prevent himself from falling. Boys had been in the habit of diving from and swimming around the bridge, a fact known to the selectman of the town and to defendant. *Nelson v. Branford Lighting and Water Co.*, 75 Conn. 548, 54 Atl. 303. The facts in this case are quite similar to those in the case at bar. They were also applied in Mississippi, in the case of a boy

10 years of age who while climbing an oak tree sustained a shock by coming in contact with a wire which defendant had negligently permitted to become and remain uninsulated. *Temple v. Electric Co.*, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698. It was held in this case that defendant was bound to take notice of the immemorial habit of small boys to climb such trees. They were also applied in Texas, in the case of a police officer who, in the discharge of his duty, went on the roof of a building in the nighttime for the purpose of discovering persons who were violating the law, and received injuries by coming in contact with an electric wire of the defendant, negligently left in a dangerous position on the roof and not properly insulated. *City of Greenville v. Pitts* (Tex. Civ. App.) 102 S. W. 451. So also in Missouri, in the case of a laborer engaged in hanging and taking down signs from buildings, a case similar to our case of *Thomas v. Electrical Co. Gelsmann v. Missouri Edison Electric Co.*, 173 Mo. 654, 73 S. W. 654. And these are the principles which we think were rightly applied by the court below to the case at bar.

Whether that degree of care in the construction, inspection, and repair of the wires carrying highly dangerous currents of electricity imposed upon one employing them so as to keep them harmless at places where persons are liable to come in contact with them has been exercised in the given case is ordinarily for the jury. *Thomas v. Electrical Co.*, supra (Syl., point 3); *Perham v. Electric Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Birsch v. Citizens' Elect. Co.*, 36 Mont. 574, 93 Pac. 940. The question whether or not the person injured, under the circumstances like the case at bar, has been guilty of contributory negligence, is likewise a question for the jury. *Geismann v. Elect. Co.*, supra; *Thomas v. Elect. Co.*, supra.

In this case the record shows that judge and jury visited and viewed the place where young Blosser was killed. True the wires were not in exactly the same condition and situation as on the evening of the accident; but having seen and viewed the premises, and heard the testimony of the witnesses, they were better able to judge of the merits of the case than we can be from a mere consideration of the record of the trial and the arguments of counsel. The case seems to have been well and carefully tried, before a learned judge, assisted by able counsel on both sides, and we cannot say that any error has been committed.

There is nothing for us to do therefore but order an affirmance of the judgment.

(65 W. Va. 355)

GILBERT et al. v. PEPPERS et al.

(Supreme Court of Appeals of West Virginia.
March 23, 1909.)**1. FRAUDULENT CONVEYANCES (§ 321*)—CREDITOR FIRST ATTACKING—PREFERENCES.**

A general creditor who first attacks a fraudulent conveyance obtains a lien on the property by the institution of his suit; and preferences among all of such creditors are determined by the dates of the commencements of their suits, if separate suits are brought, or of the commencement of the suit and the filing of petitions, if all assert their rights in the same suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 985, 986; Dec. Dig. § 321.*]

2. FRAUDULENT CONVEYANCES (§ 321*)—JUDGMENT CREDITORS—LIEN.

Judgment creditors of the fraudulent debtor have liens on his real estate from the dates of their respective judgments, and on his personal property from the dates of the acquisitions thereof by execution, attachment, or otherwise, whether they be acquired before or after the conveyance, if they are preserved by compliance with registration and other laws provided for the purpose.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 985-988; Dec. Dig. § 321.*]

3. CHATTEL MORTGAGES (§ 185*)—MORTGAGE OF STOCK OF GOODS—RETENTION OF POSSESSION.

A deed of trust on a stock of merchandise, disclosing on its face intention to permit the debtor to remain in possession and sell and dispose of the property, replenishing the sold goods by new purchases, is fraudulent per se, and void as to creditors, subsequent as well as existing.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 367; Dec. Dig. § 185.*]

4. FORMER DECISIONS DISAPPROVED.

Principles announced in *Conaway's Adm'r v. Stealey*, 44 W. Va. 163, 28 S. E. 793, and *Horne-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869, re-examined and disapproved.

5. FRAUDULENT CONVEYANCES (§§ 126, 208*)—TRANSACTIONS INVALID—PERSONS ENTITLED TO ASSERT INVALIDITY—SUBSEQUENT CREDITORS.

An honest debt may be so used as to hinder, delay, and defraud creditors, no matter how it originated, nor that the creditor is a subsequent one.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 402, 631; Dec. Dig. §§ 126, 208.*]

6. FRAUDULENT CONVEYANCES (§ 126*)—TRANSACTIONS INVALID—PREFERENCE TO SECURE PURCHASE MONEY.

The proviso in section 2, c. 74, of the Code of 1906, protecting a preference, given to secure purchase money, has no application to fraudulent conveyances.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 402; Dec. Dig. § 126.*]

7. FRAUDULENT CONVEYANCES (§ 241*)—SECURITY FOR PURCHASE MONEY.

Section 5, c. 74, Code 1906, relates to title to, and incumbrances upon, property, and the

creditors contemplated therein are lien creditors only.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 697-713; Dec. Dig. § 241.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County. Bill by John J. Gilbert and others against Walter C. Peppers, James T. Darkey, and others. Decree for complainants, and James T. Darkey appeals. Reversed and remanded.

C. O. Strieby, for appellant. Geo. P. Shirley and Cunningham & Stallings, for appellees.

POFFENBARGER, J. James T. Darkey, engaged in the mercantile business in the town of Davis, Tucker county, and owner of a stock of goods and property used in connection therewith, sold the same to Walter C. Peppers, on the 2d day of May, 1904, for the sum of \$2,000, of which sum \$200 was paid in cash. For the balance Peppers executed his 36 promissory notes for the sum of \$50 each, dated May 2, 1904, payable one each month thereafter, and a deed of trust to secure the payment thereof, by which he conveyed the property to C. O. Strieby for that purpose. Peppers took charge of the business, and carried it on for about a year, paying 9 of the notes, and incurring a good deal of other indebtedness, from \$1,200 to \$1,500. Though dated May 2, 1904, the deed of trust was not acknowledged until June 14, 1904. Darkey neglected to record it until the 21st day of February, 1905. About the 1st day of May, 1905, Strieby took possession of the property and closed the store. He advertised it for sale on the 15th day of May, 1905, and adjourned the sale until May 30th. An application for the appointment of a receiver was made by Gilbert Bros. & Co. on May 24th, and on the next day A. L. Helmick was appointed special receiver and took charge of the property. Under a subsequent order of the court he sold it, keeping the proceeds of the sale of the goods that were in the store at the time Peppers bought it separate from the proceeds of those subsequently bought, and put into it by him. The bill set up indebtedness due the plaintiffs, amounting to \$201.59, consisting of a note executed by Peppers for the sum of \$118.73 and an open account amounting to \$82.86. It charged the existence of indebtedness to various other persons. The grounds of relief are (1) that the deed of trust is fraudulent on its face; (2) that it is fraudulent in fact; (3) that the sale to Peppers was fraudulent; (4) that the provision in the deed of trust, purporting to give a lien in favor of Darkey on after-acquired goods does not constitute a lien thereon; (5) that the trustee was about to mingle the new stock with the old and sell it all for the satisfaction of Darkey's claim, to the detriment and injury

of other creditors; (6) that the deed of trust constitutes an unlawful preference in favor of Darkey; and (7) that Peppers had been permitted to retain all the accounts, claims, and demands due him, and was collecting the same. The cause was referred to a commissioner to ascertain and report the debts due from Peppers to the plaintiffs, and other creditors who had come into the suit by petition, and was submitted on his report, the pleadings and the depositions taken, and a decree pronounced holding the deed of trust fraudulent as to the creditors of Peppers, and ordering a pro rata distribution of the proceeds of the property among them, including Darkey. From this decree Darkey has appealed. The creditors are also dissatisfied, and have cross-assigned errors; their contention being that the other creditors should have been given preference over Darkey in the distribution. As the entire proceeds of the sale amounted to only \$700.25, of which \$230 arose from the sale of the after-acquired goods, the position taken by the general creditors would exclude Darkey entirely.

The right of the plaintiffs, Gilbert Bros., to maintain this suit at all is challenged on the ground that they were not in condition to proceed in the manner in which they did. The note was not then due, and the open account bore date on May 17th, the day before the institution of the suit. We held, in *Frye v. Miley*, 54 W. Va. 325, 46 S. E. 135, that an ordinary suit in equity to set aside a fraudulent conveyance cannot be maintained by a creditor whose debt is not due, and that such a creditor, in order to obtain relief, must invoke attachment. If the plaintiffs claimed no debt except the one evidenced by the note, the principle declared in *Frye v. Miley* might require a reversal of the decree and dismissal of the bill. Whether it would or not, in view of the intervention of other creditors, we need not decide, however, since the open account, bearing date one day before the institution of the suit, constitutes a debt for which it could be instituted, and, jurisdiction having been thus conferred, the court could make provision for debts not due and payable, as well as those that were. Although the decree says, by way of recital, the deed of trust is fraudulent because of failure to record it, the fund is disposed of as if it had been regarded as creating an unlawful preference. All the creditors are permitted to share therein ratably. This is not the rule of distribution or priority in cases in which deeds are set aside for fraud. The creditor who first attacks a fraudulent conveyance obtains a lien by the institution of his suit, and preferences among all of them are determined by the dates of the commencements of their suits, if separate suits are brought, or of the commencement of the suit and the filing of petitions, if all assert their rights in the same suit. *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382, 55 L. R. A. 916; *Clark v. Figgins*, 31

W. Va. 156, 5 S. E. 643, 13 Am. St. Rep. 860.

The decree plainly applies the provisions of section 2, c. 74, of the Code of 1906, determining the basis and mode of relief in cases of transfers and charges made by insolvent debtors, attempting to prefer creditors, or to secure some of their creditors to the exclusion and prejudice of others. The provisions of said section, however, are clearly inapplicable, because the suit was not brought within the time prescribed therein. The deed of trust was made on the 2d day of May, 1904. Both grantor and grantee testify to this fact, and the deed of trust itself bears that date. Besides, the record shows the contract of sale of the store bearing the same date, and Peppers then took charge of the business. The failure to have it acknowledged on that day is accounted for in the testimony of Peppers, and nothing to the contrary is disclosed, except the date of the acknowledgment, June 14th. It could do no more than raise a presumption, and it seems not to have even that weight. As between the parties, the deed of trust would be valid without any acknowledgment. The acknowledgment is for the purpose of recordation, and the recordation subverted the purpose of constructive notice to creditors and subsequent purchasers. The presumptions arising from the date of acknowledgment, if any, are not conclusive as to the date of signing and delivery. This conclusion is fully sustained by the principles and reasoning in *Colquhoun v. Atkinsons*, 6 Munf. 550. Any relevant evidence is admissible to prove the real date of delivery of a deed. *Duval v. Bibb*, 4 Hen. & M. 113, 4 Am. Dec. 506. The deed of trust was made on the 2d day of May, 1904, and not admitted to record within eight months after the making thereof, nor was the suit brought within one year after it was made, and the statute provides that the suit must be brought within one year after the transfer or charge was made, or within four months after it was recorded, if recorded within eight months after it was made. Otherwise the transfer or charge is valid as to any preferences or priority thereby given. The general limitation imposed by this provision is one year from the date on which the transfer or charge was made. No suit can be brought after the expiration of such year, under any circumstances; but the limitation will be shortened, if the instrument creating the transfer or charge is recorded within eight months. When it has been so recorded, we must count from the date of recordation, and sue within four months thereafter.

There is no provision in the deed of trust requiring or authorizing the trustee to take possession of the stock of goods; and it clearly contemplates possession by the grantor until default in payment of some of the notes or the interest thereon. The following clause, under several decisions of this court, imports intention that the grantor shall retain pos-

session: "The said notes are for the purchase money on the said stock of goods and fixtures. It is agreed and understood that the 'conveyance' of the said stock of goods shall go as to all future goods that may be placed in the said stock, and that the party of the first part agrees to keep the said stock up in good condition, and not be allowed to fall to a valuation of less than it is now." *Clafin v. Foley*, 22 W. Va. 434; *Shattuck v. Knight*, 25 W. Va. 590, 599.

Until a comparatively recent date this court held all deeds of trust on stocks of mercantile goods, allowing the debtor to remain in possession of the property and sell and dispose of the same, fraudulent and void per se. *Shattuck v. Knight*, 25 W. Va. 590; *Klee v. Reitzenberger*, 23 W. Va. 749; *Livesay's Ex'r v. Beard*, 22 W. Va. 585; *Clafin v. Foley*, 22 W. Va. 434; *Gardner & Co. v. Bodwing's Adm'r*, 9 W. Va. 121; *Kuhn v. Mack*, 4 W. Va. 186. In *Shattuck v. Knight*, Judge Green stated the doctrine as follows: "In a case where a stock of goods, wares, and merchandise is conveyed in a deed of trust to secure debts, the property not to be sold for a considerable time, if there be any provisions in the deed which clearly indicate that the grantor, when he made it, intended to remain in possession of the property until the day of sale, such deed will be regarded as per se fraudulent, precisely as it would be had there been in it an express provision that the grantor should remain in possession of the goods until the day of sale. If such intention appears on the face of the deed, whether it be express or implied, is entirely immaterial." The principle upon which the decisions above referred to stand has been elucidated in a number of them, and is well understood by members of the legal profession. Such a deed of trust, while professing to secure a debt, leaves the debtor in absolute control of the property, and free to sell it and appropriate to his own use the proceeds, and for that reason affords the creditor no security in point of fact, so long as the parties to the instrument see fit to let it operate according to the intent disclosed. As between them it would no doubt secure the debt after maturity, and be enforceable, but it discloses on its face a collusive agreement between debtor and creditor to the prejudice and injury of other creditors of the former. So long as they let it operate in accordance with the intention so disclosed, it does not secure the debt described in it, and yet, if valid, it would preclude any other creditor from resorting to the property for satisfaction of his debt.

In *Clafin v. Foley*, cited, Judge Snyder said: "Such a conveyance is certainly more a protection to the debtor than it is a security to the creditor, and is therefore condemned, as fraudulent and void as to the creditors of the grantor, by numerous deci-

sions in Virginia and this state." In *Lang v. Lee*, 3 Rand. 410, Judge Carr said: "Is it not completely a *felo de se*? A security is taken on goods, and they are left in the possession of the debtor, * * * with a power to sell and dispose of them as he may think proper—no check whatever. Does not this resolve the whole matter into personal security?" In *Sheppard v. Turpin*, 3 Grat. 399, the court said: "Can such a contract between debtor and creditor, the avowed purposes of which rest for their execution upon the good faith of the former, unguarded even by a single covenant, and which may be entirely frustrated by his imprudence or misfortune in trade, be regarded in legal contemplation as constituting a valid security or specific lien on the property conveyed, as against any creditor postponed by it?" A fuller exposition of the principle will be found in *Bump on Fraudulent Conveyances*, § 116. In a note to that section the holdings of the various courts throughout the country are given, and it will appear, by reference thereto, that such deeds of trust and mortgages are held fraudulent and void per se in Alabama, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. In the following states they are said to be presumptively, not conclusively, fraudulent: Arkansas, New Jersey, North Carolina, South Dakota, and Vermont. In some of the states (Kentucky, Maine, Michigan, North Dakota, and Rhode Island) there is no presumption either way. The question is submitted to the jury as one of fact. In California a stock of merchandise cannot be mortgaged at all, the statute prohibiting it. In Georgia such mortgages are legalized by statute; but, even there, retention of possession by the debtor is regarded as a circumstance, tending to show bad faith. The state of the law in Iowa is most peculiar and exceptional. Such mortgages are treated as transfers of title, and the registration statutes applied, but there fraudulent intent, a matter of fact, will invalidate it.

For a great many years, the doctrine of our cases cited has been adhered to by this court, but in *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793, the rule of the Iowa Supreme Court, as recognized in *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 563, 35 L. Ed. 171, was adopted, and a departure so made. The only other case cited in the opinion in *Conaway v. Stealey* as supporting the views therein expressed is *Kreth v. Rogers*, 101 N. C. 263, 7 S. E. 682; and, as has been noted, that decision was pronounced by a court which observes an entirely different principle from that adopted by ours in the earlier cases. In North Carolina such

deeds are never held to be conclusively fraudulent. They are only presumptively fraudulent, and the presumption is rebuttable. *Conaway v. Stealey* was followed in two later cases, *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869, and *Bartles & Dillon v. Dodd*, 56 W. Va. 383, 49 S. E. 414. These decisions do not wholly repudiate the doctrine of the earlier cases. On the contrary, they admit it as the general rule, but establish an exception thereto. The grounds of this exception, as stated, are (1) that the debt secured represents purchase money of the property; (2) that there are no prior or existing creditors who could be prejudiced, or against whom any fraud in the transaction could have been directed; and (3) that the recordation of the deed of trust constitutes notice of the incumbrance to all subsequent creditors, the only class of creditors who could be injured. Upon mature consideration we have concluded that these circumstances do not constitute any exception, and that the reasoning by which they were made to do so, in the three cases just mentioned, is fallacious and unsound. That the debt is for purchase money of the mortgaged property does not change its character as a debt. A debt so created may be made and used as an instrument for the perpetration of a fraud, or a cloak for fraudulent conduct, just as effectively as a debt originating in any other manner. That it is an honest and bona fide debt is a mere circumstance bearing on the question of good faith, when the inquiry is whether there was fraud in fact. It is perfectly apparent that an honest debt may be so used as to hinder and delay creditors and defraud them of their rights, just as the payment of a valuable consideration, even the full value of the property in cash, does not avail to protect a purchase in fraud of creditors, when the intention, on the part of both purchaser and seller, to perpetrate such a fraud has been established. This proposition is elementary in the law of fraudulent conveyances. If, in the case of a bona fide indebtedness, honest and meritorious in all respects, the debtor and creditor agree to use that debt so as to conceal and cover up property of the debtor, so as to shield it from other creditors, and thus establish a secret trust in favor of the debtor, so that the transaction operates, not to secure the creditor, but only to shield the property of the debtor and withhold it from other creditors, this honest debt will become the means of hindering and delaying such other creditors, and depriving them of the means of satisfying their debts. Hence it is perfectly clear that the honesty or verity of the debt mentioned in such a deed of trust is nothing more than a circumstance bearing on the good faith of the transaction. Nor can the fact that the creditors are subsequent and not pre-existing make any dif-

ference. That subsequent creditors may set aside a deed for fraud directed against them has been decided by this and many other courts. *Silverman v. Greaser*, 27 W. Va. 550. "But if it be shown that there was mala fides or fraud in fact, in the transaction, whether the actual fraudulent intent relates to existing creditors, or is directed exclusively against subsequent creditors, the effect is precisely the same, and subsequent creditors may, upon the strength of such fraud, successfully impeach the conveyance." *Lockhard v. Beckley*, 10 W. Va. 87; *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451; *Moore on Fraud, Convey.* pp. 180-189.

The three decisions of this court just mentioned involved questions of fraud in fact, and not fraud in law, it is true, but no reason is perceived why there should be a difference between fraud in fact and fraud in law, as regards the rights of creditors. If fraud in fact, directed against subsequent creditors, will vitiate a deed or other instrument of conveyance, why should not the same thing, written at large on the face of the instrument, have the same effect? Let it be supposed that the owner of a stock of goods, owing nothing, incur a debt and secure it on the merchandise by such a deed of trust as we have here, then on the next day incur further indebtedness. Is not that deed as much an obstruction of the subsequent creditor's right to resort to the property as it would be if his debt had been previously contracted? As to both classes of creditors, such a deed affords protection to the debtor, and no security to the creditor, if it is to operate according to the intent disclosed on its face. That the attacking creditors, in all the cases decided by this court, in which deeds of trust were held fraudulent *per se*, prior to the decision in 44 W. Va., and 28 S. E., happened to be existing creditors is a mere circumstance which does not affect the principle, and affords no reason for saying it is not applicable in the case of subsequent creditors. The language of the old decisions is that such a deed of trust is fraudulent and void as to creditors. The terms in which the rule has been expressed do not limit it to existing creditors, and all the reasons for holding it void as to existing creditors are applicable to the case of a subsequent creditor. He has just the same right at law and in equity to resort to the property of his debtor for satisfaction of his debt as a prior creditor, and the deed, if permitted to stand, would bar him just as effectually. How, then, can it be said that it does not hinder, delay, and defraud him within the meaning of the statute against fraudulent conveyances? The exception made in section 2, c. 74, of the Code of 1906, protecting securities given for purchase money, does not apply to this question. That section relates to preferences, not fraud, and we need hardly remark that the distinction between fraud and preference of a creditor is well

known and universally recognized. It only provides that a security given for purchase money of property by an insolvent debtor shall be valid, although it creates a preference in favor of the creditor. This it says by way of exception to the general declaration of legislative will that all securities given by such a debtor for the purpose of preferring any creditor, shall be taken for the benefit of all his creditors who shall claim the benefit thereof, not that it shall be deemed fraudulent as to anybody. The argument founded upon the recordation of the deed of trust is equally fallacious. Section 5, c. 74, of the Code of 1906, declaring contracts and deeds void as to creditors and subsequent purchasers for valuable consideration, without notice until and except from the time that it is duly admitted to record in the county where the property embraced in such contract or deed may be, does not contemplate general creditors. As to them it is valid, whether recorded or not. A mere personal debt bears no relation to the property of the debtor, since it does not constitute a lien thereon. Before a creditor can claim any legal right in respect to the property of his debtor, or any interest therein, in law or equity, he must by some means acquire a lien thereon, as by an attachment or reduction of his debt to judgment. *Moore v. Tearney*, 62 W. Va. 72, 57 S. E. 263; *McCandlish v. Keen*, 13 Grat. 615; *Dulaney v. Willis*, 95 Va. 608, 29 S. E. 324, 64 Am. St. Rep. 815.

In *McCandlish v. Keen*, Judge Lee, speaking of this statute, said: "It was not designed to make any change in the kind or character of the debts which would entitle creditors to assail an unrecorded deed, but to define the class of creditors as to whom, if their debts were of the kind and character authorizing them to call it in question, an unrecorded deed would be void. This is apparent from the context, for the section declares that the words 'creditors' and 'purchasers,' where they occur, are not to be restricted to the protection of creditors of and purchasers 'from the grantor,' but are to embrace all who but for the deed would have had title to the subject, or a right to subject it to their debts. It was intended to settle by statutory provision the question so much controverted in the cases of *Pierce v. Turner*, 5 Cranch, 154, 3 L. Ed. 64, *Land v. Jeffries*, 5 Rand. 211, and *Thomas v. Gaines*, 1 Grat. 347, and which was decided in the last-named case in conformity to the decision in *Anderson v. Anderson*, 2 Call, 198, and overruling *Pierce v. Turner* and the opinions of Judges Carr, Coalter, and Brooke in *Land v. Jeffries*; but it made no change in the well-settled rule which required a creditor who would assail an unrecorded deed to show that he had some lien, by judgment or otherwise, entitling him to charge the subject conveyed, specifically." It is to be observed here again that recordation, re-

quired by this statute, has no relation to the subject of actual or legal fraud. It relates to title and rights respecting property, in cases in which the parties are free from fraudulent intent. Its object is in conformity with the purpose of the whole scheme of registration of title papers. Its mandate is that the claimant of title to property, or a lien upon property, shall make the evidence thereof public, so that others, dealing with the property, not merely with the owner of it, may know what its status is, who owns it, and what incumbrances are upon it. It declares the deed void as to lien creditors and subsequent purchasers for failure to record it, not fraudulent as to anybody or for any cause.

Much as we regret to disapprove and overrule decisions of this court, we are constrained, by the weighty reasons of public policy which, centuries ago, impelled the passage of the statutes against fraudulent conveyances, to overrule *Conaway v. Stealey* and *Horne-Gaylord Co. v. Fawcett*. In our judgment they open the door to the perpetration, with impunity, of fraudulent practices, by means of such sales and deeds of trust as are disclosed by this record. There may be, and no doubt are, instances in which the intention of the parties is free from fraud, but this form of security, if upheld, will afford the means of robbing subsequent creditors without fear of detection, and with the assurance that the courts are powerless to prevent it. A failing merchant, or a solvent one having a store in a bad place, would be required to do no more, in order to profit at the expense of wholesale dealers, than make a pretended sale to an irresponsible party on credit, at any price they may see fit to adopt, and take such a deed of trust on the stock as we now have under consideration, and let the store continue to operate under it as long as the pretended purchaser can obtain credit. *Bartles & Dillon v. Dodd* may possibly be sustainable on principle, as the property, except a small portion thereof, was not consumable in its use, nor perishable, nor intended to be sold.

For the reasons given, we reverse the decree and remand the cause, for distribution of the fund in accordance with the principles herein stated.

BRANNON, J. I dislike to overrule cases. I did not really agree to the decision in *Horne-Gaylord v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869. I urged that it was not clear law. My real opinion appears in a note I filed at the time, which, by omission of the reporter or clerk, was not published in 50 W. Va., but will be found in 57 L. R. A. 809; and 40 S. E. 564. It was also published out of place in a later volume of state reports. So I have not changed my opinion upon the subject, as said note will show.

(150 N. C. 519)

**MARLER-DALTON-GILMER CO. v.
WADESBORO CLOTHING &
SHOE CO.**

(Supreme Court of North Carolina. April 21, 1908.)

**1. JUSTICES OF THE PEACE (§ 192*)—REVIEW—
WRIT OF RECORDARI.**

The writ of recordari may be used, under Revisal 1905, § 584, either as a substitute for an appeal from a judgment of a justice of the peace to have a new trial on the merits, or as a writ of false judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 759; Dec. Dig. § 192.*]

**2. PROCESS (§ 141*)—RETURN—CONCLUSIVE-
NESS.**

The sheriff's return of a summons with an entry of service is sufficient, prima facie, that it has been served as the statute directs.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 189; Dec. Dig. § 141.*]

**3. JUSTICES OF THE PEACE (§ 202*)—REVIEW—
WRIT OF RECORDARI—PROCEEDINGS TO PRO-
CURE.**

On an application for a writ of recordari on the ground that a defendant has been improperly joined merely to confer jurisdiction, whether there was a misjoinder of defendants is not before the court as on demurrer or answer.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 202.*]

**4. JUSTICES OF THE PEACE (§ 81*)—PROCESS—
SERVICE OUTSIDE OF COUNTY.**

Revisal 1905, § 1447, providing that no process shall be issued by a justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county, in which case only he may issue process to any county in which any such nonresident defendant resides, makes the right to serve process on a defendant outside the county of the justice depend somewhat on the good faith of plaintiff in joining the defendants as parties.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 81.*]

**5. JUSTICES OF THE PEACE (§ 199*)—REVIEW—
WRIT OF RECORDARI.**

An applicant for a writ of recordari must show merit in his case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 773; Dec. Dig. § 199.*]

**6. JUSTICES OF THE PEACE (§ 202*)—REVIEW—
WRIT OF RECORDARI—LACHES.**

An applicant for a writ of recordari must show that he has not been guilty of laches.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 202.*]

**7. APPEAL AND ERROR (§ 1008*)—REVIEW—
QUESTIONS OF FACT—FINDINGS BY COURT.**

The Supreme Court is concluded by the facts found by the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

Appeal from Superior Court, Forsyth County; Council, Judge.

The Marler-Dalton-Gilmer Company recovered a judgment against the Wadesboro Clothing & Shoe Company in a justice's court, and thereafter defendant applied to the superior court for a writ of recordari

and a supersedeas. Judgment for plaintiff denying the application, and defendant appeals. Affirmed.

B. S. Womble and McLendon & Thomas, for appellant. L. M. Swink, for appellee.

WALKER, J. The plaintiff sold a case of merchandise to the defendant for \$118.18, and shipped the same to the defendant at Wadesboro, N. C., by the Southern Railway Co. and the Seaboard Air Line Railway Co., taking a bill of lading therefor. The defendant represented to the plaintiff that it had not received the goods, and refused to pay the debt, whereupon the plaintiff sued the two railway companies and the defendant before a magistrate in Forsyth county, and caused a summons to be issued for the defendant, in the manner prescribed by the statute, to Anson county. This summons was returned by the sheriff of the latter county with an entry of service indorsed on the summons. At the trial before the justice the defendant did not appear. Upon the evidence introduced judgment was rendered against the defendant for the amount of the debt, with interest and costs, and in favor of the railway companies. The defendant received notice of the judgment on July 9, 1908. The next regular term of the superior court of Forsyth county commenced on July 27, 1908. At the next, or September, term, in the year 1908, the defendant applied to the superior court for a writ of recordari and a supersedeas, upon the general ground that the Southern Railway Company had been improperly joined as a party defendant in the suit before the justice, for the purpose of conferring jurisdiction upon him. The judge, at the request of the defendant, found and stated the facts, and, among other findings, are these: That the defendant admitted the debt, and that the plaintiffs acted in good faith in joining the railway companies as defendants, and that the joinder was not made for the purpose of conferring jurisdiction. He further found that the defendant's prayer for relief before him was that it be allowed to plead to the original action. In the petition for the recordari, the plaintiff prayed that the papers in the cause be transmitted to the superior court by the justice.

The writ of recordari may be used, under the statute (Revisal 1905, § 584), either as a substitute for an appeal, or as a writ of false judgment. In *Weaver v. Mining Co.*, 89 N. C. 198, it was said by the court that "the writ of recordari under the former practice, and retained in the new, as has been often declared, is used for two purposes; the one, in order to have a new trial of the case upon its merits—and this is a substitute for an appeal from a judgment rendered before a justice—the other, for a reversal of an erroneous judgment, performing in this re-

spect the office of a writ of false judgment." See, also, *Caldwell v. Beatty*, 69 N. C. 399; *Morton v. Rippy*, 84 N. C. 611. In the two cases last cited it is held that the writ may be resorted to in the first instance, and without moving before the justice to set aside the judgment, where it is alleged that the latter had no jurisdiction of the defendant, no process having been served upon him, and that the judgment is therefore void. But the facts of this case, as found by the judge at the request of the defendant, do not bring it within the principle announced in either of those cases, for here the judge has found all the essential facts in favor of the plaintiff and against the defendant. He has found specifically that the railway companies were joined in good faith, and not for the purpose, alleged by the petitioner, of conferring jurisdiction upon the magistrate who issued the process and tried the case. The defendant does not contend that the summons was not actually served upon it, but attacks the sheriff's return as insufficient to show a proper service. That officer returns that he did serve the summons upon the defendant, and we have decided that, when such a return is made, it carries with it, *ex vi termini*, the idea of a full performance of all that the law requires, or, in other words, that the process has been served as the statute directs. It is *prima facie* sufficient until it is made to appear, in some proper way, that in fact there was no service. There is no such evidence or finding in this case. Indeed the defendants are silent as to the fact of actual service in their affidavits, and the judge states in his findings of fact that the only position taken before him by the defendant was that the suit had been improperly brought before the justice in Forsyth county. As to this matter the findings of fact, as we have said, are all against the defendant. Whether there was a misjoinder of defendants is a question which is not now before us, as upon demurrer or answer. There seems to have been a fair contention, raising a serious doubt, as to whether the defendants were liable to the plaintiff. At least this is a reasonable deduction from the findings of the court.

The statute (Revisal 1905, § 1447) is as follows: "No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides." The language of the statute would seem to make the question of jurisdiction, or the right to serve process on a defendant outside the county of the justice, to depend somewhat upon the good faith of the plaintiff in joining the defendants as parties. In certain cases, perhaps, it may be so plain that the

plaintiff has no real or bona fide claim against the defendant, who is a resident of the county in which the suit is pending, that the question of misjoinder may be presented as one of law. However this may be, it is found in this case that the railway companies and the defendant were joined as defendants bona fide, and not for the fraudulent purpose alleged by the defendant.

It is generally held that the applicant for the writ of recordari must show merit in his case, and also that he has not been guilty of laches. *Pritchard v. Sanderson*, 92 N. C. 41; *March v. Thomas*, 63 N. C. 249; *In re Brittain*, 93 N. C. 587. Whether this rule applies where the sole question is one of jurisdiction, we need not decide.

This case was ably presented for the defendant by counsel; but, the facts having been found against the defendant by the court, we are concluded by them, and it follows that there was no error in the order dismissing the petition.

Affirmed.

(150 N. C. 517)

SUTPHIN et al. v. SPARGER et al.

(Supreme Court of North Carolina. April 21, 1906.)

1. HIGHWAYS (§ 72*)—ALTERATION—APPEAL—TIME FOR TAKING.

An appeal from the county commissioners in proceedings to change the location of a road must be taken at the term at which the report of the road commissioners is confirmed.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 248; Dec. Dig. § 72.*]

2. HIGHWAYS (§ 58*)—ALTERATION—APPEAL—DOCKETING OF APPEAL.

Appeals from the county commissioners in highway cases are governed by the rules applying to appeals from justices of the peace, and must be docketed at the first ensuing term of the superior court.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 190; Dec. Dig. § 58.*]

3. HIGHWAYS (§ 72*)—ALTERATION—APPEAL—BOND ON APPEAL.

On appeal from county commissioners in proceedings for the alteration of a road, a bond must be given, as required by Revisal 1905, § 2690.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 248; Dec. Dig. § 72.*]

Appeal from Superior Court, Surry County; Webb, Judge.

Action by Walter A. Sutphin and others against James A. Sparger and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Under authority conferred by chapter 409, p. 590, Laws 1897, the county commissioners of Surry on the first Monday in March, 1903, appointed three road commissioners for said county. By section 1 of said act the road commissioners of said county were authorized, upon petition of a prescribed number of citizens and landowners, to lay out or change

any public road of said county. Soon after their appointment, the road commissioners, acting upon a petition presented to them to change the grade and straighten the road in question at certain points, after viewing the same and upon notice of the hearing, laid off and staked out the changes. Some of the parties made no charge for damages, and the total amount assessed for those who claimed damages was \$40. The road commissioners made their report to the county commissioners at their regular session on the first Monday in April, 1908, who confirmed the same. No exception was filed and no appeal was taken. An overseer was appointed who worked out the road, as laid off, and made his report to the county commissioners at an adjourned meeting September 21, 1908, when the report of the overseer was confirmed, and the road turned over to the supervisors of that township. On September 26th a notice of appeal by plaintiff was served. The next term of the superior court for Surry was held in November, but the appeal was not docketed at that term nor till February term, 1909. The plaintiff obtained in February, 1909, a restraining order against the defendant Sparger, the road overseer, to prevent his working the road. The defendants moved to dissolve the restraining order. The court refused the motion, and continued the restraining order to the hearing. The defendants appealed.

W. F. Carter, for appellants. V. E. Holcomb, for appellees.

CLARK, C. J. The plaintiff's appeal did not put the case in the superior court.

1. The appeal should have been taken at the April term of the county commissioners when they confirmed the report of the road commissioners and ordered the changes in the road to be laid out and worked. *McDowell v. Insane Asylum*, 101 N. C. 656, 8 S. E. 118. The plaintiff should not have waited till after the work was done and the expense incurred by the public.

2. The plaintiff has further slept on his rights, in that, when he did appeal, he did not docket his appeal at the first term of the superior court thereafter, in November, 1908. Appeals from county commissioners are governed by the rules applying to appeals from justices of the peace (*Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804), and must be docketed at the first ensuing term of the superior court. The docketing at February term was a nullity. *Davenport v. Grissom*, 113 N. C. 38, 18 S. E. 78.

3. Besides, it seems that the plaintiff did not give the appeal bond required by Revisal 1905, § 2690. The new road having been laid off and worked, and the old road abandoned, it is a serious inconvenience to the public to enjoin the working of the new road, which alone can be used, for the old road

has been discontinued, and there is no authority to use it.

The restraining order was improvidently granted, and the motion to dissolve it should have been allowed. An order to that effect will be entered here. *Griffin v. Railway* (at this term) 64 S. E. 16.

Reversed.

(150 N. C. 507)

UMSTEAD et al. v. BOWLING et al.

(Supreme Court of North Carolina. April 21, 1909.)

1. WITNESSES (§ 159*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Testimony that testator rode with witness to a certain place and left him in front of a store, and as to the relative positions of testator and others when they witnessed his will, is not as to personal transactions or communications between witness and testator within the prohibition of Revisal 1905, § 1631.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 667-669; Dec. Dig. § 159.*]

2. WILLS (§ 117*) — SIGNING — PRESENCE OF WITNESSES.

It is not necessary that testator sign his will in the presence of the attesting witness, but is enough if he acknowledges his signature, declares the paper to be his will, and that they sign at his request and in his presence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 299, 300; Dec. Dig. § 117.*]

3. WILLS (§ 302*) — ATTESTING WITNESSES — SIGNING IN PRESENCE OF TESTATOR.

Evidence on a trial of an issue of *devisavit vel non held* sufficient to authorize a finding that the attesting witnesses signed in the presence of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 700; Dec. Dig. § 302.*]

4. WILLS (§ 117*) — ATTESTING WITNESSES — SIGNING IN "PRESENCE OF TESTATOR."

A signing by attesting witnesses is in the "presence of testator" if he is in a position where he might see them attest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 299; Dec. Dig. § 117.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5526-5528.]

5. WILLS (§ 324*)—UNDUE INFLUENCE—EVIDENCE.

Evidence on a trial of an issue of *devisavit vel non held* insufficient to go to the jury on the question of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769; Dec. Dig. § 324.*]

6. WILLS (§ 272*)—TRIAL OF ISSUE OF DEVISAVIT VEL NON—TITLE OF CASE.

There being no parties in the usual sense to a trial of an issue of *devisavit vel non*, the case should be stated "In re Will of," etc.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 272.*]

Appeal from Superior Court, Durham County; Long, Judge.

Proceeding between Nannie L. Umstead and others, caveators, and E. H. Bowling and others, propounders. From the judgment, caveators appeal. Affirmed.

The propounders offered a paper writing purporting to be the last will and testament*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of William Bowling, deceased, for probate before the clerk of the superior court of Durham county. The caveators filed a caveat in due form, and filed the bond as prescribed by the statute, whereupon an issue was prepared and transferred to the superior court for trial. The jury answered the issue in the affirmative, and judgment was rendered in accordance therewith. The caveators noted exceptions to his honor's rulings upon the admission of testimony and instructions to the jury, and appealed. The exceptions are set forth in the opinion.

Manning & Foushee, J. F. Cothran, and D. W. Sorrell, for appellants. Aycock & Winston and Bryant & Brogden, for appellees.

CONNOR, J. The caveators lodged a large number of exceptions, but in their brief discuss only those which go to the merits of the controversy. The evidence tended to show that the testator signed the paper writing at his home and took it with him to Rougemont, a village nearby, where he requested Mr. Flintom and Mr. Lawson to witness it. B. P. Bowling, son of the testator, one of the executors and devisees, testified: "I saw the paper writing now shown me purporting to be the will of Capt. Bowling. My father signed it before he carried it down to the store that morning. He signed it that day before he left home. It was in the evening, right after dinner. I went with my father to Rougemont. We traveled in a buggy." Counsel proposed to ask the witness: "State what your father said and did when he reached Rougemont when he saw Squire Flintom and Mr. Lawson. (Caveators objected; overruled; exception.) Where was this paper now shown you, purporting to be his will, at that time, if you know? (Objection.) The court allowed witness to state, if he knew, the locality of the paper, where he saw it, but does not allow him to make any statement as to any transaction or communication between himself and his father. (Exception.)" The witness proceeded to say that he carried his father in his buggy to Rougemont; that his father got out of buggy in front of store of Carver & Lawson; that witness drove down the road, tied his horse, and went back to store; that his father, Flintom, and Lawson had gone into the store. He described the position of his father and the other persons in the store, saying that from where his father was standing at the time Lawson and Flintom were at the desk, his father could see them and the top of the desk—a paper on the desk. Caveators excepted. The first five exceptions are directed to the admission of this testimony, and are based upon the alleged incompetency of the witness to testify to any transaction or communication with his father. The record shows that his honor carefully confined the testimony to what he saw his father do, and excluded any evidence of declarations or conversations. It

will be noted that no objection was made to the testimony of the witness that his father signed the will before going to Rougemont.

It is decided in *Pepper v. Broughton*, 80 N. C. 251, that the inhibition of section 1631 of the Revisal of 1905 applies to the trial of an issue of *devisavit vel non*, that persons excluded on account of interest to testify in regard to transactions or communications with the deceased, the validity of whose alleged will is involved, are within the statute. The correctness of his honor's ruling depends upon whether the witness was permitted to testify to a communication or transaction with the deceased. It has been found impracticable to give a satisfactory definition to the words used in the statute for the purpose of establishing a precedent for cases as they arise. Many of the cases found in the reports are very near to the line which separates those which come within the language and mischief intended to be avoided. The interpretation of the words "transaction or communication" as they are used in the statute, which was introduced into our law by Code Civ. Proc. 1868, was first considered in *Whitesides v. Green*, 64 N. C. 307, in which Rodman, J., said: "No interested party shall swear to a transaction with the deceased to charge his estate because the deceased cannot swear in reply. * * * But there is no prohibition against the witness testifying as to any matter other than a transaction or communication with the deceased." In *Gray v. Cooper*, 65 N. C. 183, it was held that the plaintiff was competent to prove that the defendant's intestate "had and enjoyed the services of slaves," for whose kin the suit was brought because it was "a fact which the plaintiff might know and which he says he did know otherwise than from a transaction or communication with the intestate." In *March v. Verble*, 79 N. C. 19, plaintiff was permitted to testify that he had but one animal, for the price of which the action was being tried. Smith, C. J., said: "The plaintiff did not testify to any conversation or transaction with the intestate within the meaning of the statute, but to a substantive and independent fact." In *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225, it is said that an interested witness may testify what he saw the deceased do—as that he saw the deceased stand off with the money and bring back the deed. *Lane v. Rogers*, 113 N. C. 171, 18 S. E. 117. In *Davidson v. Bardin*, 139 N. C. 1, 51 S. E. 779, Clark, C. J., said: "The plaintiff was competent to testify that he went to the house of the defendant's intestate, and his condition, and what he saw or heard, so long as these were independent facts, and did not tend to show a communication or personal transaction." *Johnson v. Rich*, 118 N. C. 268, 23 S. E. 1007. With the light thrown upon the subject by these decisions and "upon the reason of the thing," we conclude that the witness B. P. Bowling was competent to testify within the limitations

prescribed by his honor. The fact that the testator rode to Rougemont with the witness, and that he left him in front of the store, cannot reasonably be said to be personal transactions or communications. The testimony in regard to the position of the attesting witnesses and the desk and counter in the store are manifestly independent facts. We do not express any opinion upon the competency of witness to say that his father signed the will before he left home, because there is no objection to the admission.

Caveators insist that the testimony does not show that the attesting witnesses signed their names in the presence of the testator. The testimony upon this point tended to show that Capt. Bowling, the testator, went to the home of Mr. Flintom, and said to him that he wanted him to witness his will; wanted to know where Mr. Lawson was; wanted them to witness his will. They met Mr. Lawson at the store. He says: "Immediately after Capt. Bowling pulled out his paper and gave it to me and Mr. Lawson, and we went in the store in a little room where Mr. Carver did his writing, and I signed the paper. Captain was 20 or 25 feet from the front door of the store when he handed me the paper. * * * The desk was opposite the door. The gap was two feet from the desk. There was a little screen about 2½ feet square placed on the desk. This cut the view from the desk if you stand on the floor opposite the desk. The screen don't cut off the view of a person who was in the gap between the counter. When I signed my name, I was in that place. The paper was on a little writing desk or table, which desk had the screen to it. * * * Mr. Lawson signed it at the same time. We were both together in each other's presence. * * * I think a person standing where Capt. Bowling was when he handed me the will could have seen the desk through the window that I speak of. * * * The bench on which Capt. Bowling was sitting was 10 or 12 feet from the window opposite the desk."

Mr. Lawson testified substantially as the other attesting witness in regard to the place at which they signed and the position of testator. He also testified that Capt. Bowling said to him that he had a paper which he wanted Mr. Flintom and himself to sign for him—that it was his will—that he took it from his pocket and handed it to Mr. Flintom. It was folded.

William Mangum, who was present at the time, and described the location of the parties, said: "It seems to me that Capt. Bowling was in plain view of that desk from where I last saw him. Could not have been more than three feet."

E. W. Thacker said: "I happened to be at Rougemont when Capt. Bowling, Lawson, and Flintom came in and went behind the counter. I was standing back of the store, and Capt. Bowling said something to me;

said he came to have his will signed. I said: 'You did?' He said 'Yes,' and some one passed along and said, 'What did he say?' and I said: 'He came to have his will signed.' I was standing 12 or 15 feet from the desk. Capt. Bowling was standing at the gap. The gap is only two feet from the desk. He was standing at the gap, and could see both the desk and the paper."

H. L. Carver said: "A man standing in the gap could easily see the desk."

The testator was 84 years of age when he signed the will. The caveators introduced no evidence. They submitted a large number of prayers involving different phases of the testimony in regard to the position of the testator at the time the witnesses attached their names to the will, and his ability to see them do so. Several were given as asked, and to the refusal to give other and the giving of general instructions they assigned error. It is neither necessary nor practicable to set out all of the prayers or discuss all of the assignments of error. We have carefully examined them, and think that they are embraced in the instructions given in so far as they were correct propositions of law. While the subscribing witnesses do not testify directly that the testator was in a position from which he could see them at the time they signed the will, and it may be conceded that their testimony leaves the question in doubt, the other witnesses who were present and in a position to observe the transaction testified very clearly as to this point. The other witnesses do not contradict the testimony of the attesting witnesses, but make the matter very much clearer.

His honor instructed the jury that it was not essential to the valid execution of the will that the testator signed in the presence of the witnesses. This is sustained by authority. It is sufficient if he acknowledge his signature and declare the paper to be his will, and that they sign as attesting witnesses at his request and in his presence. Whether this requirement is met is usually for the jury under the direction of the court. We think that there was evidence proper for the consideration of the jury. The only question presented upon the exception is whether his honor correctly instructed them upon the law. He instructed the jury: "If you find from the evidence and by the weight of the evidence that P. A. Flintom and J. J. Lawson signed their names as witnesses to the paper offered in evidence at the time they say they signed or subscribed their names as witnesses to the paper writing, that William Bowling was in a position where he did or could have seen them sign or subscribe their names, this would be a signing in the presence of William Bowling in compliance with the law, if you find the facts to be as herein cited. In order to make a valid will, it was not necessary that Mr. Bowling sign in the presence of the subscribing witnesses at the time they subscribed their names to it, provided he had

signed the same when he handed it to them to witness the paper. If you find that the two witnesses signed their names to the script that has been offered in evidence, and that the same was already signed by William Bowling before these parties signed their names to the paper, and if you find from the evidence that at the time the two witnesses signed the paper that William Bowling was standing between the gap in the counter and within three or four feet of the desk upon which the witnesses were signing the paper, and if you find from the evidence, further, that Mr. Bowling had his face in the direction of where the witnesses were signing the paper and actually saw them, and also the paper writing that they were signing, and if you find that he was standing close enough to them to see them and the paper writing, if he desired to do so, and there was nothing obstructing the view between him and the witnesses as they were signing the paper and the paper they were signing, and if you find that they at the time when they were thus in a position to see them and see the paper writing he was in a position to see the paper writing and see them, and see what it was they were subscribing their names to, and you find that they, under these circumstances, did sign their names to the paper—this would be a signing of the paper agreeable to the requirements of the statute, and, nothing else appearing, you would answer this issue in favor of the propounders—that is to say, you would answer it 'Yes.' If at the time they signed this paper, if you find they did sign it, if you find that he was in a position where he could not see them nor see the paper nor see them sign the paper, and you find that under these circumstances they did sign this script—that is to say, at a time when he was not in a position where he could see them nor the paper writing nor see them sign it—this would not be a signing of the paper in his presence as required by the statute, and you would answer it 'No.' If you find from an examination of the evidence that Mr. Bowling was standing on the porch not far away from where the witnesses Flintom and Lawson were, and that he was in a position that he could see the witnesses and the paper writing in controversy, and could see them sign their names to the paper writing, and if you further find that he was only a few feet away at the time, and you further find that he had himself prior to that time signed the paper writing, these facts, if you find them to be so, would be a compliance with the statute, and nothing else appearing, you would answer the issue 'Yes.' But if you find that he had signed the paper and the witnesses themselves had subscribed their names to it, but at the time that they did so that he was on the porch and at a place where he could not see them nor the paper they were signing, this wouldn't be a compliance with the statute, and, if you find the

facts so to be, your answer to it would be 'No.' If you find from the evidence that William Bowling was in the store at the time the paper writing was witnessed by Mr. Flintom and Lawson, and that he was in such a position that he could see the instrument as it was placed upon the desk and at the time they subscribed it as witnesses, and if you find that they did so, and further find he was in such a position at the time that he might see them sign their names to the instrument, and see the instrument and see them sign it, and you further find he had previously signed the instrument himself, these facts, if you find them so to be, nothing else appearing, would be a compliance with the statute, and you would answer the issue 'Yes.' You may consider also whether this was openly done, whether the room where the alleged signature was made was light at the time, and whether the said witness returned the said paper to Mr. Bowling. The jury will also consider the evidence that relates to the size of the room, of the distance of Mr. Bowling from the subscribing witnesses, the position of the window and that of the counter, and especially of the desk, the localities of the parties, both the witnesses and Mr. Bowling, and all of the other facts and circumstances that have been given in evidence by the defendant's witnesses. If, after reviewing all the evidence, your minds reach the conclusion from the evidence, and by the greater weight of it, that the paper writing was executed by the said William Bowling, witnessed by Flintom and Lawson in his presence, you would answer the issue 'Yes.' That the deceased, William Bowling, must actually have seen, or been in a position to see not only the witnesses, but the paper writing itself at the time the witnesses signed the same, and that if the jury shall believe from the evidence that he did not see the paper writing and the witnesses at the time that the witnesses signed it, they should answer the issue 'No.'"

We think these instructions are fully sustained by the authorities. In *Bynum v. Bynum*, 33 N. C. 632, Ruffin, C. J., said: "Actual view is never necessary, but it is sufficient if the party might see the witnesses at test though in a different as well as in the same room; for, if actual sight were requisite, if a man did but turn his back or look off, though literally present by being at the spot when the thing was done, the attestation would be invalid." In *Cornellius v. Cornellius*, 52 N. C. 593, Judge Manly said: "The strictest interpretation of the law has gone no further than to require the testator should be in a position and have power, without a removal of his person, to see what was done. It is not necessary for him, in fact, to see." *Burney v. Allen*, 125 N. C. 314, 34 S. E. 500, 74 Am. St. Rep. 637. The examination of the testimony in these cases will show that they are direct authorities to sustain

his honor's instructions. "If the testator is able to see the attestation by the witnesses, it is not material to prove that, in fact, he did not see it. But he must be able to see the witnesses subscribe the will, or, to define the rule more clearly, their relative position to him at the time they are subscribing their names as witnesses, whether they are in the same room with him or not, must be such that he may see them if he thinks proper to do so; * * * for the purpose of the law is not so much to secure a signing of the names of the witnesses in the actual view of the testator as to afford him an opportunity to detect and to prevent the substitution of another will in the place of that which he has signed." 1 Underhill, Wills, § 196. The instructions are very full and present every phase of the testimony. His honor instructed the jury that there was no evidence of fraud or undue influence. The testimony showed that the testator had been married twice, and had living children by both wives; that two days before making his will he executed deeds for several tracts of land, aggregating 2,400 acres, to his children by his second marriage. It will be observed that in the fourth item of the will he says: "To the children of my first marriage I have heretofore given as much property as I intended for them, and therefore I make no further provision for them." He directs payment of a bond of \$849, which he had given to the clerk, to his children by his first marriage. He had given them some lands of small value. He was 84 years of age when the will was executed in 1903, and died in 1907. There is no suggestion of any other circumstances relied upon to show undue influence. We concur with his honor that there was no evidence fit for the consideration of the jury tending to sustain the allegation.

We have examined the entire record and the briefs of counsel, and find no error. The case was carefully tried and fairly submitted to the jury. We note a want of uniformity in the manner of stating cases involving the trial of an issue of *devisavit vel non*. It would seem that, in view of the fact there are no parties in the usual sense of the term, the case should be stated "In re Will of," etc. There is no error.

(150 N. C. 523)

PRICE et al. v. GRIFFIN et ux.

(Supreme Court of North Carolina. April 21, 1909.)

1. DESCENT AND DISTRIBUTION (§ 1*) — "HEIRS"—WHO ARE.

No one can be heir to the living; one's heirs being his surviving descendants who are capable of inheriting.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 3; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

2. DEEDS (§ 90*)—CONSTRUCTION—CONTEXT.

The context of a deed may be examined to determine the true meaning of ambiguous words therein.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 236; Dec. Dig. § 90.*]

3. DEEDS (§ 128*)—ESTATE GRANTED—RULE IN SHELLEY'S CASE.

Where a conveyance was to one for life and at his death to his surviving heirs, and the covenant for quiet enjoyment ran to the grantee and to his heirs and assigns forever, the grantee took a fee; the word "surviving" being mere surplusage, and not preventing the application of the rule in Shelley's Case.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415; Dec. Dig. § 128.*]

Appeal from Superior Court, Wayne County; Neal, Judge.

Action by B. A. Price and others against G. O. Griffin and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

M. T. Dickerson and H. L. Stevens, for appellants. Isaac F. Dortch, F. A. Daniels, and Aycock & Winston, for appellees.

WALKER, J. This is an action for the partition of land. In March, 1879, Jesse Price, Sr., who was then the owner of the land in controversy, conveyed the same by deed to his son, John C. Price, during the term of his lifetime, and at his death to his surviving heirs, reserving to Jesse Price, Sr., the grantor, an estate for life in the land. Jesse Price, Sr., died in 1879, and John C. Price on January 15, 1883, conveyed the land by deed to W. P. Price in fee simple. John C. Price died on April 6, 1906, leaving as his heirs four children, B. A. Price, E. H. Price, A. B. Price, and Bettie Pearsall, who are the plaintiffs, and W. P. Price, Lewis H. Price, John T. Price, and C. D. Price. The defendant G. O. Griffin has acquired the interest of W. P. Price and C. D. Price by deeds duly executed to him in 1884, before this proceeding was commenced. If the deed from Jesse Price, Sr., to John C. Price conveyed a fee-simple estate to the latter, the plaintiffs are not entitled to recover, so that the only question in the case is whether it conveyed a fee or only a life estate with remainder to his children surviving him. The difficulty presented in the cases arises from the use of the word "surviving" prefixed to the word "heirs," but we do not think this is sufficient to render inapplicable the rule in Shelley's Case to this limitation. It is said that, as one of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance, it only applied to those limitations in which the word "heirs" (or some equivalent word of inheritance) is used on account of the maxim, "Nemo est hæres viventis." As under this maxim no one can be heir to a living person, the word "heirs" must necessari-

ly refer to those who survive the ancestor, and the word "surviving" therefore is mere surplusage, just as we have held that the word "lawful" in a limitation to the "lawful heirs" of a person has no significance and does not restrict the ordinary meaning of the word "heirs." *Wool v. Fleetwood*, 136 N. O. 460, 48 S. E. 785, 67 L. R. A. 444.

In *Criswell's Appeal*, 41 Pa. 283, Judge Strong (afterwards a justice of the Supreme Court of the United States), for the court, said: "It is said there could be no other heirs than such as were living at the death of the ancestors; that the words 'then living' would be superfluous, unless the testator intended children by 'heirs'; and that, in order to give meaning to those words, the technical words of limitation must give way, and be treated as only a description of persons. We are not convinced by the argument. Let it be admitted that the words 'then living' are strictly of no legal meaning, when applied to heirs, this is no sufficient reason for holding that the testator in the use of technical words of limitation intended to depart from their ordinary legal meaning. It is not so easy to overcome the presumption. The words 'heirs' and 'heirs of the body' will retain their significance, though the effort be to make unmeaning other words in the will not technical, and even though there may be inconsistent expressions. If the words are repugnant, why should the word 'heirs' give way, rather than the words 'then living'? In the will of an unlettered man, however, they can hardly be called repugnant. Lawyers may understand that there are no heirs of a living person, or that the phrase 'living heirs' is a superfluous addition to a gift to heirs; but laymen may not." He adds that the books are full of cases in which it has been held that superfluous expressions in a will do not suffice to reduce the words "heirs" or "heirs of the body" into words of purchase, so as to make them the root of a new inheritance, or the stock of a new descent or *descriptio personarum*. Chancellor Kent (4 Kent's Comm. [13th Ed.] 226) says that Mr. Hargrave in his observations on the rule is for giving it a most absolute and peremptory obligation. "He considered that the rule was beyond the control of intention when a fit case for its application existed. It was a conclusion of law of irresistible efficacy, when the testator did not use the words 'heirs' or 'heirs of the body' in a special or restrictive sense, for any particular person or persons who should be the heir of the tenant for life at his death, and in that instance inaptly denominated 'heir,' and when he did not intend to break in upon and disturb the line of descent from the ancestor, but used the word 'heirs' as a nomen collectivum for the whole line of inheritable blood. It is not nor ought to be in the power of a grantor or testator to prescribe

a different qualification to heirs from what the law prescribes when they are to take in their character of heirs; and the rule in its wisdom and policy did not intend to leave it to the parties to decide what should be a descent and what should be a purchase."

The heirs of a man are his descendants who survive him and are capable of inheriting at the time of his death. At no other time can it be ascertained who his heirs will be. They may be his lineal descendants, or those only who are related to him collaterally. *Hardage v. Stroope*, 58 Ark. 306, 24 S. W. 490. In the case of *Watts v. Clardy*, 2 Fla. 389, 390, where the limitation was very much like the one in this case, it is said: "The term 'surviving heirs' is one of unusual occurrence in the books; for, whilst we have 'survivors,' 'surviving children,' 'sons,' 'issue,' and 'daughters,' there is in the books no such word attached to heirs as far as we have been able to discover, and we are inclined to the opinion that so connected it is without meaning, neither enlarging nor contracting the estate. The heirs of Mrs. Clardy from necessity are those who survive her at her death. They could not have preceded her. 'Nemo est hæres viventis.' There is no heir until the death of the ancestor. The fair import of the clause then would seem to be that the estate is to go to the heirs of her body at her decease. If this view be correct, the case is freed from difficulty, and the deed is a naked grant to the heirs of her body. Obviously those who take as surviving heirs claim as heirs to the mother at her death, and, taking as heirs, they take by descent. According to our view, the property would descend to the whole class of heirs of Mrs. Clardy, and they would become entitled to the estate in the same manner, and to the same extent, and with the same descendible qualities, as if the grant had been simply to her and her heirs." The same conclusion was reached by the court in *Hlester v. Yerger*, 166 Pa. 445, 81 Atl. 122, in which the court said that "there is no distinction between the expressions 'his then surviving heirs' and 'heirs then living at the time of their deaths.' In each case the word 'heirs' refers to those who under the intestate laws would inherit from the first taker, *qua* heirs." In *May v. Lewis*, 132 N. C. 115, 43 S. E. 550, this court construed the following devise: "I loan unto my son Benjamin May my entire interest in the tract of land [describing it] to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever, and if he should die without heirs, said land to revert to his next of kin." We held that the rule in *Shelley's Case* did not apply, because of the closing words which changed the ordinary course of descent, but it was said that "if the deviser had conclud-

ed the limitation with the words "to his heirs, if any, to be theirs in fee simple forever," the rule would have applied and given to Benjamin May a fee simple. In other words, that the expression "if any" would not in such a case prevent the application of the rule. By the words "if any" the deviser evidently meant if any living or surviving, or, to state it differently, to the "living" or "surviving" heirs, "if any." The court further said in that case that the person designated by the technical word "heir" is he on whom the law casts an inheritance at the time of the ancestor's death, citing *Oroom v. Herring*, 11 N. C. 393, where Henderson, J., so defines the word.

The limitation in this case cannot be differentiated from one to a person, and, at his death, to his heirs; for his heirs must be ascertained at that time. They are those upon whom at his death the inheritance or descent is cast. In the case of *Richards v. Bergavenny*, 2 Vern. 324, the estate was limited to the Lady Bergavenny and such heirs of her body as should be living at her death, and, in default of such heirs of her body, the remainder over. The court held that the Lady Bergavenny took an estate in fee tail, and did not attach any importance to the words "living at her death," as having the effect to restrict the words "heirs of her body" so as to cut down her estate to one for life. This case has often been cited as an authority in support of the position that such words cannot be allowed to reduce the quantity of the estate or to free the limitation from the operation of the rule in *Shelley's Case*. We are authorized to examine the context of the deed in order to ascertain the true meaning of words which we are required to construe when they are ambiguous. *Gudger v. White*, 141 N. C. 507, 54 S. E. 386; *Railroad v. Railroad*, 147 N. C. 368, 61 S. E. 185. In this way we may determine whether the words "surviving heirs" were used as *designatio personarum* or as descriptive of those persons upon whom the law casts the inheritance under the canons of descent as heirs of John O. Price, and not as purchasers from Jesse Price, or as those who take under the law, and not under the deed.

Looking at the instrument in its entirety, we find that, in addition to the words we have already taken from the deed, the clause of warranty contains a covenant for quiet enjoyment which runs, not to John O. Price for life and then to his "surviving heirs," but "to him and to his heirs and assigns forever." This may be slight evidence of what the grantor meant when he used the words "surviving heirs"; and, while this may be so, it is not to be disregarded, but may be considered as shedding some light upon the question in controversy. The form of the covenant is in perfect harmony

with the interpretation we have given to the words of the limitation "to him during the term of his life time," and, at his decease, "to the surviving heirs of the said John O. Price." It evinces a purpose to give him the fee, and not merely a life estate, by the use of proper words of inheritance which are sufficient for the application of the rule of law laid down in *Shelley's Case*. We believe our conclusion to be supported by recent decisions of this court as to the application of the rule in *Shelley's Case*. *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30; *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459; *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111.

As John O. Price acquired by the deed from his father a fee-simple estate, he conveyed the same estate to the defendant G. O. Griffin by the deeds executed in 1884, and the plaintiffs consequently have no interest in the land as tenants in common with the defendants.

The ruling of the court was therefore correct.

No error.

(150 N. C. 441)

BROWN v. MYERS et ux.

(Supreme Court of North Carolina. April 14, 1909.)

1. DEEDS (§ 118*)—MISTAKE IN DESCRIPTION—PRESUMPTION.

That the word "east" in the description in a deed down a certain road in an "east" direction, to a certain stream, should clearly have been "west," raised no presumption that there was a further mistake, in that the description should have been down the road to a bend in it, thence in the same direction to the stream.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.*]

2. DEEDS (§ 118*)—MISTAKE IN DESCRIPTION—EVIDENCE.

On the issue of a mistake in a deed, in that a description, instead of being down a certain road to a certain stream, should have been down the road to a bend therein, thence in a straight line to the stream, a second deed containing the latter description, and written after the first, in the absence of the grantee and without her request, but at the request of some one not shown, is inadmissible.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.*]

3. DEPOSITIONS (§ 56*)—NOTICE OF TAKING—SERVICE BY CONSTABLE.

Service of a notice of the taking of a deposition in the superior court by a constable is insufficient.

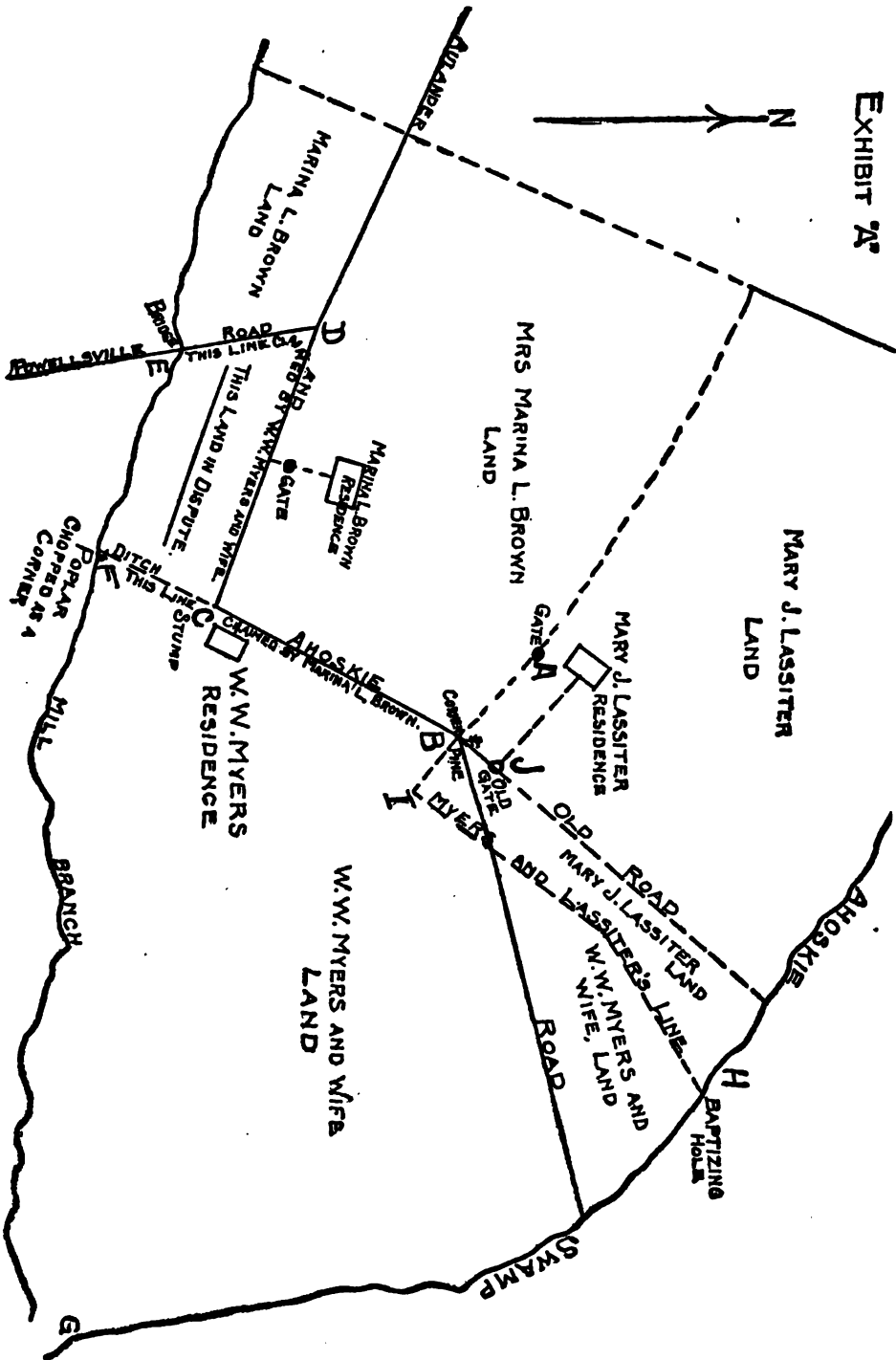
[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 110; Dec. Dig. § 56.*]

Appeal from Superior Court, Hertford County; W. R. Allen, Judge.

Action by Marina L. Brown against W. W. Myers and wife for alleged trespass. Judgment for defendants. Plaintiff appeals. Affirmed.

The following is a map of the property in question:

EXHIBIT 'A'



R. C. Bridger and L. L. Smith, for appellants. Winborne & Lawrence, for appellees.

CLARK, C. J. The plaintiff conveyed to the feme defendant a tract of "75 acres more or less," describing the boundaries as follows: "Beginning at Mrs. M. J. Lassiter's road gate,

thence running in an east direction down the road to the run of Mill Branch, thence down the run of the branch to the run of Ahooskie Swamp; thence up the run of said swamp to the Baptizing Hole; thence running a line of marked trees between Mrs. M. J. Lassiter's land and Walter Lassiter to the be-

gining." The only controversy is as to the line "down the road to the run of Mill Branch." Going "down the road," one would come to Mill Branch, without let or hindrance. There are two bends or sharp turns in the road, and the plaintiff contends that, while the straight road from B to C should be followed, that at C, the first bend, instead of further following the road, the line should be extended almost straight ahead through the woods to F, which is a point on Mill Branch, but below the point which would be reached, going "down the road to the run of Mill Branch," as is prescribed in the deed. This variation of leaving the road, and "taking to the woods," if allowable, would save the plaintiff, the grantor in the deed, the 10 acres now in controversy. To justify such departure from the plain words of the deed, the plaintiff avers in the complaint that, "by mutual mistake or by mistake of the draftsman," the words "along the road to the run of Mill Branch" were written when it ought, and was intended, to be written, "along the road to the bend of the road, thence nearly the same course a line of marked trees to a poplar near the canal or the run of Mill Branch." This was denied, as was also the further allegation that prior to the execution of the deed the grantor went over the land with the husband of feme defendant and located the line as being from the bend of the road at C to F on Mill Branch, below where the line, if following the road, would strike Mill Branch. These contentions were submitted to the jury, who found for the defendant on the following issues:

"(1) Is the land in dispute embraced within the boundaries of the deed to the defendant Rosa L. Myers? Ans. Yes.

"(2) If so, did the plaintiff and W. W. Myers prior to the execution of the deed go over the land to be conveyed for the purpose of locating the land to be embraced in the deed, and did they locate said line and make the same run from B to C and then to F on the plat? Ans. No.

"(3) If so, was it the intention of the parties to said deed at the time of the execution thereof to convey the land to the line B to C and then F on the plat, and no further? Ans. No."

The points at issue were fairly submitted and determined. The words "in an east direction" along the road should have been "west," as the plaintiff avers, and as is evident (*Wiseman v. Green*, 127 N. C. 288, 37 S. E. 272), but that fact has no bearing on the controversy. It raises no presumption that there were other errors and omissions whereby the plaintiff conveyed 10 acres more than he intended. The jury found on the evidence that there was no omission, and that the road was the boundary on that side, as stated in the deed. The court properly refused to charge the jury that the line in dispute was

where the plaintiff contended. This was his first exception.

The second exception relied on in the plaintiff's brief is the rejection in evidence of another deed written after the defendant's deed was recorded, making the line run from the bend of the road at C to F, which deed was written by witness in the absence of the feme defendant, without her request, and witness is unable to remember at whose request.

The third exception is to the holding by the court that the service of a notice in the superior court by a constable was insufficient. *Cullen v. Absher*, 119 N. C. 441, 26 S. E. 33.

The only other exception relied on in plaintiff's brief is the refusal of the following prayer: "That as a matter of law the description in the defendant's deed is too vague to cover the land in controversy, and you will therefore answer the first issue, 'No.'"

These exceptions require no discussion at our hands.

No error.

(150 N. C. 381)

STATE v. JACKSON.

(Supreme Court of North Carolina. April 7, 1909.)

1. CRIMINAL LAW (§ 407*)—ADMISSIONS—ACQUIESCENCE.

Evidence of acquiescence in the conduct or the statements of another is only admissible where such conduct was fully known, or the statements were heard and fully understood, by accused under circumstances giving him an opportunity to act or speak, and naturally calling for some action or reply from a person similarly situated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900, 968; Dec. Dig. § 407.*]

2. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSION—ACQUIESCENCE.

In a prosecution for perjury by falsely swearing, in a prosecution of another for disturbing an election, that such other stole a ballot from the box, a witness testified that, in an investigation of the election before the county commissioners, accused was present, and said nothing about the other person taking a ballot, but it did not appear what the nature of the investigation was, or whether accused was especially interested therein, or that he was given an opportunity to speak concerning it. Another witness testified that some time after the election a certain person said in conversation that the election certainly was fair, and accused was present, and did not say anything. *Held*, that the evidence was not admissible against accused as admissions by acquiescence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898, 900, 968; Dec. Dig. § 407.*]

Appeal from Superior Court, Cumberland County; W. J. Adams, Judge.

L. C. Jackson was convicted of perjury, and he appeals. Reversed and new trial ordered.

There was evidence tending to show that an election had been held in Rockfish township, in said county, on the question of graded schools for district No. 5½, and that one Thos. Seals had been arrested and tried for unlawfully disturbing said election, and stealing a ballot from the ballot box being used in same; that present defendant swore out the warrant, against Seals, and testified against him, in the hearing before the justice, that he saw said Seals steal a ballot from the box pending said election; that Seals was bound over by the justice, and, the grand jury having ignored the bill, the defendant was indicted for perjury, by reason of the oath and testimony as above stated. There was evidence, on the part of the state tending to show that the said testimony was wrongfully and corruptly false, and, on the part of the defendant, that the facts stated and testified against Seals were true, and in the trial below one John Calhoun, a witness for the state, was allowed to testify over defendant's objection; that, in a hearing or investigation had before county commissioners concerning this election defendant, Jackson, was present, and said nothing at that time about Seals having taken the ballot. To the admission of this testimony defendant excepted. Again Edgar Hall, a witness for the state, was allowed, over defendant's objection, to testify that "some time after the election [date not given in record] Henry Ratly said to some one that he (Ratly) did not understand the election, but it certainly was fair; that defendant was present, and could have heard this remark, and did not say anything." Defendant excepted. There was verdict of guilty, and from judgment on verdict defendant appealed, assigning for error the rulings of the court on the admission of evidence as above stated.

Thos. H. Sutton, for appellant. The Attorney General and A. S. Hall, for the State.

HOKE, J. (after stating the facts as above). The silence of a party in the presence and hearing of statements relevant to a matter undergoing investigation, may, under given circumstances, be received in evidence against him by way of admission or acquiescence. Although the statements, under the circumstances indicated, are necessarily to be heard, it is the silence of the party, and the inferences fairly deducible from that fact, which constitutes the evidence; and, while this silence may at times have strong probative force, it is a fact so liable to misinterpretation and abuse that the authorities uniformly consider it as evidence to be received with great caution, and, except under well-recognized conditions, hold it to be altogether inadmissible. The very terms of the maxim to which the admission of such evidence is referred give clear indication that this is a proper estimate, and a correct position concerning it. "Qui tacet consentire videtur."

The general principle, and the conditions required for its admissibility, will be found very well stated in Taylor on Evidence (with American notes by Chamberlayne) vol. 2, pp. 523, 525, 555 (5), 588 (5). Thus page 523: "Admissions may also be implied from the acquiescence of the party. Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood, by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be, not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated." And on page 527: "Admissions are, too, sometimes, inferred from acquiescence in the oral statements of others. At the same time the maxim, 'Qui tacet consentire videtur,' must be applied by the lawyer with careful discrimination. 'Nothing,' it has been observed, 'can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations, of that kind which naturally calls for contradiction—some assertions made to the party with respect to his right, which by his silence he acquiesces in.' Moreover, to effect one person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, but they must also have been made on an occasion when a reply from him might be properly expected." And on page 554 (5): "To render an unchallenged declaration, made in a person's presence, evidence against him it is essential that he be in a position to reply, if so minded. 'If a party is so situated that he is not called upon to say anything, and does not say anything, his silence under such circumstances is not to be taken as furnishing any ground for an inference that he thereby made any admission'—citing *Proctor v. Old Colony R. R.*, 154 Mass. 251, 28 N. E. 13 (1891); *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753 (1860); *Gibney v. Marchay*, 34 N. Y. 301, 305 (1866); *Loggins v. State*, 8 Tex. App. 434, 444 (1880); *Kaelin v. Com.*, 84 Ky. 354, 367, 1 S. W. 594 (1886); *Peck v. Ryan*, 110 Ala. 336, 17 South. 733 (1895)." And again on page 588 (5): "The inference that silence is tantamount to an admission of guilt must rest upon the idea of acquiescence, and it is not consistent with sound reason to imply an acquiescence from silence, unless the circumstances are such as to afford the party an opportunity to act or speak, but such, also, as would naturally call for some action or reply from prudent men similarly situated."

The rule is well and tersely settled in *Com. v. Brown*, 121 Mass. 69, as follows: 'A statement made in the presence of a defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply unless he intends to admit it. But, if he makes a reply wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. *Com. v. Kennedy*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672.'

The doctrine so stated is fully supported by the decisions of our own court on the subject, and others of recognized authority. *Tobacco Co. v. McElwee*, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404; *Guy v. Manuel*, 89 N. C. 83; *Francis v. Edwards*, 77 N. C. 271; *Peck v. Ryan*, 110 Ala. 336-341, 17 South. 733; *State v. Mullins*, 101 Mo. 514, 14 S. W. 625.

A perusal of these authorities, and a proper consideration of the subject, will establish that, when admissible, it is always open to the party affected to impair or destroy the force of the testimony by showing that he did not, or could not, hear the statements, or that he was ignorant of the facts, and not in a condition to make intelligent reply, or other circumstances of like tendency; and, unless the party at the time was afforded fair opportunity to speak, or the statements were made under circumstances, and by such persons, as naturally called for a reply, the evidence in question is not admissible at all. The first of these conditions, suggested as positive limitations on the reception of the evidence in question, more usually arises where the statements are made in the course of some judicial, or quasi judicial, investigation, and of these an instance is afforded in the case of *Tobacco Co. v. McElwee*, supra, where the statements were made by a witness when a deposition was being taken, and the party affected was present, and did not make reply. Chief Justice Smith for the court said: "In our opinion it would have been rude and indecorous in him to do so orally; nor was it to be expected that he should interfere with the course of his examination as a witness, conducted by counsel, for the mere purpose of contradiction. The testimony was taken for use in a case then depending, and its pertinency and materiality were under the control of counsel. It was not required that the witness should use the occasion to correct every erroneous statement made in the deposition of another witness, even to his own prejudice, under the penalty of having the omission construed into an admission of the truth of what was said, and more especially when he is a mere hearer, and no party to the conversation, so to denominate what was then going on." Another appears in *State v. Mullins*, supra, where it was held: "That statements of a

witness made at a coroner's inquest, in the presence of the defendant, are not subsequently admissible against him on the trial of the charge." In this case *Black, J.*, for the court said: "The rule of evidence which allows the silence of a person to be taken as an admission or confession of the truth of the matters stated in his presence should be applied with caution, for it is often much abused. The rule is based on the assumption that the party is at liberty to speak and proceed upon the ground that the circumstances are such as call on him for a reply. The rule has no application whatever to statements given in evidence in a judicial proceeding, for in such case he is not at liberty to interfere or contradict the evidence whenever he pleases."

And the second limitation suggested that the declarations should be made under such circumstances, and by such persons, as naturally call for a reply can rarely, if ever, arise when the party had no present right or interest involved or to be affected. This is illustrated in *Guy v. Manuel*, supra, where it was sought to use the silence of the party in the hearing of declarations of a person deceased as to boundary, and it appeared that, at the time the declarations were made, the party to be affected had then no interest in the property, but acquired it later. *Ashe, J.*, for the court said: "The plaintiff at the time of the survey had no interest in the land, nor does it appear that he then had its purchase in contemplation. He was then a stranger to the controversy about the location of the land which was being surveyed. If he had at the time any interest in the question sought to be settled by the survey, his failure to object to the oral statements of the persons present, we are ready to admit, would have been some evidence of his acquiescence in what was said in regard to the corner, in his presence and hearing. To make the statements of others evidence against one on the ground of his implied admission of their truth by silent acquiescence they must be made on an occasion when a reply from him might be properly expected. *Taylor on Ev.* 738; *State v. Sugg* (at this term) 89 N. C. 527. But where the occasion is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence."

An application of these authorities leads to the conclusion that the court below made an erroneous ruling in the reception of the evidence objected to. On the first exception noted, the investigation as to the election before the board of commissioners, it does not clearly appear from the record what was the nature or purpose of the investigation, nor does it appear that the defendant was especially interested, or, if he was, that he was given opportunity or called on to speak in any way concerning it. And

in the second, the statements testified to by the witness Hall, they appear to have been made by one Henry Ratly to some third person, at a time when this defendant had no present interest specially involved, and when there was no call or occasion for him to reply.

We are of opinion that the admission of the evidence constitutes reversible error, and the defendant is entitled to have his cause tried before another jury, and it is so ordered.

New trial.

(150 N. C. 487)

IN RE THORP'S WILL.

(Supreme Court of North Carolina. April 14, 1909.)

1. EVIDENCE (§ 220*) — ADMISSIONS — ADMISSIONS BY ACQUIESCENCE.

Evidence that a few years before testator's death, testator pleaded guilty to a charge of trespass, and his counsel in argument stated, in testator's presence, that testator had recently returned from an asylum, and was still of weak mind and irresponsible, was inadmissible, as made on an occasion when testator was not called upon to speak.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 778; Dec. Dig. § 220.*]

2. EVIDENCE (§ 832*) — DOCUMENTARY EVIDENCE—OFFICIAL RECORDS.

The record of an instrument, not authorized by law to be recorded, is inadmissible in evidence, so that in a will contest the Book of Settlements of the Superior Court, containing a copy of the papers discharging testator from the asylum, which were issued by the asylum authorities pursuant to statute, were inadmissible, no statute authorizing the record of such certificates in the Book of Settlements.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 832.*]

3. EVIDENCE (§ 83*) — PRESUMPTIONS — DISCHARGE OF OFFICIAL DUTY.

It will be presumed in a will contest, in the absence of evidence to the contrary, that testator was discharged from an asylum because he had become sane.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

4. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—PREJUDICIAL EFFECT—ADMISSION OF EVIDENCE.

In a will contest, several pages of the Book of Settlements of the Superior Court, containing a copy of the certificate discharging testator from the asylum as sane, were admitted in evidence, though the statute did not require such certificates to be recorded in the Book of Settlements. A large number of witnesses on both sides spoke of testator having been confined in the asylum, and of his discharge after about two years, which was some 12 years before the will was made, and all the evidence outside the copy of the certificate admitted showed that testator was confined in the asylum and discharged as sane, and the testimony on both sides went to testator's sanity during the last few years of his life, there being no evidence showing that he was not sane immediately after leaving the asylum. Held that, under the circumstances, error in admit-

ting the Book of Settlements was not prejudicial to caveator.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162-4185; Dec. Dig. § 1051.*]

5. WILLS (§ 52*)—WILL CONTEST—BURDEN OF PROOF.

In a will contest, the burden is on caveator to establish insanity at the time the will was executed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

6. WILLS (§ 88*) — WILL CONTEST — MENTAL CAPACITY.

If testator signed the purported will as his will, and at the time had the mental capacity to know and understand the intent and effect of his act, the property he owned and wished to dispose of, his relation to the property and the beneficiaries under his will, he had the mental capacity to make a will; but, if he was laboring under insane delusions, so that he did not know and understand those things, he was incapable of making a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78-81; Dec. Dig. § 88.*]

Appeal from Superior Court, Granville County; Long, Judge.

In the matter of the will of James M. Thorp. From a judgment establishing the will, caveator, William H. Thorp, appealed. Affirmed.

B. S. Royster, B. K. Lassiter, and T. T. Hicks, for propounder. Graham & Devin, for caveator.

BROWN, J. The ground upon which the will of the testator, James Thorp, was contested is stated in the caveat to be "for the reason that at the time of the execution thereof and continuously thereafter until his death, the said James M. Thorp did not have the capacity to make and execute a will for that he was not of sound and disposing memory at and during said time." The evidence on both sides is quite voluminous. That introduced for the propounders, including that of the witnesses to the will, tends to prove that the testator, a colored man, was eccentric, had been committed to the asylum for the insane in 1894 for about two years, and then discharged; that he returned to his home and managed his affairs successfully, up to his death, so much so that he surpassed all of his race in that community in making money and in keeping it, and got decidedly the better of two lawyers on a land trade; that up to his death he kept his houses insured, collected his rents, could read and write and kept accounts accurately; and that he had ample capacity to make a will. The evidence offered for caveator tends to prove that testator was of unsound mind, suffered from mental delusions, and that he did not have testamentary capacity, at the time of the execution of the will.

There are two exceptions to the evidence relied upon in the brief of counsel for appellant.

1. To the exclusion of evidence of witness Nat Venable, by whom caveator proposed to show that, a few years before the death of testator, he pleaded guilty to trespass, and his counsel, in his plea to the court for mercy, stated in the presence of testator that he had lately returned from the insane asylum, and was still of weak mind, and not responsible for his acts. It would be hard measure to charge a person in after life with everything an attorney may say for him in a fervent plea to the judge for mercy upon his client. But in any event, the occasion was one when the testator was not called upon to speak for himself; and, under such circumstances, he will not be held to have acquiesced therein what was said by another. To make the statements of others evidence against a person on the ground of the implied admission of their truth by silent acquiescence therein they must be made on an occasion when a reply might be properly expected. It would have been indecorous for the testator to have interrupted the speech of his counsel while addressing the court. *Tobacco v. McElwee*, 96 N. C. 74, 4 S. E. 676, 60 Am. Rep. 404; *Guy v. Manuel*, 89 N. C. 86; *State v. Jackson* (this term) 64 S. E. 376.

2. To the admission in evidence of certain pages of the Book of Settlements No. 3 of the Superior Court of Granville county, upon which was recorded the following:

"The Eastern Hospital, Dr. J. F. Miller, Supt. Goldsboro, N. C., June 2, 1896. To the Board of Directors of the Eastern Hospital—This is to certify that Mat. Thorp, an insane person, was sent to this hospital from Granville county, and that in my opinion he having become of sane mind is recommended for discharge. A duplicate of this certificate is made to the clerk of the superior court of said county in accordance with the provisions of section 21, c. 156, p. 246, Laws 1883. Very respectfully, J. F. Miller, Superintendent."

"The Eastern Hospital. Dr. J. F. Miller, Superintendent. Goldsboro, N. C., June 2, 1896. To Dr. J. F. Miller, Superintendent, of the Eastern Hospital—Sir: The Board of Directors of the Eastern Hospital having considered your certificate made in accordance with the provisions of section 21, c. 156, p. 246, Laws of North Carolina Session of 1883, to the effect that Mat Thorp, an insane person in this hospital, was sent from the county of Granville, and that in your opinion he having become of sane mind and recommend that he be discharged, it is hereby ordered that the said Mat Thorp be discharged. Very respectfully, J. F. Sutherland, T. B. Parker, Executive Committee."

These appear to be the discharge papers of the testator required by law. Revisal 1905, § 4596, and issued in pursuance of the statute. It is possible the originals, or the record of the executive committee of the Eastern Hospital containing them, would be com-

petent evidence if proven and identified, but it is quite clear that the Book of Settlements upon which the papers are recorded is not competent. We have been cited to no statute which authorizes the recording of such certificates upon the Book of Settlements, and our own researches fail to discover any. It is familiar learning that, when the law does not require or authorize an instrument, or paper, to be recorded, a copy of the record is not admissible in evidence. 1 Greenleaf, Ev. § 485, p. 551 (note). But a majority of the court are convinced that the error was harmless, and evidently did not affect the result. The record discloses that a large majority of the witnesses of both sides spoke of the fact that the testator was confined in the hospital, and that he was discharged after being there some 18 months or 2 years, and returned to his home. The law will presume, in the absence of anything to the contrary, that the testator was discharged because he had become of sane mind again. It is not even contended that the testator was ever a raving maniac or hopelessly incurable. On the contrary, for most of the period covered by the evidence of the caveator the testator had occasional delusions, and was sensitive about any reference to the asylum. The will was made some 12 years after testator's discharge, and it is only in the very last years of his life that witnesses for caveator declare he was "mighty bad off." All the evidence in the record outside of these certificates indicates clearly that the testator was confined in the asylum for a period, and then discharged because it was thought he had been restored to normal sanity. In fact the testimony on both sides is directed almost exclusively to the mental condition of the testator in the last few years of his life, and there is nothing tending to prove that immediately after leaving the asylum he was otherwise than normally sane, something which may well be presumed from the admitted fact that he had been duly discharged, and resided at home for 12 years thereafter undisturbed. For these reasons we are unable to see anything prejudicial in the admission of the Book of Settlements.

3. The several exceptions to the charge of the court are without merit. His honor properly placed the burden of proof on the caveator to establish insanity at the time of the making of the will by a preponderance of the evidence, and charged as follows: "If you find from the evidence that Mat Thorp signed the paper writing offered in evidence as and for his will, and you find that at the time he signed the alleged will he had mental capacity to know and understand what he was doing, the property he owned and wished to dispose of; knew and understood the relation he bore to his property, and the persons to whom he was giving it; understood the nature of the act in which he was engaged and its extent and effect—if he possessed the mental capacity so defined, and you find

the facts so to be from a review of all the evidence, he had mental capacity sufficient to make a will. But if at the time he executed the paper you find that he did not know what he was doing, and you find that he was suffering from an insane delusion, or delusions, so that he did not understand what property he had, and what he was doing with it, or did not know how and to whom he was giving his property, and did not understand and know the nature or extent and effect of his act, and if you find the facts so to be from the greater weight of the evidence, then he did not have sufficient capacity to make a will." This charge is in line with an array of well-settled precedents. *Horne v. Horne*, 31 N. C. 106; *Cornelius v. Cornelius*, 52 N. C. 595; *Lawrence v. Steel*, 66 N. C. 586; *Paine v. Roberts*, 82 N. C. 453; *Horah v. Knox*, 87 N. C. 489; *Bost v. Bost*, 87 N. C. 479; *Crenshaw v. Johnson*, 120 N. C. 274, 26 S. E. 810; *Snow's Will*, 128 N. C. 102, 38 S. E. 295.

Upon a review of the entire record, we are of opinion that the appellant has shown no substantial error which warrants us in directing another trial.

No error.

(150 N. C. 501)

FRALEY et al. v. FRALEY et al.

(Supreme Court of North Carolina. April 21, 1909.)

1. DEEDS (§ 211*)—CANCELLATION—FRAUD—DEGREE OF PROOF REQUIRED.

In a suit to cancel decedent's deed to defendants, for fraud and undue influence, plaintiffs were not bound to make out their case by "clear, strong, and convincing" proof; a preponderance being sufficient.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 641, 642, 645; Dec. Dig. § 211.*]

2. EVIDENCE (§ 122*)—CANCELLATION—FRAUD—EVIDENCE—RES GESTÆ.

In a suit to cancel decedent's deed to defendants for fraud and undue influence, evidence of a decision of persons called in by decedent before the conveyance to determine whether the property was worth more than services to be rendered by defendants, and of an announcement of the decision to decedent, was admissible as part of the *res gestæ*; any fact in the transaction leading to the deed and tending to affect decedent's mind in making the deed being admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 339-350; Dec. Dig. § 122.*]

3. WORDS AND PHRASES — "COTEMPORANEOUS."

The term "cotemporaneous" does not necessarily always refer to any single or ultimate fact, however important to any precise or definite time.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, p. 1489.]

4. WORDS AND PHRASES—"TRANSACTION."

A "transaction" may include a series of occurrences extending over a great length of time.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 7060-7062, 7818-7819.]

5. EVIDENCE (§ 119*)—RES GESTÆ—WHAT CONSTITUTE.

A relevant fact in any one of a series of occurrences forming one transaction may constitute part of *res gestæ*.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 123; Dec. Dig. § 119.*]

Appeal from Superior Court, Rowan County; B. F. Long, Judge.

Action by D. H. Fraley and others against G. W. Fraley and others. Judgment for defendants, and plaintiffs appeal. New trial granted.

The action was instituted to set aside a deed made by Jacob Fraley, now deceased, to Jane E. Stokes, daughter of said Jacob, and one of the defendants, and G. W. Fraley, his son, another one of defendants, on the ground of mental incapacity and of fraud and undue influence. Issues were submitted: (1) As to the mental capacity of Jacob Fraley. (2) As to fraud and undue influence. It was shown that in March, 1900, Jacob Fraley died, leaving surviving a number of children and grandchildren, his descendants and heirs at law, who were parties plaintiff or defendant in the action; that about 16 months before his death, Jacob Fraley's home having burned, he went to live with Jane Stokes, his daughter, and G. W. Fraley, his son, staying a portion of the time with either; and that not long after making the move, to wit, on October 19, 1898, he executed to Jane E. Stokes, the daughter, and G. W. Fraley, the son, the deed in question, conveying to them his home tract of 109 acres, and 10 days thereafter he executed to these same grantees a deed for 40 acres of land in Stanly county, on which there was a mortgage for \$300 or over, the two deeds conveying practically all of his property. There was evidence on the part of the plaintiff tending to show mental incapacity on the part of Jacob Fraley, grantee, at the time of execution of these deeds, and of fraud and undue influence on the part of the grantees and of J. F. Stokes, husband of Jane E. Stokes, one of the grantees. There was evidence on the defendants tending to show that Jacob Fraley at the time the deeds were executed was of sound mind and memory, and that he made them of his own mind and will. Among other circumstances offered in support of defendants' position was the fact that some time before the execution of the deeds three neighbors were called in at the instance of Jacob Fraley and the grantees and perhaps other members of the family, the record not being clear as to this last statement, to consider and decide whether "his property was worth too much, or not, for taking care of him," and J. D. Austin, one of these who took part in the consultation, was allowed, over plaintiffs' objection, to state that, pursuant to the request of Jacob Fraley and the others, the three men selected met at a given

time on the premises, and, after consulting over the matter, decided, in substance, that the proposed service, taking care of the old man the remainder of his life, was about a fair equivalent for the property he had. The consultation seems to have been partly in the presence of Mr. Fraley, but the decision was not made in his immediate presence, but he was immediately informed of what their decision was. Plaintiffs excepted. There was judgment for defendants, and, from judgment on the verdict, the plaintiffs appealed, having in apt time assigned for error, among other things, the ruling of his honor on the question of evidence, as indicated, and in charging the jury on the second issue, in part, as follows: "That the plaintiffs were required to make out their contentions by clear, strong, and convincing proof."

R. Lee Wright, P. S. Carlton, and T. J. Jerome, for appellants. Clement & Clement and T. F. Kluttz, for appellees.

HOKE, J. (after stating the facts as above). There was error in the charge of the court as to the degree and quality of proof required on an issue as to the execution of a deed by fraud and undue influence. The question was directly presented in the case of *Harding v. Long*, 108 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, and the principle declared and sustained in an elaborate and learned opinion by Associate Justice Avery that, on the issue indicated, the plaintiff was required to establish the allegation to the satisfaction of the jury by the greater weight of the evidence. The main purpose of this decision was to withdraw an issue of this character from the principle announced in *Ely v. Early*, 94 N. C. 1, that in a certain class of cases, notably where it was sought to correct or alter a written deed or superimpose a trust thereon by parol, the proof must be clear, strong, and convincing, and place it within the rule which ordinarily obtains in the determination of civil issues—that is, by the preponderance or greater weight of the evidence—the language of the opinion on the point in question being as follows: "But, on the other hand, when the relief demanded by a party is that a deed shall be declared void because its execution was procured by false and fraudulent representations or undue influence, or that it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud must be proven, so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury." In saying here that fraud must be proven to the satisfaction of the jury, etc., the learned justice was only describing or defining the result to be attained in the mind of the jury, and did not, as stated, intend to lay down any special rule of proof differing from that usually applied in the

determination of civil issues. This interpretation of the words "proof to the satisfaction of the jury" is fully supported in a later opinion of the court in *Chaffin v. Manufacturing Co.*, 135 N. C. 95, 47 S. E. 226, where, in an action to recover for damages caused by the erection and maintenance of a dam, the trial judge had charged the jury that "it is not sufficient for plaintiffs to show that their land has been damaged. They must further prove, to the satisfaction of the jury, that this damage was caused by the erection of the dam." It was objected that this required of plaintiffs a greater degree of proof than the law imposed upon them, and Justice Walker, in disallowing the exception, said: "The use of the word 'satisfied' did not intensify the proof required to entitle the plaintiffs to their verdict. The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied, or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. In order to produce this result or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiff's proof need not be more than a bare preponderance, but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence. In *Neal v. Fesperman*, 48 N. C. 446, the court (by Pearson, J.), in stating the true rule in civil cases, said that 'the party affirming a fact must prove it to the satisfaction of the jury, because the "onus probandi" is upon him. If he does prove it to the satisfaction of the jury, it is settled that in civil actions he is entitled to a verdict in his favor upon the issue.'" And intimation of like tenor is given in *Ferrall v. Broadway*, 95 N. C. 551.

There was error, therefore, in the charge of the court on the second issue as to the degree of proof required. It is urged by defendants that this should be regarded as harmless error, for the reason that there was no evidence presented in favor of plaintiffs' position sufficient for a jury's consideration, but we cannot so hold. At this stage of the action we do not think it desirable to state in detail the testimony which makes only for plaintiffs' claim, but will say in general terms that we have carefully considered the entire evidence, and are of opinion that plaintiffs are entitled to have their cause submitted to the jury, under a correct and proper charge, and that the mistake in the respect indicated constitutes reversible error.

As the case goes back for a new trial, we deem it proper to say, further, that the court below made a correct ruling as to the evidence of J. D. Austin, admitted over plaintiffs' objection. It appears that at some time prior to the execution of the deed in question, and with a view to its execution, this

witness, with two others, was called in by Jacob Fraley, the grantor, and the grantees, to consider and decide whether the property owned by Jacob Fraley and to be included in the deed was too much for taking care of him and the payment of his debts, amounting to about \$300. The persons called in met on the premises, and, having considered the matter, decided that one was about a fair equivalent for the other, and while Jacob Fraley, it seems, was not present at the precise time when the decision was made, he was then and there immediately informed of the conclusion reached, and the deed was afterwards executed for the consideration indicated. This decision, followed by the immediate announcement of it to Jacob Fraley under the circumstances presented, was admissible as part of the *res gestæ*, not as conclusive on the question decided, but as a circumstance occurring as a part of an entire transaction which resulted in the execution of the deed; and, in any event, its announcement to the grantor was relevant as an independent fact in the *res gestæ*, and as tending to affect the mind of the grantor in reference to the execution of the deed. It is said by an intelligent writer—Chamberlayne—in his notes to Taylor's Evidence, 391 (1): "That it would probably be difficult and perhaps impossible to give a wholly satisfactory definition of the term '*res gestæ*,' and possibly this very ambiguity constitutes no small part of the attractiveness of the phrase." After this comment, the writer makes the statement: "That legal liability in any case is predicated upon the existence of some particular transaction or state of affairs, and it is this group of facts or events which make up its *res gestæ*." And Greenleaf on Evidence, § 108, after making comment not dissimilar as to any satisfactory definition of the term, intimates that the phrase "*res gestæ*" consists of the principal fact and surrounding circumstances consisting of kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. And both of these authors and others of repute lay it down as essential to the inclusion of a given fact within the meaning of the term that it should be cotemporaneous with the principal fact, and so connected with it as to illustrate its character. And this term "cotemporaneous" does not always of necessity refer to any single or ultimate fact, however important to any precise or definite time; for a "transaction" may, and not infrequently does, include a series of occurrences extending over a great length of time, and a relevant fact in any one of them, and, until the close of the matter, may come within this term "cotemporaneous," and constitute a part of the *res gestæ*. Greenleaf and Taylor, *supra*; Brander on Evidence, 325; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91,

13 Sup. Ct. 267, 37 L. Ed. 93; Ahern v. Goodspeed, 72 N. Y. 108. In this last case it was held: "Representations made by one offering to sell property to another negotiating therefor are part of the *res gestæ*, and binding upon the maker, although a bargain is not concluded at the time, if afterwards, as a continuation of the negotiation, the person to whom they were made becomes a purchaser"; and so it is here. The ultimate fact of the execution of the deed is not an important or controlling fact in this inquiry, nor the point of time to which the admission of testimony must be necessarily referred. It is not even the issuable fact, for the execution of the deed is admitted, and the issuable fact is whether the grantor executed the deed of his own mind and will, or was induced to do it by fraud and undue influence; and any fact taking place in the treaty between the parties which resulted in the execution of the deed, and any relevant fact occurring at any time during the treaty tending to throw light upon the transaction, which was intended and reasonably calculated to affect the mind of the grantor, in reference to the execution of the deed, would be competent as part of the *res gestæ*, or an independent fact in the *res gestæ*, and so admissible in evidence. And see Chamberlayne's Best on Evidence (Int. Ed.) p. 463, 1893-94, where the annotator puts down as an exception to the rule excluding facts which are *res inter alios acta*, such acts as reasonably tend to show the existence of knowledge, intent, and motive, or any bodily or mental state whatever, in any case, when the existence of such knowledge, intent, or state is a fact in issue, or a fact relevant thereto.

On authority and the reason of the thing we hold that the decision and its announcement to the grantor were properly received.

For the error in the charge, there will be a new trial on all the issues, and it is so ordered.

New trial.

(32 S. C. 369)

FAULK v. COLUMBIA, N. & L. R. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. CARRIERS (§ 158*)—CARRIAGE OF FREIGHT—LIMITATION OF LIABILITY—CONTRACT.

A shipper who by a special contract agrees on a value of the goods in case of loss, and in consideration thereof obtains a reduced rate, is estopped from showing that the real value of the goods was greater than that specified in the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 708; Dec. Dig. § 153.*]

2. CARRIERS (§ 155*)—CARRIAGE OF FREIGHT—LIABILITY—CONTRACT.

A carrier cannot as a general rule limit its liability by notice, unless brought to the knowledge of the shipper within a reasonable time before shipment, and expressly assented to

by him, and, in the absence of misrepresentations by the shipper as to the nature and value of the goods, the carrier must make known the conditions as to the value which it proposes to attach at a specified rate, and procure his assent thereto.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 677; Dec. Dig. § 155.*]

3. CARRIERS (§ 218*)—CARRIAGE OF HORSES—LIMITATION OF LIABILITY—CONTRACT.

Where a carrier receiving horses for shipment without inquiry and without representations by the shipper as to value sought to impose on the shipper conditions contained in the regulations of the Railroad Commission governing intrastate shipments, providing for classification of freight with a maximum valuation of live stock shipments at a specified rate, it must show the shipper's assent to the regulations, for the conditions involve a limitation on the carrier's common-law liability to respond for the true value of freight destroyed by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 677; Dec. Dig. § 218.*]

4. CARRIERS (§ 155*)—CARRIAGE OF FREIGHT—LIABILITY—CONTRACT.

The regulations of the Railroad Commission governing intrastate shipments, and providing for a classification of freight with a maximum valuation of live stock shipments at a designated rate, and stipulating that the reduced rates specified will apply only on the property shipped subject to the conditions of the carrier's bill of lading, and that, where the classification provides for reduced rates based on a fixed valuation, a special release containing the agreed valuation must be signed by the shipper, etc., make the assent of the shipper a prerequisite to the limited value clause, and under Civ. Code 1902, § 1709, providing that no public notice shall limit the common-law liability of any carrier, etc., the shipper is not estopped from recovering the real value of a shipment on the ground that he received the benefit of reduced rates based on a particular valuation, unless he had notice of the facts and assented thereto.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 677, 691; Dec. Dig. § 155.*]

Appeal from Common Pleas Circuit Court of Richland County; Ernest Gary, Judge.

Action by J. H. Faulk against the Columbia, Newberry & Laurens Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Lyles, for appellant. Nelson & Nelson, for respondent.

JONES, J. On November 6, 1905, plaintiff shipped a car load of horses over defendant's line from Columbia, S. C., to Newberry, S. C. When unloaded at Newberry, one horse was found injured, his leg having fallen through a defective floor of the car furnished by defendant, from which injury the horse died. Plaintiff brought this action to recover damages for the loss of the horse at a valuation of \$165 and the reasonable expense incurred in trying to cure it, and recovered judgment for \$200.

The vital question was whether the shipment was subject to a classification under which the value of the car load of horses was limited at \$75 per head. No bill of lading was issued or signed. The plaintiff phoned

for the car, and ascertained that the rate would be \$19 for the car load. The car was placed for plaintiff, and was loaded by him Sunday night, and was unloaded by him at Newberry early Monday morning. During the conversation over the phone nothing was said about classification or valuation other than the rate should be \$19 per car load, and plaintiff testified that he knew nothing of the classification as established by the Railroad Commission. The only paper in writing was the waybill covering a shipment of a car load of horses, "weight 20,000 class N, rate \$19.00," which waybill plaintiff had never seen until the day before the trial. There was not even an oral agreement as to classification and valuation.

The defendant proved the schedule of rates and the rules and regulations adopted by the Railroad Commission governing intrastate shipments at the time, and there was some evidence that the tariffs and specifications were posted or published for the benefit of the public. It appears that the Southern Classification No. 34, applies to all roads in South Carolina subject to the classification and rules as provided in the South Carolina exception sheet. The Southern Classification shows the maximum valuation of live stock shipments for horses and mules each \$75, and the South Carolina exception sheet classes horses and mules at class N, but does not specify valuation. Rate table, local rate tariff, distance between 40 and 50 miles, shows the highest rate per car load of 20,000 in class N to be \$19, but nothing is stated therein as to valuation. Some of the rules of the Southern Classification provide:

"(1) The reduced rates specified in this classification will apply only on property shipped subject to the conditions of this company's bill of lading. If the shipper elects not to accept the said reduced rates and conditions, he should notify the agent of the receiving carrier, in writing, at the time his property is offered for shipment, and if he does not give such notice, it will be understood that he desired the property subject to the standard bill of lading conditions in order to secure the reduced rate thereon. Property carried not subject to the standard bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several states in so far as they apply. Property thus carried will be charged twenty (20) per cent. higher (subject to a minimum increase of one [1] cent per hundred pounds) than if shipped subject to the conditions of the standard bill of lading."

"(6) Where the classification provides for reduced rate, based on a certain fixed valuation, the following special release, containing the agreed valuation, must be written and signed by the shipper or owner upon the face of the bill of lading or shipping re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

celpt. 'It is hereby agreed that the property herein designated is of the value of * * * and the rate of freight charged thereon is based on such agreed valuation, and on the condition that the carrier assumes liability only to the extent of such agreed valuation and no further.'"

The standard bill of lading contained this provision: "The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such classification." The testimony further shows "that rules all intend that a bill of lading shall be issued for every shipment."

Upon this state of facts the court was requested by defendant's counsel to instruct the jury as follows: "That, in the absence of a special contract of shipment, evidenced by a bill of lading issued by the railroad company at the time of shipment, under the provisions of law, all shipments must be held to have been made under the appropriate classifications and upon the rates and conditions prescribed by the Railroad Commissioners; and, as there is no evidence in this case that a bill of lading or special contract was made at the time of shipment, the jury cannot find more than \$75 as the value of the horse, that being the valuation fixed by the rules of the Railroad Commissioners as class N at the rate of \$19 per car load from Columbia to Newberry." The court refused to so charge, and instructed the jury that, in the absence of a bill of lading or contract of shipment agreeing upon a valuation, the defendant was liable as at common law for the true value of the property. We find no error. Where a shipper of goods by special contract agrees upon a value to be placed upon such goods in case of loss and in consideration thereof obtains a reduced rate of transportation, he is bound by the stipulation, and is estopped from showing that the real value of the goods was greater than that specified in the contract. *Johnstone v. Railroad Co.*, 39 S. C. 60, 17 S. E. 512. It is contended that a special contract may be implied or inferred from the fact that the shipper secured transportation at the rate of \$19 per car load, when the transportation rate without limitation of value was 20 per cent. higher, and from the fact that general public notice was given of the classification which limited the value of horses and mules to \$75 per head. The general rule is "that a carrier cannot limit its liability by any mere notice unless such notice is shown to have been brought to the knowledge or attention of the shipper within a reasonable time before shipment and to have been expressly assented to by him." 5 Ency. Law, 290, and cases cited to show the necessity of express assent on the part of the

shipper. The authorities which do not require express assent of the shipper do require that the notice shall be clear, explicit, not unreasonable, and brought home to the shipper. 5 Ency. Law, 291. There appears to be much authority in other jurisdictions that there is an exception to the general rule that a common carrier cannot limit its liability by mere notice without the shipper's assent; the exception being that a published rule requiring a shipper to state the true value of the goods shipped is binding on the shipper, whether brought to his attention or not. 5 Ency. Law, 289; note to *Cole v. Goodwin*, 32 Am. Dec. 506. It is supposed that such a rule is not an attempt to limit liability, but is a mere regulation for the dispatch of the carrier's business, and to protect the carrier from bad faith by the shipper. We do not think the exception should be sanctioned in this state. It may be granted that the carrier has the right to inquire as to the value of the goods to be shipped, and in such case it is the duty of the shipper to make answer in good faith, and to that extent the rule might be regarded as a reasonable regulation for the proper adjustment of the compensation for the risk assumed. But, in the absence of fraud or deception or misleading representations by the shipper as to the nature and value of the goods to be shipped, it is the duty of the carrier to make known to the shipper the conditions as to the value which it proposes to attach to a specified rate and procure his assent thereto. In *Bottum v. Railway*, 72 S. C. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773, 110 Am. St. Rep. 610, the court held that, when the shipper represented by words on a box that it contained "Glass," he could not recover for loss of the contents as "pictures," and that in such a case it was not the duty of the carrier to make further inquiry; but the court recognized that when the carrier received a package marked "Glass," and makes no inquiry as to its kind or value, it is responsible for any article received coming under the general description of glass. Here the carrier received 11 horses for shipment without representation by the shipper or inquiry by the carrier as to their value. The conditions sought to be imposed upon the shipper without his assent in this case are more than a regulation. They involve a limitation on the carrier's liability at common law. When the carrier would limit its common-law liability to respond for the true value of the article lost or destroyed by it, the burden is on it to show the shipper's assent. *Jenkins v. Southern Ry.*, 73 S. C. 289, 53 S. E. 480. To sustain the appellant's contention would shift the burden on the shipper to show his non-assent.

We think also that a proper construction of the rules in question makes the assent of the shipper a prerequisite to the limited value clause, for rule 6 provides expressly for the shipper's special release, and rule 1 con-

templates an election by the shipper to accept or reject the reduced rates with the conditions. There can be no real election by the shipper without knowledge that there is more than one object of choice. So far as appears, the shipper knew of but one rate, which he paid. Hence there was no basis for an estoppel upon the ground that he received the benefit of the reduced rate with knowledge that it was based upon a particular valuation. The contention by appellant being an attempt to limit common-law liability by a public notice, it must fall under the express terms of section 1709, Civ. Code 1902, which provides: "No public notice or declaration shall limit or in any wise affect the liability at common law of any public common carriers for or in respect of any goods to be carried and conveyed by them; but they shall be liable, as at common law, to answer for the loss of or injury to any articles and goods delivered to them for transportation, any public notice or declaration by them made and given contrary thereto or in any wise limiting such liability notwithstanding."

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(82 S. C. 341)

STATE v. WASHINGTON.

(Supreme Court of South Carolina. April 9, 1909.)

1. JURY (§ 67*)—SUMMONING JURORS—VENIRE.

The venire to the sheriff commanded him, in the name of the state, to serve upon certain persons named *36 men, whom he should immediately summon to appear before the common pleas court. Held that the writ was not fatally defective for the omission, at the place marked with an asterisk, of the words "jury commissioners of the county, this writ of venire requiring them, the said jury commissioners, to draw and annex to the panel of this writ as provided by law the names of."

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 295; Dec. Dig. § 67.*]

2. JURY (§ 67*)—SUMMONING—WRIT OF VENIRE—CONSTRUCTION—"NEXT."

The word "next," in a writ of venire issued June 12, 1908, commanding the sheriff to serve the writ upon the jury commissioners, and requiring them to summon the jurors to appear before the common pleas court held on the 22d of June next, at 10 o'clock, etc., meant the next 22d day of June in that year, especially in view of the fact that the next term of the court after June 12th was June 22d (citing 5 Words & Phrases, p. 4795).

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 67.*]

3. JURY (§ 67*)—SUMMONING JURORS—ISSUANCE OF WRIT OF VENIRE—TIME.

Under Civ. Code 1902, § 2930, requiring the jury commissioners to draw jurors in Greenwood county not less than 10 or more than 20 days before the first day of each week of any term of the court, where the next regular term of court for Greenwood county was on June 22d, the venire was properly issued on June 12th, when the jurors were drawn.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 67.*]

4. JURY (§ 82*)—SUMMONING—EFFECT OF IRREGULARITIES—QUASHING VENIRE.

Statutes prescribing the time and manner of selecting jurors are merely directory, and venires will not be quashed for mere irregularities.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 82.*]

Appeal from General Sessions Circuit Court of Greenwood County; J. C. Klugh, Judge.

Marsh Washington was convicted of murder, and he appeals. Affirmed.

D. H. Magill, for appellant. R. A. Cooper, for the State.

JONES, J. The defendant, Marsh Washington, was convicted of murder, and sentenced to be hanged, at the June term, 1908, of the general sessions for Greenwood county, Hon. J. C. Klugh, presiding judge. Defendant's counsel, before sentence, moved in arrest of judgment on the ground that the venire facias for jurors was void, which motion was overruled, and this ruling is the only question for review.

The writ was as follows: "Venue. The State of South Carolina, to the Sheriff of Said County—Greeting: You are hereby strictly required and commanded to serve upon T. C. Turner, C. C. C. P., J. A. Marshall, treasurer, and J. D. Watson, auditor, esquires, 36 good and lawful men whom you shall immediately thereafter summons to be and appear before the court of common pleas and general sessions for the county aforesaid to be holden at Greenwood on the 22d day of June, next, at 10 o'clock in the forenoon, to serve as petit jurors. Herein fall not on the pain of the penalties that will fall thereon. Witness T. C. Turner, clerk of the said court, at Greenwood, this 12th day of June, A. D. 1908, and in the one hundred and 32 year of the sovereignty and independence of the United States of America. T. C. Turner, Clerk C. C. P. and G. S. [Seal.]" Then follows the list of the names of the jurors. The following is the certificate of the jury commissioners: "We, T. C. Turner, C. C. C. P., J. A. Marshall, treasurer, and J. D. Watson, auditor, jury commissioners for said county of —, state of South Carolina, certify that on the 12th day of June, A. D. 1908, the names in the panel above were drawn from the jury box, in accordance with the law in such case made and provided, and in obedience to the foregoing writ of venire facias. Done at Greenwood, this 12th day of June, A. D. 1908. T. C. Turner, C. C. C. P. J. D. Watson, Auditor. J. A. Marshall, Co. Treas." The following is the sheriff's return: "I solemnly swear that I have summoned each of the above-named jury by depositing in the post office a summons, sealed and directed to their post office with the letter, having a two-cent stamp on it. T. W. McMillan, S. G. C." This form of writ and certificate of jury commissioners is exactly like the form in use in many counties, except that

between the word "esquires" and "36 good and lawful men" there was omitted the words "jury commissioners of the said county, this writ of venire requiring them, the said jury commissioners, to draw and annex to the panel of this writ as provided by law the names of."

The objections to the writ were (1) that the omission of said words was fatal; (2) that as the writ appears it commands the sheriff to do an impossible thing, viz., to serve upon the officers named 36 good and lawful men; (3) that it appears the writ did not issue 15 days before the commencement of the term of the court which rendered the verdict; (4) that the writ required summoning of jurors for June term, 1908, as the writ dated June 12, 1908, summoned jurors to attend at court to be held on the 22d day of June next; (5) that the defects were not cured by the certificate of the jury commissioners. We think the circuit court was correct in overruling the motion, and in holding that the writ is not void. It runs in the name of the state, is addressed to the sheriff under the seal of the court, is signed by the clerk of the court, and commands the sheriff to summon the persons named to attend the court of common pleas and general sessions as petit jurors at a proper time and place. The word "next" as used in the writ may fairly be construed as referring to the day of the month, and as meaning the next 22d day of June, at 10 o'clock in the forenoon. 5 Words and Phrases, 4795. This is especially true since the "next" ensuing regular term of court after the issuing of the writ was the fourth Monday (22d day) in June, 1908. Act Feb. 24, 1908, 25 St. at Large, p. 1016.

As to the objection that the clerk did not issue the writ of venire 15 days before the commencement of a regular term of court, as required by section 2913, Civ. Code 1902, it is sufficient to say that Greenwood county falls within the provision of section 2930, Civ. Code 1902, which provides for the drawing of jurors by the jury commissioners not less than 10 nor more than 20 days before the first day of each week of any regular or special term of the circuit court, and the clerk of the court is required to issue the venire immediately after such drawing. As the drawing of the jurors took place on the 12th day of June, and the writ of venire was issued on that day, the time was not less than 10 days before the court, which commenced on the 22d day of June. The existence of the special provision for Greenwood county no doubt accounts for the attempt to correct the printed form framed to meet the requirements of sections 2913 and 2914, which contemplated that the clerk of the court should issue the writ of venire, and have it served on the jury commissioners, previous to the drawing of the jury by

them. The writ was a substantial compliance with the provisions of section 2930.

We have attempted to show that the writ is not fatally defective in any of the particulars alleged. We might add that section 2947 provides: "No irregularity in any writ of venire facias or in the drawing, summoning, returning or impaneling of jurors, shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict." There is no showing that the objections urged could not have been made before the returning of the verdict, by the exercise of due diligence, and no showing that the jurors drawn were not good and lawful men, and no showing that appellant was in any way injured by the alleged irregularities. Statutes prescribing the time and manner of selecting jurors are usually regarded as directory merely, and venires will not be quashed for mere irregularities. *State v. Smalls*, 73 S. C. 519, 53 S. E. 976, and cases cited; *Hutto v. Railway*, 75 S. C. 296, 55 S. E. 445; *State v. Smith*, 77 S. C. 251, 57 S. E. 868.

The judgment of the circuit court is affirmed.

(32 S. C. 350)

YORK SUPPLY CO. v. SOUTHERN RY. CO.
(Supreme Court of South Carolina. April 9, 1909.)

JUSTICES OF THE PEACE (§ 166*)—APPEAL—DISMISSAL.

Under Code Civ. Proc. 1902, § 368, providing that an appeal from a magistrate's court, if not brought to hearing before the end of the second term, shall be dismissed unless continued for cause shown, an appeal which has never been called for trial or continued by either party should not be dismissed summarily without an opportunity by appellant to be heard.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 166.*]

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge.

Action by the York Supply Company against the Southern Railway Company. From an order dismissing an appeal from the magistrate's court, defendant appeals. Reversed.

C. E. Spencer, for appellant. W. W. Lewis, for respondent.

JONES, J. This is an appeal from an order of the circuit court dismissing an appeal from a judgment in a magistrate's court in favor of plaintiff against defendant for \$51.27, for want of prosecution, under section 368, Code Civ. Proc. 1902. The appeal was duly docketed on calendar 2 of the common pleas for York county for April term, 1907, and the cause remained on the calendar until February term, 1908. The record fails to show, and it was not otherwise made to

appear, that up to that time any disposition had been made of the appeal, or that the case was called for trial by either party at the second term or subsequently, or that any special order for cause was passed continuing the same. At the February term, 1908, on the last day of the term, plaintiff moved to dismiss the appeal for want of prosecution, and the motion was granted notwithstanding the fact that appellant announced itself ready for trial; the court remarking that he had no discretion in the matter. The order of dismissal recited that the cause had been docketed for four terms, and that no continuance or other disposition of the matter had been had.

The statute regulating this matter is section 368 of the Code of Civil Procedure of 1902, which provides: "If a return be made, the appeal may be brought to a hearing by either party. It shall be placed upon the calendar, and continue thereon until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order, for cause shown. At least eight days before the court, the party desiring to bring on the appeal shall file the return and accompanying papers, if any, with the clerk, and the clerk shall thereupon enter the cause upon the calendar, according to the date of the return, and it shall stand for trial without any further notice." This statute was construed in *Manuel v. Loveless*, 54 S. C. 348, 32 S. E. 421, and it was declared that, whenever the circuit court is moved to dismiss an appeal at or after the second term, to justify dismissal, it must appear that the case was called for trial at the second term or some subsequent term, and that neither party, after such opportunity to be heard, brought it to a hearing or had it continued for cause shown. In this cause it did not appear that the case had ever been called for trial by the court until the term it was summarily dismissed for want of prosecution. The statute never contemplated a summary dismissal without an opportunity to be heard. The usual and orderly way for the court to give such opportunity is to call the docket of cases. With a view to enforce the statute, it might be well for the court, after calling the docket, to make some entry therein indicating that the case had been called, and what disposition was made of it, so that the foundation for a summary dismissal may be properly evidenced. The court will not indulge a presumption that cases on appeal from magistrate's courts were called at the second term and opportunity presented for a hearing.

In *Bell v. Pruitt*, 51 S. C. 344, 29 S. E. 5, opportunity for hearing was given before dismissal for want of prosecution, and the order was sustained. In *Manuel v. Loveless*, 54 S. C. 348, 32 S. E. 421, a refusal to

dismiss was sustained because the case was not called for trial until the fourth term, when it was continued for cause.

The judgment of the circuit court is reversed.

(82 S. C. 268)

GRANT v. CITY COUNCIL OF CHARLESTON.

(Supreme Court of South Carolina. April 9, 1909.)

INJUNCTION (§ 157*)—PRELIMINARY INJUNCTION—ISSUANCE OF ORDER AGAINST PLAINTIFF.

Plaintiff having sought an injunction against the collection of inspection fees imposed by a city ordinance requiring the inspection of fresh meats sold in the city, the right to require payment of such fees being denied by the plaintiff, a temporary injunction requiring him to close up his business pending the litigation, instead of restraining the collection of the fees upon the giving of the usual injunction bond to secure the city against loss, was improper, as being beyond the scope of the issues, and unnecessary for the preservation of the city's right to require inspection which was not disputed.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 340; Dec. Dig. § 157.*]

Appeal from Common Pleas Circuit Court of Charleston County.

Action by Thomas L. Grant against the City Council of Charleston. From an order granting a temporary injunction, plaintiff appeals. Modified.

J. C. Miller and N. B. Barnwell, for appellant. Geo. H. Moffet, for respondent.

WOODS, J. On 23d February, 1904, the following ordinance was passed by the city council of Charleston:

"An ordinance to provide for the payment of the cost of inspecting fresh meat outside of the city market: Whereas the preservation of the health of the community demands that there shall be daily inspection of fresh meat sold throughout the city, and said daily inspection is attended by expenses on the part of the city, and it is desired that the city be compensated for such extra labor and expenses,

"Be it ordained by the mayor and aldermen of the city council of Charleston, S. C., in council assembled:

"Section 1. That green grocers and other persons selling fresh meat outside of the city market shall pay to the city treasurer on or before the first day of March, 1904, the sum of \$57.20 as a compensation for such inspection by the city officials for the year 1904. That any person or corporation failing to pay this sum to the city treasurer shall be liable to a forfeiture of his license and be subject to a penalty of \$100, or imprisonment not exceeding thirty days.

"Sec. 2. That all ordinances or parts of ordinances, the provisions of which are in

conflict or inconsistent with this ordinance, are hereby repealed."

The plaintiff, a green grocer doing business outside of the city market, was arrested and held to bail for his appearance before the police court of the city of Charleston on the charge of failing to pay the inspection fee of \$57.20. Thereupon he instituted this action to enjoin the enforcement of the ordinance, alleging it to be void on these grounds: (a) Because the entire expense of inspecting meats, both in and outside of the city market, was placed on green grocers outside of the city market alone; (b) because it violated section 6, art. 8, of the Constitution of South Carolina, as to taxes and licenses imposed by municipalities; (c) because the city was without power under its charter to enact such an ordinance; (d) because it limited and abridged rights already granted, in violation of the city's charter; (e) because it violated section 5, art. 1, of the Constitution of South Carolina, and the fourteenth amendment of the Constitution of the United States, first, in that it provided for the forfeiture of his licenses without refunding the sums paid by him to the city for the same, and, secondly, in that, while purporting to be a police measure for the preservation of the health of the city, it was, in effect and reality, simply a measure for increasing the revenue of the city market, and for defraying the current expenses. On hearing the complaint and affidavit of the plaintiff Judge Dantzler made an order requiring the city council of Charleston to show cause why it should not be enjoined from enforcing the ordinance until the trial of the cause, and restraining the city council from any further proceeding for enforcement until the hearing of the return. Thereafter, on 22d December, 1904, on hearing the return, Judge Dantzler made this order: "That until the hearing of this cause upon its merits the defendant, the city council of Charleston, S. C., be restrained and enjoined from enforcing against T. L. Grant the provisions of an ordinance passed by defendant on 23d February, 1904, and that the plaintiff, T. L. Grant, be enjoined and restrained from carrying on the business of a green grocer—that is, to say more particularly, selling meat in the city of Charleston—until he has complied with the provisions of the said ordinance." The plaintiff appeals, alleging error in the portion of the order which enjoins him from carrying on his business as a green grocer.

The inference must be that the circuit judge reached the conclusion that the reasons for assailing the ordinance were of sufficient importance to require an injunction against its enforcement until the cause could be heard on its merits; for, if he had not reached that conclusion, he would not have granted any injunction. The city council has not appealed, and therefore this court cannot re-

view the conclusion of the circuit judge that a prima facie cause had been made, showing the necessity of interference of the court by injunction, in order to protect the plaintiff from irreparable injury. The sole question, then, is whether under the pleadings and affidavit there was any ground for enjoining the plaintiff from "carrying on the business of green grocer—that is, to say more particularly, selling meat in the city of Charleston, until he has complied with the provisions of the said ordinance." No doubt, this provision of the order was inserted with the view of protecting the health of the people of the city during the progress of the litigation. But in deciding the point at issue, it is important to observe that the plaintiff does not deny the right of the city council to have inspected the meat offered by him for sale. Indeed the power and duty of the city council to have such inspection is too clear to be questioned. The foundation of the action is the denial of the right, asserted by the city council, to require the plaintiff to pay the sum of \$57.20 as a fee for such inspection; and the relief sought is an injunction, not against the inspection, but against the collection of the inspection charge. The temporary injunction, therefore, could not prevent the inspection of the meat offered for sale, and therefore could not imperil the health of any of the citizens, or interfere in any manner with the city government, except to the extent of withholding from the city treasury the fee of \$57.20 per annum pending the litigation. The requirement that the plaintiff should close up his business during the litigation was, therefore, not only beyond the scope of the pleadings, but entirely unnecessary to the protection of the health of the city or the preservation of the rights claimed by the city council. Evidently the ultimate loss of the inspection fees was the only risk to which the city council or the municipal public could be subjected from the order of injunction in favor of the plaintiff; and the city council would have been made secure against this risk by the insertion in the order of the usual statutory requirement for an injunction undertaking to be given by the plaintiff.

The judgment of this court is that the order of injunction appealed from be modified by striking out so much thereof as enjoins the plaintiff, and by providing that, until the hearing of the cause on its merits, the city council of Charleston, S. C., be enjoined from enforcing against T. L. Grant the collection of the inspection fees provided for by the ordinance of 23d February, 1904, upon the plaintiff, T. L. Grant, entering into an undertaking, with one or more sureties, to be approved by the clerk of the court of common pleas for Charleston county, to the effect that he will pay to the city council of Charleston such damages, not exceeding \$500, as the city council of Charleston may sustain

by reason of the injunction, if the court shall finally decide that the said T. L. Grant is not entitled thereto.

(82 S. C. 232)

ENGLISH v. McDOWALL.

(Supreme Court of South Carolina. April 9, 1909.)

LANDLORD AND TENANT (§ 298*)—SUMMARY PROCEEDINGS TO RECOVER POSSESSION — RIGHT TO MAINTAIN.

A landlord cannot, while retaining a check sent him by the tenant for the rent due, institute summary proceedings, under Civ. Code 1902, § 2423, to dispossess the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1276-1278; Dec. Dig. § 298.*]

Appeal from Common Pleas Circuit Court of Kershaw County; Ernest Gary, Judge.

Proceedings in a magistrate's court, under Civ. Code 1902, § 2423, by C. N. English as landlord to eject J. D. McDowall as his tenant. A warrant of ejectment was issued by the magistrate, but the circuit court on appeal reversed his judgment, and plaintiff appeals. Affirmed.

B. B. Clarke, for appellant. Kirkland & Smith, for respondent.

WOODS, J. This proceeding was instituted under section 2423 of the Civil Code of 1902, by C. N. English, as landlord, to eject J. D. McDowall, as his tenant, from a house and lot in Camden, on the allegation that rent to the amount of \$25 was due and unpaid. The magistrate, after hearing evidence on both sides, issued the warrant of ejectment, but the circuit court on appeal reversed the judgment of the magistrate, saying in the decree: "Upon full consideration of the case I find that, at the time the proceedings were instituted, the defendant had sent to the plaintiff a check for the rent alleged to be due. The plaintiff received this check, and held the same until it was put in evidence by the plaintiff in the proceedings of ejectment. Under these circumstances I hold, as a matter of law, that the plaintiff could not retain this check and maintain the proceedings which he sought under the provisions of the section of the statute invoked. He would be estopped, and the magistrate was in error in not so holding." The evidence of English, the landlord, was to the effect that McDowall contracted to pay as rent \$125 per annum, in equal monthly installments in advance, and that he should have the option to purchase the property by May 1st, that McDowall told him just before May 1st he was trying to get the money from a building and loan association to pay the purchase money of the property, and that he himself was silent as to awaiting the result of McDowall's application, but that he did not demand possession. On May 28th McDowall sent English a check for \$19.85,

stating the same to be in full of the rent due for April and May, after deducting \$1 for repairs on fence. English received the check, and, without returning it, on May 29th instituted this proceeding to eject McDowall. It was not until the trial that the check was tendered back, and then it was received and used by the respondent as evidence. The landlord testified on cross-examination, if he had not had an opportunity to sell the property, he would have presented the check for payment. The landlord was not obliged to accept the check as payment, but his retention of it was evidence that he accepted it as payment of the rent for April and May, on condition that it would be paid on presentation to the bank on which it was drawn, and that he assumed the obligation to present it within a reasonable time. The retention of the check was also evidence of an obligation assumed by the landlord to accept payment of the past-due rent, and not to insist on the right of ejectment for nonpayment for the months of April and May, if the check should be paid when presented at the bank. Therefore he could not legally institute ejectment proceedings while he retained the check.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 311)

SEVIER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. PLEADING (§ 248*)—AMENDMENTS—CHANGING CAUSE OF ACTION.

Where the complaint alleged that defendant negligently failed to stop a train at a station long enough for plaintiff, a passenger, to alight safely, and "negligently, * * * while plaintiff was endeavoring to get off the car, moved the same rapidly forward, causing plaintiff to fall," etc., and plaintiff's testimony was that the train did not stop a sufficient time to permit her to alight, and that while she was attempting to do so while the train was slowly moving she fell and was injured, an amendment substituting for the quoted words the words, "Defendant negligently started the car from the station before plaintiff had time to alight therefrom, and after defendant started the same and while it was moving slowly, plaintiff attempted to alight, and fell to the ground, defendant thus causing plaintiff to fall," etc., did not substantially change plaintiff's claim, and was proper under Code Civ. Proc. 1902, § 194.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 248.*]

2. CARRIERS (§ 347*)—INJURIES TO PASSENGER ALIGHTING FROM MOVING TRAIN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

It is not contributory negligence in law for a passenger to alight from a slowly moving train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1391; Dec. Dig. § 347.*]

3. CARRIERS (§ 347*)—INJURIES TO PASSENGER ALIGHTING FROM MOVING TRAIN—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Whether plaintiff, a passenger, was guilty of contributory negligence in alighting from a

moving train held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 847.*]

Appeal from Common Pleas Circuit Court of Greenville County; Geo. E. Prince, Judge.

Action by Elizabeth M. Sevier against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cothran, Dean & Cothran, for appellant. B. M. Shuman, for respondent.

JONES, J. Plaintiff recovered judgment against defendant for \$500 for personal injuries alleged to have been sustained by her while a passenger on defendant's train from Spartanburg to Campobella on August 1, 1906. The plaintiff went to trial upon a complaint, in part alleging that defendant's servants, upon arrival of the train at said station, negligently, willfully, and recklessly failed to stop the train long enough for plaintiff to alight in safety, and "negligently, willfully, and recklessly, while plaintiff was endeavoring to get off of said car at said station, moved and caused the same to move rapidly forward and onward, thus causing plaintiff to fall and be thrown violently from said car to the ground." At the close of all the testimony, defendant moved to direct a verdict (1) because there was no evidence of willfulness to support punitive damages (as the court directed the jury not to find punitive damages this ground goes out of the case); (2) because there was no evidence to sustain the cause of action alleged in the complaint; (3) because the testimony shows conclusively that plaintiff was guilty of contributory negligence in alighting from the moving train. Plaintiff moved to amend the complaint to conform to the facts proved, and the court granted an amendment striking out the words which we have quoted above, and inserting in lieu the words: "Defendant negligently started said car from said station before plaintiff had time to alight therefrom, and after defendant started the same, and while it was moving slowly, plaintiff attempted to alight therefrom, and fell violently to the ground from said car, defendant thus causing plaintiff to fall and be thrown violently from said car to the ground." The testimony for plaintiff tended to show that the train did not stop a sufficient time to permit plaintiff to alight, and that, when attempting to do so while the train was slowly moving forward, she fell to the ground, and was injured. We do not think that the amendment allowed substantially changed the claim of plaintiff, and therefore it was expressly permitted by section 194, Code Civ. Proc. 1902; Booth v. Langley Co., 51 S. C. 412, 29 S. E. 204; Roundtree v. Railway, 72 S. C. 478, 52 S. E. 231. Section 190 of the Code provides no variance between the allegation in a plead-

ing and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, and it appears that counsel for defendant upon the motion to direct a verdict stated that he had not been misled by the variance. The first and third exceptions therefore cannot be sustained.

Defendant's second, and remaining, exception, contends that the evidence warrants no other inference than that plaintiff negligently contributed to her injury by alighting from a moving train under circumstances making it obviously dangerous to do so. According to the testimony for plaintiff, the train was moving slowly, not over two miles per hour, and a witness for the defendant testified that the train had not moved more than the length of a car when plaintiff alighted. The authorities in this state hold it is not contributory negligence in law for a passenger to alight from a slowly moving train. *Cooper v. Railway Co.*, 56 S. C. 94, 34 S. E. 16; *Creech v. Railway*, 66 S. C. 533, 45 S. E. 86. The rule is thus stated in *Gyles v. Railway*, 79 S. C. 177, 60 S. E. 433: "The rule of law declared in this state is that it is not negligence per se to board or alight from a moving train, unless the train is moving so fast as to make the danger of alighting or boarding obvious to a person of ordinary prudence, and that ordinarily it should be left to the jury to determine whether the passenger's act is negligent under the circumstances." If, however, it be admitted or conclusively shown that the speed of the train is high and dangerous, it is contributory negligence in law to alight therefrom; the danger being obvious to a person of ordinary prudence. *Smith v. Southern Railway*, 80 S. C. 1, 61 S. E. 205. Under these authorities, the matter of contributory negligence was properly submitted to the jury.

The judgment of the circuit court is affirmed.

(53 S. C. 307)

COUSAR MERCANTILE CO. v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. CARRIERS (§ 20*)—CARRIAGE OF GOODS—LOSS OF GOODS—PENALTIES—CONSTRUCTION OF STATUTE.

The act of 1903 (24 St. at Large, p. 81) provides that a claim for loss of or damage to property while in possession of a carrier shall be adjusted and paid within 90 days, in case of shipments from without the state, after the filing of the claim, and that the carrier shall be liable for the amount of such loss or damage with interest from the date of filing of claim until payment thereof, and for failure to adjust and pay the claim within the prescribed time shall be subject to a penalty to be recovered by the consignee, provided that, unless the consignee recover the full amount claimed, no penalty shall be recovered, but only the actual amount of loss or damage, with interest. *Held*, that, to recover under the statute, a consignee must show loss of or damage to the specific

goods as distinguished from damage to him for delay in transportation, and, if the goods were delivered after the claim was filed and before expiration of the time for adjustment, they could not be treated as lost.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

2. CARRIERS (§ 20*)—CARRIAGE OF GOODS—LOSS OF GOODS—PENALTIES.

Under the act of 1903 (24 St. at Large, p. 81), allowing recovery for loss or damage, if the claim be filed for loss of goods and the proof show only damage thereto or vice versa, the court may allow recovery for whatever loss or damage be established, but, to recover the penalty, recovery must be had for the amount of the claim as filed.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

3. CARRIERS (§ 20*)—CARRIAGE OF GOODS—DELAY IN DELIVERY—PENALTIES.

The act of 1904 (24 St. at Large, p. 671), to prevent delays in transportation of freight by railroads, provides a remedy, with a penalty, for delay in transportation, the act having no application to loss of or damage to the goods.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Chester County; John S. Wilson, Judge.

Action by the Cousar Mercantile Company against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Abney & Miller and J. E. McDonald, for appellant. A. L. Gaston, for respondent.

JONES, J. The plaintiff recovered judgment against defendant for \$80.84, for the value of a shipment of freight alleged to have been lost and \$50 penalty for failure to adjust the claim filed for said loss within 90 days. It appeared that the freight was delivered to the defendant at South Boston, Va., on December 12, 1906, for delivery to the plaintiff, consignee, at Chester, S. C. The goods not having arrived by January 2, 1907, plaintiff on that day filed its claim as for lost goods valued at \$80.84. There was some evidence that such a delay was unusual and unreasonable. The plaintiff's testimony was to the effect that notice of the arrival of the goods at Chester, S. C., was given plaintiff on February 19, 1907, and that plaintiff declined to receive the goods at full value; the goods being heavy winter dry goods. There was no evidence that the goods had been damaged in any way. The packages were not broken. The goods were not examined. John G. Cousar, secretary and treasurer of the plaintiff corporation, testified that plaintiff was liable for the price of the goods, and was "aggrieved" by the nondelivery of the goods \$80.84, their value. A motion for nonsuit was made on the grounds (1) that no case under the statute had been made out; (2) that it appears from the undisputed testimony that the claim was filed for the loss of the goods, and that the goods were not lost,

and that recovery for the penalty can be had only in case of loss of or damage to freight; (3) that the testimony shows that plaintiff as consignee has not been injured or aggrieved. The motion was overruled, and defendant excepts.

The terms of the penalty statute material to the issue are: "Sec. 2. That every claim for loss of or for damage to property while in possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor, until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage with interest as aforesaid. * * *" In order to recover under this statute, plaintiff must show loss of, or damage to, the specific freight as distinguished from damage to plaintiff in consequence of delay in its transportation. For delay in transportation, the act of 1904 (24 St. at Large, p. 671) provides a remedy with penalty, and it has been declared that such statute has no reference to loss of or damage to freight. *Macon v. Southern Ry. Co.*, 81 S. C. 168, 62 S. E. 6. On the other hand, it has been declared that the act of 1903 (24 St. at Large, p. 81), the statute in question, provides for the adjustment of claims for loss of or damage to freight, and does not cover claim for delay in transportation. *Moody v. Railway Co.*, 79 S. C. 300, 60 S. E. 711. This last case shows that, notwithstanding the delay, the plaintiff was bound to receive the goods, and that the carrier's liability was to compensate for the damages growing out of the delay, but not for loss; the court citing *Nettles v. Railroad Co.*, 7 Rich. Law, 190, 62 Am. Dec. 409, and other cases. The penalty statute does not abrogate this well-established rule of law. The statute allows recovery for loss or damage, and, if the claim were filed for loss of freight and the proof showed only damage to freight,

or vice versa, the court might not turn the plaintiff out, but might allow recovery for whatever loss of freight or damage to freight was established. But, in order to recover the penalty, it would be necessary to recover for loss or damage the amount of the claim as filed.

It appearing that there was no loss of freight, and, there being no testimony of any damage to the specific freight, nonsuit should have been granted. It is true there was testimony that the goods were seasonable goods, heavy winter dry goods, and that while shipped December 12, 1906, were not tendered until February 19, 1907, when the winter season had far advanced, but the goods were intact, and not shown to have been damaged in the least. It is true, also, that Mr. John G. Cousar testified that plaintiff was "aggrieved" to the amount of \$80.84, the value of the goods, because of the nondelivery, but this merely meant that such was his estimate of the damages resulting from delay in shipment under the mistaken theory that plaintiff could treat the goods as lost. It was impossible for the jury on the testimony to conclude that the goods had been damaged to the full extent of their value.

After the refusal of the nonsuit, defendant offered testimony tending to show that the goods arrived at Chester, S. C., on January 5, 1907, a few days after the filing of the claim for their loss, and were immediately tendered to plaintiff, with a suggestion that claim be filed for delay in shipment, and that plaintiff declined to receive the goods. There was some testimony that the delay was due to a congestion of freight at all transfer points in the rush of business preceding the Christmas holidays. Defendant's counsel made requests for instruction to the jury in accordance with the view announced by this court above in discussing the motion for nonsuit, viz., in substance, that no recovery could be had under the statute upon proof of a delay in transportation, but that it must appear that there was loss of or damage to the freight. The court, however, instructed the jury that, if the claim for loss was filed after the lapse of a reasonable time for the arrival of the goods, it was filed in accordance with the statute, and that a tender of the goods thereafter would not prevent plaintiff from treating the goods as lost. This we think was error which would justify reversal, even if we were wrong in the view that there was no proof of loss of or damage to the freight. We adhere to the rule declared in *Moody v. Railway*, supra, and it follows there can be no recovery for loss of freight upon evidence that the freight had been tendered and refused, certainly if tendered before the expiration of the time allowed by statute for adjustment. Whether a different rule should prevail if tender is made after the expiration of the time allowed

by statute for adjustment is not involved, and need not be discussed.

The judgment of the circuit court is reversed.

(82 S. C. 492)

MONTAGUE v. PRIESTER et al.

(Supreme Court of South Carolina. April 24, 1909.)

1. MORTGAGES (§ 415*)—FORECLOSURE—DEFENSES—SATISFACTION.

A mortgagor having elected to repudiate his deed and to rescind the contract, under which, in part consideration of the deed, the mortgage was to be canceled, and on that election having had the contract annulled and retained the land, he cannot thereupon, as against an action to foreclose the mortgage, claim that mortgage was satisfied by the deed, or that it was canceled by being merged in the deed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1210; Dec. Dig. § 415.*]

2. MORTGAGES (§ 319*)—PAYMENT—EVIDENCE—RECEIPT.

Indorsing a mortgage paid and surrendering it is nothing more than a receipt in full of the mortgage debt, which as between the parties is not conclusive of payment.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 863; Dec. Dig. § 319.*]

3. MORTGAGES (§ 424*)—FORECLOSURE—LIMITATIONS.

Twenty years from date of mortgage is the limitation for an action for foreclosure, without regard to the time elapsing from the giving by mistake of a receipt in full of the mortgage debt, or the time when the mistake was discovered.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1284; Dec. Dig. § 424.*]

4. WITNESSES (§ 162*)—COMPETENCY—TRANSACTIONS WITH DECEDENT'S AGENT.

One, though prosecuting a claim against a decedent's estate, is not incompetent, under Code Civ. Proc. 1902, § 400, to testify to the transaction, which was not with decedent, but with his agent.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 701; Dec. Dig. § 162.*]

5. LIMITATION OF ACTIONS (§ 103*)—COMPUTATION OF PERIOD—TRUST—REPUDIATION.

Even if W. be a trustee of an express trust as to money paid by P. to him on his agreement to pay it to a creditor of P., yet, on P. having notice from a statement of account by W. that W. had repudiated the trust by applying the money to P.'s debt to him, the statute of limitations commenced to run.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 506; Dec. Dig. § 103.*]

Appeal from Common Pleas Circuit Court of Barnwell County; R. W. Memminger, Judge.

Action by H. W. Montague, administrator of W. P. Wilcox, deceased, against Daniel R. Priester; the Bank of Barnwell intervening. From the judgment, plaintiff and defendant Priester appeal. Modified.

Q. L. Tobin and Bates & Simms, for appellants. Robert Aldrich, for respondent.

WOODS, J. In this case the plaintiff, H. W. Montague, administrator of the estate

of W. P. Wilcox, and the defendant, Daniel R. Priester, both appeal from a decree of Judge Memminger for the foreclosure of a mortgage executed by Priester to Wilcox. The position relied on by counsel for Priester, the mortgagor, is that the mortgage was satisfied by a deed of conveyance of the mortgaged premises, made by Priester to Wilcox, the mortgagee, on the 18th January, 1905; and it is contended that the deed was adjudged to have that effect in the case of *Wilcox v. Priester*, 68 S. C. 106, 46 S. E. 553. The record in that case shows the position to be entirely untenable. There the action was brought by the heirs of Wilcox against Priester to recover possession of the land, in reliance on the deed from Priester to Wilcox now set up. Priester's defense to their claim was that he had executed the deed in consideration of a promise by Wilcox to satisfy his mortgage and to pay the remainder of the purchase price in cash, that Wilcox had breached his contract, and that thereupon he had "repudiated the transaction." On the issue made by this defense, the jury found a verdict in Priester's favor for the land in dispute, and the judgment on the verdict was affirmed by this court. The mortgagor having elected to repudiate his deed and to rescind the entire contract under which the mortgage was to be canceled, and on that election having succeeded in annulling the contract and in retaining the land, it is quite clear he cannot now set up the repudiated and rescinded contract to defeat the mortgage. He cannot have the benefit of a rescission of the contract and also of its enforcement. For the same reason, the mortgagor cannot allege the mortgage was canceled by being merged in the deed. When the deed fell by reason of the mortgagor's repudiation of it, all its incidents fell with it.

The respondent, Bank of Barnwell, intervened in this action for foreclosure, and as assignee set up a senior mortgage on the land, executed by Priester to Charles Pechman, alleging a balance of \$100 and interest to be due thereon. The defendant Priester by formal plea alleged against the bank's mortgage that Wilcox, the holder of the junior mortgage, had agreed with him to pay the \$100 due, that he had paid Wilcox that amount to be applied to the bank's mortgage, "and that the said Wilcox did pay the said Bank of Barnwell, or should have done so." The plaintiff, as administrator of the estate of Wilcox, replied to the matters alleged by the Bank of Barnwell and the defendant Priester by a general denial and by the allegation that "the said claim as against the estate of Wilcox did not accrue within six years prior to the commencement of the action." The president of the bank testified that, after several payments had been made on the mortgage, the officers of the bank made the mistake of supposing the mortgage fully paid, and so on November

3, 1891, surrendered it to Priester, marked "Paid"; but that very soon afterwards they discovered that there was a balance of \$100 due, and notified Priester of the mistake. He testified further that the claim of the bank was for \$100 principal and interest thereon at 8 per cent., together with attorney's commissions of 10 per cent. on the whole sum due. The bank amended its pleadings to conform to this proof. The defendant Priester then set up additional defenses, as follows: "First, it being alleged by the said defendant that the alleged mistake was made by it and without fault of the defendant Priester, no interest or attorney's commission can be charged on said mistake to this defendant; second, that the said alleged mistake having occurred more than six years before the filing of this action by the defendant the Bank of Barnwell, and more than 10 years from the said action taken by the Bank of Barnwell, and said mistake having been known to said Bank of Barnwell more than 6 years and more than 10 years from its alleged making, the remedying of said mistake at this time is barred by the statute of limitations." The mortgage to Pechman was then introduced, and, though it is not printed in the record, it seems to be conceded that it provided for 8 per cent. interest and 10 per cent. attorney's fees. The indorsement on the mortgage and its surrender to the mortgagor was nothing more than a receipt in full of the mortgage debt. A third party who had been misled by such a receipt might possibly set it up as conclusive. But between the original parties a receipt is not conclusive evidence of payment. *Daniels v. Moses*, 12 S. C. 130; *Park v. So. Ry. Co.*, 78 S. C. 302, 58 S. E. 931. The fact that the receipt was placed on the mortgage makes no difference. 2 *Jones on Mortgages*, § 918. The Bank of Barnwell therefore is enforcing its original mortgage which had not been paid, and as 20 years from its date had not elapsed, it was not barred by the statute of limitations, and was enforceable as a lien on the land, for the amount of principal and interest and attorney's fees according to its terms.

The remaining question is whether the circuit court erred in granting to Priester the relief of requiring Montague, as administrator of the estate of Wilcox, to satisfy the balance due on the bank's mortgage. The testimony of Priester was that H. W. Montague was Wilcox's "head man" in the conduct of his business, that in the course of business Montague paid out and received money for Wilcox, and that he paid to Montague for Wilcox the sum of \$100 which Montague for Wilcox received with the promise to pay it in satisfaction of the balance due on the bank mortgage. This testimony was all objected to by the attorney for the plaintiff on the ground that it was incompetent under section 400 of the Code of Civil

Procedure of 1902. The objection seems quite groundless, for while Wilcox is dead, and Priester is prosecuting this claim against his estate, the transaction and communication to which Priester testified was with Montague, not Wilcox.

But assuming Priester's testimony to be true, his claim that Wilcox's estate should be required to discharge the bank mortgage is barred by the statute of limitations. He introduced the following, furnished him by Wilcox as an account of their transactions, and testified that the \$100 which was to be paid on the bank mortgage is that mentioned in the first credit to him:

Allendale, S. C., Jan. 18-95.

Mr. D. R. Priester, in Account with W. P. Wilcox.	
To balance of account 1893 and interest.....	\$480 25
" " " N. & M. of Jan. 20-93.....	113 53
" " " N. & M. of Jan. 28-93.....	251 05
" " " N. & M. of July 10-91.....	29 81
	<hr/> \$874 63

Or.

By amount in sale of John Bradley tract....	\$100 00
By one (12-horse) boiler, one (16-horse) engine, one gin sprinkler, one 50-saw gin, 1 steam cotton press.....	774 63
	<hr/> \$874 63

There is no evidence that Priester ever made any objection to the credit of \$100 on his general account with Wilcox, or demanded that it should be taken from the general account and paid to the bank. Thus the account introduced by Priester shows he has received the benefit of the \$100, as a credit on his account with Wilcox. If it is now taken from that account, it is manifest there would be a balance due by Priester to Wilcox of \$190, long since barred by the statute of limitations. Even regarding Wilcox the trustee of an express trust as to the \$100 paid to Montague, Priester had notice from the above account, when he received it in 1895, that Wilcox had repudiated the trust by applying the \$100 to his own debt. The statute began to run from that time, and Priester's demand that Wilcox or his administrator should apply the money to the bank's mortgage is barred by the statute of limitations. *Boyd v. Munro*, 82 S. C. 253, 10 S. E. 963.

The result is that the plaintiff, as the administrator of the estate of Wilcox, is not legally liable to Priester for the payment of the mortgage of the Bank of Barnwell, and that the proceeds of the sale of the mortgaged premises should be applied first to the payment of the balance of the \$100, and interest at 8 per cent. from November 8, 1891, and 10 per cent. attorney's fees due to the Bank of Barnwell on its mortgage and then to the payment of the sum of \$336.36, with interest thereon at the rate of 8 per cent. from November 15, 1892, found by the circuit judge to be due on the mortgage to Wilcox.

The judgment of this court is that the judgment of the circuit court be modified accordingly.

(82 S. C. 315)

HYPES v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina. April 9, 1906.)

1. CORPORATIONS (§ 493*)—TORTS—LIABILITY.

A corporation is liable for the tort of an agent acting within the general scope of his employment, without previous express authority or subsequent ratification, though the tort involves malice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1904; Dec. Dig. § 493; * Principal and Agent, Cent. Dig. § 804.]

2. CORPORATIONS (§ 493*)—TORTS—LIABILITY.

A corporation is liable for malicious libel published, or for willful slander uttered, by its agent while acting within the scope of his employment, and in the actual performance of the duties of the corporation touching the matter in question, though the slanderous words were uttered without the knowledge, approval, consent, or ratification of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1904; Dec. Dig. § 493; * Principal and Agent, Cent. Dig. § 804.]

3. CORPORATIONS (§ 493*)—TORTS—LIABILITY.

A railway company is liable for malicious slander of one employed by it as locomotive engineer, uttered by its general division superintendent within the scope of his authority, and in the discharge of his duties, though it does not appear that it ratified the slander.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1904; Dec. Dig. § 493; * Principal and Agent, Cent. Dig. § 804.]

Appeal from Common Pleas Circuit Court of Greenville County; J. C. Klugh, Judge.

Action by C. E. Hypes against the Southern Railway Company and another. From a judgment overruling a demurrer to the complaint, defendant the Southern Railway Company appeals. Affirmed.

Cothran, Dean & Cothran, for appellant.
J. J. McSwain, for respondent.

JONES, J. This is an action to recover damages, for alleged slander, against the defendant railway corporation and its general division superintendent. The defendant corporation interposed a demurrer to the complaint that it failed to state facts sufficient to constitute a cause of action, for the reason that a corporation cannot be held liable in damages for slander by one of its employees. The demurrer was overruled by Judge Klugh, and exception is now taken, in which it is contended that a corporation is not liable for slander uttered by one of its employees unless it affirmatively appear that such agent was expressly directed or authorized by the corporation to speak the words in question, of which there is no allegation in the complaint.

It appears that, some time previous to July 20, 1906, the plaintiff was a locomotive engineer of the defendant company, and at

the end of May, 1906, turned in his time report showing the number of hours he had worked during the month. This claim was disallowed by defendant to the extent of \$37. Plaintiff, after some correspondence, had an interview with P. L. McManus, the superintendent of the defendant corporation, in the division headquarters in Greenville, S. C., in which they took up the matter of plaintiff's unpaid time. In this interview it is alleged that McManus as superintendent declared in loud tones, in the hearing of several persons within the room, and referring to plaintiff, "I am going to stop you fellows from stealing from the company," and called plaintiff a "thief" several times. The complaint further alleged that a letter was immediately written to each of the defendants setting out the slander and demanding an apology, and that the letter was never acknowledged or answered, and that, after notice of the wrong, the defendant corporation by its silence and acquiescence has approved and ratified the conduct of its said superintendent. It was further alleged: "That the action of the said P. L. McManus in accusing plaintiff of 'stealing' and of being a 'thief' was done within the scope of his authority, and in the discharge of his duties as superintendent as such; that he was acting for the Southern Railway Company and for its interests, as indicated by his words, 'I am going to stop you fellows from stealing from the company'; that the tort against the plaintiff was committed in the office of the said superintendent, while going over the books, considering the question of plaintiff's time, which said P. L. McManus had full authority and power to settle; and, further, that the said defendant company has approved of the slander of its said agent and superintendent by failing to acknowledge said letter, and refusing to apologize to plaintiff for the insult offered him and the wrong and damage to his good name, and said injury was caused by the joint and concurrent act of the defendants." We think the demurrer was properly overruled.

It is established that corporations, as well as natural persons, are liable for the willful tort of an agent acting within the general scope of his employment, without previous express authority or subsequent ratification. *Rucker v. Smoke*, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758; *Williams v. Tolbert*, 76 S. C. 217, 56 S. E. 908; *Schumpert v. Railway*, 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; *Gardner v. Railway*, 65 S. C. 342, 43 S. E. 816; *Riser v. Railway*, 67 S. C. 419, 46 S. E. 47; *Dagnall v. Railway*, 69 S. C. 115, 48 S. E. 97; *Fields v. Cotton Mills*, 77 S. C. 549, 58 S. E. 608, 11 L. R. A. (N. S.) 822, 122 Am. St. Rep. 593. The old doctrine that a corporation, having no mind, cannot be liable for acts of agents involving malice has been completely exploded in modern jurisprudence. While a corporation is non-

personal in its formal legal entity, it represents natural persons, and must necessarily perform its duties through natural persons as agents; hence must spring the correlative responsibility for the acts of its agents within the scope of their employment. The liability of a corporation for malicious libel published by its agent in the course of his employment is generally recognized. *Philadelphia, etc., Ry. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293; *Bacon v. Michigan, etc., R. R. Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Fogg v. Boston, etc., R. R. Co.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; *Missouri Pacific Ry. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794; 10 Cyc. 1215; 18 Ency. Law, 1058. We do not regard the distinction between written and unwritten slander to be of sufficient importance to warrant the application of a different rule. The written slander is not always or necessarily more public than the spoken; and if it may indicate more deliberation, and hence warrant more easily the inference of malice, the difference is merely in degree, not in kind. It may otherwise appear that the slander was willful, as in this case under the demurrer.

This view is supported by a recent decision by the Supreme Court of Mississippi (*Rivers v. Yazoo & Mississippi Valley R. R. Co.*, 90 Miss. 196, 43 South. 471, 9 L. R. A. [N. S.] 931), which quotes from Lord Mansfield in *Maloney v. Bartley*, 3 Camp. 210, to the effect that there is no well-founded distinction between written and unwritten slander, and that the reasons given in the books for such a distinction are very insufficient. The Mississippi case held that a corporation is liable for slander spoken by its agent while acting within the scope of his employment, and in the actual performance of the duties of the corporation touching the matter in question, although it did not appear that the slanderous words were uttered and published with the knowledge, approval, consent, or ratification of the corporation. In the case of *Singer Manufacturing Co. v. Taylor*, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, the Supreme Court of Alabama held that, in the absence of contract relation between the master and the person slandered, the master is not liable for a slander uttered by his servant which the master does not authorize or ratify. In the case at bar the complaint shows a contract relation between the corporation and the person slandered, and that the slander was in reference to a matter growing out of such relation, a dispute as to the correctness of plaintiff's claim for wages, a matter within the duty of the agent to adjust. In the case of *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320, the court

held that, while a corporation may make a libelous publication, it is not liable for oral slander by one of its servants, though within the scope of the duties of the agency, unless it affirmatively appear that the agent was expressly authorized by the corporation to speak the slanderous words. The reason assigned for this conclusion is that there can be no agency in slander. We see no good ground for distinguishing slander from other willful torts in this regard. In 10 Cyc. 1216, it is stated that the liability of a corporation for oral slander seems to stand on a different footing, and that the corporation is exonerated unless it authorized, approved, or ratified the act of the agent. To support the text the only case cited is *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 292. An examination of that case, however, shows that a majority of the court were of the opinion that "a corporation is responsible for slanderous words uttered by its agents in the course and scope of such agents' employment, and in aid of the company's interest," but that under the circumstances of the case they concurred in holding the charge error because it excluded the right of possible justification. The case is really authority for our conclusion. The later case of *Sawyer v. Norfolk & S. B. Co.*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, more fully shows the position of the North Carolina court. In that case the court was unanimous in holding that a corporation may be liable for slander committed by its agent, and that the test of liability depended upon the question whether injury was committed by the authority of the master expressly conferred, or fairly implied from the nature of the employment and the duties incident thereto. In applying the principles stated the court held that a corporation was not liable for slander by its superintendent against one voluntarily in its office, seeking employment which the superintendent was authorized to give, but which was refused, and then the superintendent slandered the person in regard to his former work for the company. In determining the question of implied authority the court considered, not only the relation between the corporation and its agent, but between the corporation and the person slandered, holding that at the time of the slander there was no special relation of duty between the corporation and the plaintiff. We have adverted to the fact that in the case at bar the special relation between the corporation and the plaintiff is shown. In the case of *International Text-Book Co. v. Heartt*, 136 Fed. 132, 69 C. C. A. 127, the slander was uttered by the agent after he had left plaintiff's premises, and gone to another locality where he was not engaged in the performance of any duty under the terms of his employment. *Childs v. Bank*, 17 Mo. 213, cited by appellant, held the early

view, that a corporation is not capable of malice, but that conception is not now recognized in the law of Missouri, as appears by reference to *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315, 17 Am. Rep. 653, and *Boogher v. Life Association*, 75 Mo. 319, 42 Am. Rep. 413.

Our conclusion is that the complaint shows facts from which it may be inferred that the slander in question was uttered within the course and scope of the agent's employment, and under implied authority of the master. This view sustains the order overruling the demurrer, and it is unnecessary to consider whether the facts stated also show subsequent ratification of the alleged slander by the master.

The judgment of the circuit court is affirmed.

(32 S. C. 232)

BERLEY & KYZER v. COLUMBIA, N. & L. R. CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. CARRIERS (§ 134*)—CARRIAGE OF FREIGHT—ACTIONS FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

In an action against a carrier for damages for freight injured, and for the statutory penalty for failure to pay the claim, evidence held to sustain a finding that the property was of no value after it was injured.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 588, 607; Dec. Dig. § 134.*]

2. TENDER (§ 8*)—PLACE.

Where a creditor is in the state, and no place of payment is fixed by law or contract, the debtor must find the creditor, and tender payment where he is.

[Ed. Note.—For other cases, see *Tender*, Cent. Dig. § 11; Dec. Dig. § 8.*]

3. CARRIERS (§ 20*)—CARRIAGE OF FREIGHT—PAYMENT OF CLAIMS—PLACE.

Since St. 1903, 24 St. at Large, p. 81, requiring that claims for damages to freight shall be presented to the agent at destination, does not provide for the place of payment, the carrier as the debtor must find the claimant and tender payment to him within the statutory period in order to avoid the penalty for nonpayment, but the carrier may require claimant to state where he desires payment to be made, when payment at that place within the required time will prevent the penalty from attaching.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.*]

Appeal from Common Pleas Circuit Court of Lexington County; J. W. De Vore, Judge.

Action by Berley & Kyzer against the Columbia, Newberry & Laurens Railroad Company. From a judgment for plaintiffs, defendant appealed. Affirmed.

Edward L. Craig, for appellant. A. D. Martin and De Pass & De Pass, for respondents.

WOODS, J. The plaintiffs on November 15, 1906, filed with defendant's agent at Irmo, a station on defendant's railroad, a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

claim for \$1.84 for 50 feet of iron piping, shipped from Columbia and consigned to the plaintiffs at Irmo. This action was brought for the amount of the claim and the statutory penalty of \$50 for failure to adjust and pay the claim within 40 days from the date of filing it with the defendant. The judgment of the magistrate for the amount of the claim and penalty was affirmed by the circuit court.

The defendant first submits the point that the plaintiff could not recover \$1.84, the entire amount of the claim, because the evidence for the plaintiff shows that the entire value of the piping was only \$1.84; that it was not lost, but only injured; and that after the injury it was of some value. The plaintiff Kyzer testified the piping was so broken as to be of no value to him, though "it might have been worth something to somebody." This mere conjecture of value by the plaintiff does not warrant this court in holding there was no evidence to support the judgment of the magistrate that the piping was a complete loss, especially when it is considered that Hook, defendant's agent at Irmo, testified the defendant admitted and allowed the whole claim after investigation.

The defendant next contends the plaintiffs, at the expiration of the statutory period of 40 days allowed to the defendant to adjust and pay the claim, should have applied to the defendant's agent at Irmo for payment of the claim; and that, because of the failure of the plaintiffs to do so, this action for the penalty cannot be sustained. On this point Hook, the agent, testified: "Mr. Kyzer nor Mr. Berley has never been back to demand payment since the claim was filed. I would have paid Mr. Kyzer his claim in a week's time if he had called for it. I have been willing to pay it since that time. I have never refused to pay it. I have tried to locate them by mail. About a year ago I notified him that I could pay them. I wrote to them twice. I addressed them at Lexington, S. C., some time since Christmas. I received a letter from Berley & Kyzer (which) asked me the date and amount of the claim in question. I replied to the letter. I received a second letter from Berley & Kyzer. This letter is lost. To the best of my knowledge I burned it." On January 27, 1908, the agent sent a check through the mail for the amount of the claim, directing the letter to Lexington, S. C. On February 8, 1908, the plaintiff returned the check, refusing to accept the amount of the claim without the penalty. The general rule is that when the creditor is in the state, and no place of payment is fixed by law or the contract of the parties, the debtor must find the creditor and tender payment. 2 Parsons on Contracts, 751, note; 22 Am. & Eng. 533; 30 Cyc. 1185; Emlen v. Lehigh Coal & Navigation Co., 47

Pa. 76; 86 Am. Dec. note, 520. The statute of 1903 (24 St. at Large, p. 81) requires that the claim shall be presented to the agent at the point of destination, but it does not provide for the place of payment. The obligation, therefore, is on the carrier to find the claimant and tender payment to him within the period fixed by the statute.

It was earnestly pressed at the argument that the application of this rule to claims against carriers would impose upon them an oppressive and unreasonable burden on account of the difficulty of finding claimants who have no regular place of business or settled residence. But this hardship may be easily avoided. When a claim is presented, we think the carrier has the right to require the claimant to indicate where he desires payment to be made; and, of course, tender within the statutory period at that place will prevent the penalty from attaching.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 382)

SIGWALD v. CITY BANK et al.

(Supreme Court of South Carolina. April 9, 1909.)

1. CORPORATIONS (§ 206*)—SUIT BY STOCKHOLDERS IN BEHALF OF CORPORATION.

When directors or officers of a corporation have mismanaged the corporate property, the action for redress should usually be brought by the corporation, yet a stockholder may sue in his own name when an application for redress through corporate action would be obviously useless, and hence a stockholder's action will be permitted where the corporation is in a receiver's hands, so that application for redress could not be successfully made at a stockholder's meeting nor before the board of directors, who are themselves charged with mismanagement, and the receiver is one of the persons charged with wrongdoing, so that he would not and could not sue himself.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 206.*]

2. RECEIVERS (§ 174*)—ACTIONS—LEAVE OF COURT TO SUE RECEIVERS.

If the absence of leave of the court appointing a receiver to sue him is a mere irregularity, and not jurisdictional, the leave may be given by the Supreme Court on appeal of the case.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 174.*]

3. RECEIVERS (§ 174*)—ACTIONS—LEAVE OF COURT TO SUE RECEIVER.

Where a stockholder's suit was brought nominally against a receiver of the corporation, but practically against the directors for mismanagement of corporation property, not to enforce any liability of the receiver as such, nor to recover or affect assets in the control of the court, but to augment the assets for distribution, so that a judgment against the receiver would not interfere with or embarrass the administration of the receiver's trust or give any advantage as against distributees, a failure to obtain leave to sue the receiver was not a jurisdictional defect.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 334; Dec. Dig. § 174.*]

4. CORPORATIONS (§ 320*)—ACTION BETWEEN STOCKHOLDER AND OFFICERS—NONJOINER OF DEFENDANTS—TORT-FEASORS.

The liability of one of several corporate directors who have mismanaged the corporate property is several as well as joint, and in a stockholder's suit for redress it is not necessary to join all the directors or their legal representatives.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

Appeal from Common Pleas Circuit Court of Greenwood County; Geo. W. Gage, Judge.

Action by Lucy M. Sigwald against the City Bank and others. A demurrer to the complaint was overruled, and defendants appeal. Affirmed.

Grier & Park and Ellis G. Graydon, for appellants. Caldwell & Gaston, for respondent.

JONES, J. This appeal is from an order of Judge Gage overruling a demurrer to the complaint. The demurrer was based upon two grounds: (1) That plaintiff had not legal capacity to sue; (2) defect of parties defendant. The suit is by a stockholder of the City Bank of Greenwood, S. C., now insolvent and in the hands of a receiver, in behalf of herself and all other stockholders who shall come in, against the said bank and its directors, including James F. Davis, its president, who is also a receiver of the bank, charging gross negligence in the management of the bank to the loss of the stockholders, and demands an accounting by said directors. The complaint is quite lengthy, and we accept for the purpose of this appeal the following condensed statement of the material facts alleged as stated in the argument of appellants' counsel: (1) Plaintiff is a stockholder in City Bank. (2) The bank failed on May 20, 1903, and was placed in hands of receiver defendant James F. Davis on May 27, 1903, and is now in hands of said receiver. (3) The defendants Bailey, Marse, Tinsley, Klugh, and Davis were directors of the bank at the time of failure, and Davis was president. (4) Other persons than those defendants had been officers and directors of the bank at various times, during the period of time for which the defendants are asked to account, to wit, Jordan (who died December 7, 1901), Maxwell (who died July or August, 1899), Joel S. Bailey (who died September 3, 1900), and Barksdale (resigned, time not stated)—none of whom are parties to this action. (5) During this time certain statements were made by the officers of the bank showing the bank to be in good condition. (6) Dividends were paid regularly until the bank suspended. (7) Jordan, who is not a party, and Davis, who is, made returns for taxation showing the value of the capital stock to be above par. (8) That the assets of the bank will not pay stockholders over 25 per cent. of their holdings. (9) That Davis was elected a director and president,

and was not the owner of stock in the bank, in violation of law. (10) That the directors never attended meetings of the board, and the defendant Davis was allowed to run the bank according to his own notions. (11) That during Jordan's presidency (who is not a party) and during Davis' presidency large unauthorized loans were made on insufficient security and on unrecorded mortgages of both real and personal property. (12) General charges of mismanagement, carelessness, and negligence on the part of the defendant directors, resulting in loss to the bank.

It is contended that plaintiff has no legal capacity to sue (1) because the alleged cause of action belongs to the corporation, and cannot be properly brought except by the receiver; (2) because the complaint fails to show that plaintiff obtained leave of the court to bring the action; (3) because the court, having appointed a receiver to manage the affairs of the corporation, should not grant plaintiff power to bring the action.

The general rule is that, when directors or officers of a corporation are charged with the mismanagement of the corporate property, the action to redress should be instituted by the corporation, but to this rule there is a well-established exception that a stockholder may be permitted to bring such action in his own name when it is apparent that an application for redress through corporate action would be useless. *Latimer v. Railroad Co.*, 39 S. C. 44, 17 S. E. 258; *Wenzel v. Brewing Co.*, 48 S. C. 80, 26 S. E. 1; *Stahn v. Catawba Mills*, 53 S. C. 523, 31 S. E. 498; *Matthew v. Bank*, 60 S. C. 183, 38 S. E. 437; *Klugh v. Milling Co.*, 66 S. C. 106, 44 S. E. 566. Such is the situation in this case. The corporation is in the hands of a receiver, and therefore no application for redress could be successfully made at a meeting of stockholders or before the board of directors charged with mismanagement, and, as the receiver is one of the parties charged with wrongdoing, he would not and could not sue himself. The case is much like *Brinckerhoff v. Bostwick*, 88 N. Y. 52, wherein demurrer was overruled. Appellants contend plaintiff's only remedy was to have the receiver removed and a new one appointed who could be directed by the court to conduct the litigation. But the present suit is before the court which appointed the receiver, and the court may not care at this juncture to remove the receiver as no charges are made against him as such, and may consider that the ends of justice would as well be met by permitting the present action to continue with the receiver as a party defendant.

Judge Gage was of the opinion that such leave to maintain the action should now be given to plaintiff, and we see no want of

power or impropriety in such determination, if the absence of previous leave is a mere irregularity and not jurisdictional. It will be observed that the suit is practically against the directors, and is not to enforce any liability of the receiver as such. It is not intended to recover or affect assets in the control of the court, but to augment the assets for distribution. Such considerations might well have moved the court to hold that leave to bring the action was unnecessary if the stockholders' right to sue was complete on the other ground mentioned. In *Barton v. Barbour, Receiver*, 104 U. S. 126, 26 L. Ed. 672, the court held that where the action was to recover specific property in the hands of the receiver, or a money judgment against the receiver, or generally where a judgment in the action would give the claimant some advantage over other claimants upon the assets in the receiver's hands, it was necessary to obtain leave to sue from the court appointing the receiver, and that failure to obtain such leave was jurisdictional; the suit being in the District of Columbia upon a cause of action arising in Virginia, where the receiver was appointed and the property situated. The distinction between that case and the one at bar is wide. There is considerable conflict among the authorities as to whether the failure to obtain leave to sue a receiver is jurisdictional. 17 Ency. Pl. & Pr. 776, 777. In 23 Ency. Law, 1125, cases are cited to support the text: "The failure to obtain leave to sue a receiver at law is not a jurisdictional omission, or a defense to the action, at least where there is no attempt to interfere with actual possession of property which the receiver holds under the order of the court of chancery. * * * Failure to obtain leave of court before suing a receiver is therefore merely an irregularity, which though punishable as a contempt may be cured or waived at any stage of the proceedings." We do not

think the failure to obtain leave to sue the receiver in this case can be regarded a jurisdictional defect, since no assault is made on the receiver's possession, and no attempt is made which resulting in a judgment would interfere with or embarrass the administration of the receiver's trust or give any advantage as among distributees.

We agree, also, with the circuit court that there was no defect of parties defendant. The liability of a director for mismanagement of the corporate property is several as well as joint. The authorities generally hold that it is not necessary to join all the directors or their legal representatives in such a suit as this. 15 Ency. Pl. & Pr. 71; 10 Cyc. 826. The liability of a tort-feasor is both joint and several. *Chanet v. Parker*, 1 Mill, Const. 333; *Gardner v. Railway Co.*, 65 S. C. 344, 43 S. E. 816.

The judgment of the circuit court is affirmed.

(32 S. C. 441)

HOLDEN v. ALEXANDER.

(Supreme Court of South Carolina. April 13, 1909.)

On petition for rehearing. Denied.

For former opinion, see 62 S. E. 1108.

PER CURIAM. After careful consideration the court is of the opinion that no material question raised by the exception has been overlooked or disregarded and that there is no good ground for a rehearing of the case.

It is therefore ordered that the petition herein be dismissed, and that the order heretofore granted staying the remittitur be revoked.

GARY, A. J. (concurring). After careful consideration of the petition for a rehearing, I have reached the conclusion that it should be granted.

(82 S. C. 509)

EASTERN MFG. CO. v. THOMAS, Sheriff.
(Supreme Court of South Carolina. May 4, 1906.)

EXEMPTIONS (§ 45*)—EXEMPTION OF PERSONAL PROPERTY INSTEAD OF HOMESTEAD — "TOOLS AND IMPLEMENTS OF TRADE"—AUTOMOBILE.

An automobile, not being a tool or an implement of trade, is not exempt from levy and attachment under 1 Civ. Code 1902, § 2631, as amended by the act approved February 20, 1904 (24 St. at Large, p. 412), exempting from attachment tools and implements of trade.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 45.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7000-7005, 7817.]

Petition by the Eastern Manufacturing Company for mandamus against W. W. Thomas, sheriff, to compel respondent to levy on certain property. Granted.

T. B. Butler, for petitioner.

PER CURIAM. This is an application for mandamus in the original jurisdiction of this court. The petitioners allege that the respondent as sheriff refuses to levy upon an automobile the property of one Walter Baker, with a proper execution in favor of petitioners. The return of the sheriff admits the allegations of the petition to be true, but says there is an apparent conflict between the statute and the Constitution with reference to homestead exemption for persons not the head of a family. While 1 Civ. Code 1902, § 2631, does appear to allow to such a person a homestead, not only in necessary wearing apparel and tools and implements of trade, but "other property," these words "or other property" have been stricken from the statute by an act of the General Assembly (24 St. at Large, p. 412) approved February 20, 1904. So there is no conflict between the Constitution and the statute, and, the petition having been admitted as true, it is the plain duty of the respondent, as sheriff, to make the levy as prayed for.

It is therefore ordered and adjudged the respondent do forthwith make the levy upon and enforce the petitioner's execution upon the said automobile of the said Walter Baker as it does not appear said automobile is a tool or an implement of trade, and is not exempt from levy and attachment under the homestead law to a person not the head of the family.

(82 S. C. 345)

SUTTON v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. April 9, 1909.)

1. NEGLIGENCE (§ 119*)—PLEADING—EVIDENCE.

Under a complaint alleging negligence generally, plaintiff may introduce any competent evidence, in the absence of a motion to have the allegations made definite and certain, but, where

the complaint alleges specific acts of negligence, plaintiff is restricted to proof of such acts.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 208, 208; Dec. Dig. § 119.*]

2. CARRIERS (§ 306*)—INJURIES TO PASSENGER—COLLISION—LIABILITY OF STATION AGENT.

A railroad station agent, under no duty to notify a train that another train is preceding it, is not liable for injuries to a passenger in a rear-end collision resulting from failure to give such notice.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 306.*]

3. CARRIERS (§ 280*)—CARRIAGE OF PASSENGER—CARE REQUIRED.

A carrier must exercise the highest degree of care to transport its passengers safely.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1087; Dec. Dig. § 280.*]

4. CARRIERS (§ 316*)—INJURIES TO PASSENGER—NEGLIGENCE—EVIDENCE—PRESUMPTIONS.

A presumption of negligence arises against a carrier on proof that a passenger on its train was injured by some agency of the carrier, or some act or omission of its servants or some defect in the instrumentalities of transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.*]

5. CARRIERS (§ 315*)—INJURIES TO PASSENGER—NEGLIGENCE—PLEADING—PROOF.

Where, in an action for injuries to a passenger in a rear-end collision, plaintiff made out a prima facie case on proof of facts alleged in the complaint, he could not be defeated merely because he failed to prove other allegations not essential to his cause of action.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 315.*]

6. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—NECESSITY OF PLEADING.

Contributory negligence is not involved in a case when not pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 195; Dec. Dig. § 117.*]

7. CARRIERS (§ 321*)—INJURIES TO PASSENGER—COLLISIONS—NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.

In an action for injuries to a passenger, an instruction that if a passenger is injured on a train, and the railroad does not exercise the highest degree of care, it is liable for the injury, etc., was not erroneous as eliminating the question of proximate cause, and making defendant an insurer.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

8. EVIDENCE (§ 127*)—RES GESTÆ.

In an action against a railroad for injuries to a passenger in a collision, a declaration of plaintiff as to his condition just after his restoration to consciousness, a minute or two after the collision, was properly admitted as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.*]

Appeal from Common Pleas Circuit Court of York County; John S. Wilson, Judge.

Action by J. M. Sutton against the Southern Railway Company and F. G. Whitlock. Judgment for plaintiff, and defendants appeal. Affirmed as to the railway company, and reversed as to defendant Whitlock.

J. E. McDonald, for appellants. J. C. Wilburn and G. W. S. Hart, for respondent.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

JONES, J. The plaintiff recovered judgment against the defendants for \$1,350 as damages for personal injuries alleged to have been sustained by reason of a rear-end collision between two of defendant's trains at Pineville, N. C., on November 28, 1905, while plaintiff was a passenger on one of said trains. The defendants made a motion to direct a verdict and a motion for new trial on the ground that there was no testimony to sustain the allegations of negligence set forth in the complaint, which motions were refused, and these rulings are the main subject of exception. The complaint alleged that defendant Southern Railway Company was a common carrier of passengers operating a railroad from Columbia, S. C., to Charlotte, N. C.; that plaintiff was received in one of its trains as a passenger from Ft. Mill, S. C., to Charlotte, N. C.; that F. G. Whitlock was agent of defendant railway company at Ft. Mill, S. C. The allegations to which special attention is directed are in the fourth and fifth paragraphs, as follows:

"(4) That at the time aforesaid, to wit, on or about the 28th of November, 1905, the defendants herein negligently permitted one of the trains of the defendant railway company, following the train upon which plaintiff was being transported as a passenger, as aforesaid, to collide with the train upon which plaintiff had taken passage and was being transported, the collision being a rear-end collision, and the negligence of F. G. Whitlock, the agent and servant of his codefendant, consisting in his failure to give notice to the following train that the train upon which the plaintiff was riding was ahead of it upon the same track, preceding it in the direction of Charlotte, N. C., which negligence was also the negligence of the defendant railway company.

"(5) That in the collision which occurred as hereinbefore set forth a heavy lamp frame in the car upon and in which the plaintiff was riding, with a lamp in it, was forcibly wrenched by the shock from its fastening, and fell upon and struck the plaintiff on the head, rendering him unconscious; and in the jar incident to and produced by the collision the plaintiff was thrown about in the car, and was wounded and bruised. * * *

Appellants contend that the only specific act of negligence alleged is the failure of Whitlock "to give notice to the following train that the train upon which the plaintiff was riding was ahead of it upon the same track"; that no testimony was offered to prove that it was the duty of Whitlock to give such notice; that the general allegation of negligence was controlled by the specific act alleged; and that, therefore, plaintiff had failed to establish any case under the complaint. The general rule upon which appellant relies is thus stated in *Goodwin v. Railway*, 76 S. C. 560, 57 S. E. 531: "Where a complaint is general in its allegations of negligence, and the defendant does not move

to have the allegations made definite and certain, the plaintiff may introduce under the general allegations any competent evidence to support the charge of negligence (*Spire v. Railroad Co.*, 47 S. C. 80, 24 S. E. 992; *Johnson v. Railroad Co.*, 53 S. C. 303, 31 S. E. 212, 69 Am. St. Rep. 849), but, where the complaint alleges specific acts of negligence, the plaintiff is restricted to proof of such acts of negligence (*Fell v. Railroad Co.*, 33 S. C. 198, 11 S. E. 691; *Jenkins v. McCarthy*, 45 S. C. 278, 22 S. E. 883; *Brown v. Railroad Co.*, 57 S. C. 435, 35 S. E. 731). So, when a complaint contains allegations of specific acts of negligence and also general allegations of negligence, the general allegations should be regarded as explained and controlled by the specific acts of negligence averred, in the absence of some clear indication in the complaint that the general allegations were intended to cover other acts of negligence than those alleged. This general subject is exhaustively discussed in a note to *King v. Oregon, etc., R. R. Co.*, 59 L. R. A. 209." Under this rule a verdict should have been directed or new trial granted as to defendant Whitlock. He was a mere agent of defendant company in charge of its depot at Ft. Mill, S. C., and was not shown to have stood in any relation of duty to plaintiff. There was no testimony that it was his duty to give the notice alleged in the complaint, which was the only act of negligence alleged against him. Hence as against him there was no case.

But with respect to the defendant company a different relation appears. Under the allegations and testimony the relations of carrier and passenger existed between them, from which sprang the duty of defendant company to exercise the highest degree of care to transport plaintiff with safety. According to the rule in this state, a presumption of negligence arises against the carrier on proof that a passenger on its train was injured as the result of some agency or instrumentality of the carrier, some act of omission or commission of the servants of the carrier, or some defect in the instrumentalities of transportation. *Steele v. Railroad Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756; *Jarrell v. Railroad Co.*, 58 S. C. 494, 36 S. E. 910; *Doolittle v. Railroad Co.*, 62 S. C. 139, 40 S. E. 133; *Stembridge v. Railroad Co.*, 65 S. C. 447, 43 S. E. 968; *Hunter v. Railroad Co.*, 72 S. C. 340, 51 S. E. 860, 110 Am. St. Rep. 605; *Anderson v. Railroad Co.*, 77 S. C. 436, 58 S. E. 149, 122 Am. St. Rep. 591. Having made out a prima facie case upon proof of facts alleged in the complaint, plaintiff could rest upon such case, and could not be defeated merely because he failed to prove other allegations in the complaint not essential to his cause of action against the defendant carrier. Hence in the application of the general rule stated in *Goodwin v. Railway*, 76 S. C. 560, 57 S. E. 530, the material distinction must be observ-

ed between a suit by a passenger against a carrier, where the presumption mentioned applies, and a suit by some other person not a passenger, as employé, trespasser, or licensee, in which the presumption of negligence does not necessarily arise upon mere proof of injury by some agency or instrumentality of the carrier. The cases cited by appellant to sustain his contention were not cases by a passenger against a carrier, but were cases in which it was essential to recovery to show the specific act of negligence alleged.

The sixth exception complains of error in instructing the jury as follows: "If a man is injured on one of the railroad trains, being their passenger, and the railroad does not exercise the highest degree of care, he is entitled to compensation for that injury." It is contended this instruction made a common carrier an insurer, and eliminated the questions of proximate cause and contributory negligence. Contributory negligence, not having been pleaded, is not involved in the case. The instruction given to the jury, construed as a whole, made it clear that defendants were to be held liable only for injury proximately caused by their negligence as alleged. The foregoing conclusions dispose of the first exception as to the admissibility of testimony.

The remaining exception as to the admissibility of testimony cannot be sustained. The declaration of plaintiff as to his condition just after his restoration to consciousness, a minute or two after the collision, was properly admitted as falling within the rule of *res gestæ*.

The judgment of the circuit court as to the defendant Southern Railway Company is affirmed, but as to defendant Whitlock it is reversed.

(32 S. C. 551)

WHITTLE v. JONES et al.

(Supreme Court of South Carolina. April 18, 1909. Rehearing Denied May 11, 1909.)

COURTS (§ 90*)—PREVIOUS DECISIONS AS CONTROLLING.

An order of a judge refusing to send a case back to a referee for further evidence is not binding upon another judge to whom the case has been sent after appeal and remand, and it is within the discretion of the latter judge to send the case back to the referee for the taking of further testimony.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 90*]

Appeal from Common Pleas Circuit Court of Edgefield County; J. W. De Vore, Judge.

Action by J. D. Whittle against Ellie Brooks Jones and others. From an order of reference to take further testimony, defendants appeal. Affirmed.

See, also, 79 S. C. 205, 60 S. E. 522.

B. E. Nicholson, De Pass & De Pass, and John S. Reynolds, for appellants. W. G. Evans, for respondent.

WOODS, J. This action was brought by J. D. Whittle, the assignee of F. M. Mixson, upon a sealed note and mortgage of real estate, given as security, made by Mrs. Ellie Brooks Jones, for the purchase money of a pressing club, its equipment, and good will. This note was dishonored by the defendant Mrs. Jones, who claimed that Mixson had misrepresented the value of the business, and hence that there was failure of consideration. The cause was referred to the master, and after the filing of his report the plaintiff applied to the circuit court for an order referring the case back to the master for further evidence. This motion was denied. Thereafter the cause was heard by Judge Gary on the pleadings and the evidence; and though his honor found that, had Mrs. Jones proceeded differently, she would have been entitled to relief, he held that she had put herself beyond the aid of the court by failing to rescind the contract and gave judgment for the plaintiff for the full amount of the note and mortgage. On appeal this court, holding that the omission of Mrs. Jones to seek a rescission of the contract and of her sale of the property to Mixson did not deprive her of the right to rely upon the defense of misrepresentation, modified the judgment of the circuit court and remanded the case to that court for the purpose of determining the amount due on the plaintiff's mortgage. 79 S. C. 208, 60 S. E. 522. On the call of the case by Judge De Vore after remand, Mrs. Jones and A. C. De Pass, the defendants, demanded judgment on the record, contending that they were entitled to it under the decision of this court; but the plaintiff moved that the cause be referred to the master for the taking of further testimony. The order of Judge Gary refusing a similar motion was brought to the attention of Judge De Vore, but after a review of the testimony he granted plaintiff's motion. The rights of the Scottish-American Mortgage Company, Limited, are not involved in this appeal.

The appeal turns on the question whether Judge Gary's order refusing to refer the case back to the master to take further testimony was binding on Judge De Vore, when the cause came up before him for trial. In *Wilson v. York*, 43 S. C. 303, 21 S. E. 82, Judge Gary made an order striking the case from calendar 2, and placing it on calendar 1, on the ground that the defendants were entitled to a trial by jury. Subsequently Judge Watts made an order of reference to take the testimony. On appeal from this latter order, it was held that the order of Judge Gary "was the law of the case, and could not be disregarded by any subsequent circuit judge, unless, perhaps, the subsequent developments made by the trial put upon the case such a different aspect from that presented by the pleadings, which alone were before Judge Gary, as to show that the order of reference

was proper." Even if the same general principle applied to an order like that under consideration, a subsequent judge would not be bound by such a mere ministerial order where there had been a material change in the aspect of the case. We think there was such a change here. Judge Gary entertained the opinion that the defense set up by Mrs. Jones could not avail, even assuming the allegations of her answer and the evidence offered by her to be true, and therefore he could not do otherwise than refuse to order a reference to enable the plaintiff to submit evidence; but afterwards this court held that Mrs. Jones had set up a good defense and had offered evidence tending to establish it, and remanded the case for the purpose of ascertaining the amount due on the mortgage in view of the mortgagor's defense. The aspect of the case, as presented to Judge De Vore, by reason of the decision of this court, was very different from that presented to Judge Gary. Judge De Vore could not therefore be bound by the order of Judge Gary, and the order of reference made by him was within his discretion; but, without respect to any change in the aspect of the case, Judge De Vore was not bound by the order of Judge Gary. The point was expressly decided in *Farmers, etc., Association v. Berry*, 53 S. C. 129, 31 S. E. 53, and *Gregory v. Perry*, 66 S. C. 455, 45 S. E. 4. In affirming this order, we express no opinion as to whether discretion was wisely exercised by the circuit judge.

There can be no doubt that the defendant Mrs. Jones is entitled to the benefit of the evidence already introduced by her. The order of Judge De Vore does not contemplate that she shall be required to re-introduce that testimony, but that both parties may introduce additional evidence.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 424)

LAIRD v. PIEDMONT MUT. FIRE INS. CO.
(Supreme Court of South Carolina. April 13, 1909.)

INSURANCE (§ 668*)—FORFEITURE—REPRESENTATIONS IN APPLICATION—QUESTION FOR JURY.

In an action on a fire policy, held a question for the jury whether the policy was void on the ground that plaintiff had committed a fraud, or put it in the power of defendant's agent to do so, by overvaluing the property in the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1737; Dec. Dig. § 668.*]

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by W. M. Laird against the Piedmont Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Efird & Dreher, for appellant. Graham & Sturkle, for respondent.

WOODS, J. In this action on a fire insurance policy of \$1,618, the plaintiff recovered judgment for \$1,468, the full amount claimed. The defendant's motion for the direction of a verdict in its favor on the ground that the evidence admitted of no other inference than that the plaintiff had committed a fraud in his application for insurance was refused, as was also his subsequent motion for a new trial on the same ground. The correctness of these rulings is involved in the first and second exceptions.

The first exception rests on the proposition that the circuit judge erred "in refusing to direct a verdict in favor of the defendant, on the ground that the proof showed that the plaintiff signed the applications for insurance in blank, and thereby committed a fraud on the defendant by putting it in the power of James Dodd to fraudulently and falsely represent the facts to the insurance company as to the values, risks, and as to the incumbrances by giving false answers to those questions in the applications."

The second exception alleges similar error in the refusal to grant a new trial.

The written application for the policy contains a statement that the valuations therein contained are estimated and fixed by the applicant; and in the application the valuations and the insurance desired are thus stated: "On two-story, shingle roof, frame building, while occupied by W. M. Laird as a ginhouse, situated on west side of Wagner road, in Lexington county, S. C., 9 miles west of Swansea, S. C., on Wagner and Swansea road. Present value of property \$800; amount insurance wanted, \$534. On machinery consisting of two gins, pulleys, belting, shafting, feeder, condenser, flues, press, and scales: Present value \$650; amount insurance wanted, \$534. On engines and boilers: Present value of property, \$600; amount insurance wanted, \$400." Testimony on behalf of plaintiff, which is uncontradicted, tends to prove that the plaintiff consented to take out the insurance at the urgent solicitation of one Dodd, the agent of the defendant company; that the application was made out by Dodd, the plaintiff signing it without reading; that, when the application was made out and signed, Dodd and the plaintiff were together at the plaintiff's place of business, where all the insured property was under Dodd's observation; and that the valuation was agreed on by Dodd and the plaintiff. These valuations were no doubt high, but they necessarily rested on opinion, and there was evidence tending to show that they were not excessive. It is true the plaintiff admitted he had paid only \$300 for machinery valued at \$600, but this is not conclusive of the true value, for the purchase might have been made for less than the market value. The circuit court was not in error in refusing to hold the policy to be void as a

matter of law either on the ground that the plaintiff himself had committed a fraud or had put it in the power of Dodd to do so in the overvaluation of the property. The evidence on this subject made an issue for the jury. There was no evidence whatever of fraud by false representation as to incumbrances on the property; for in the application there was no answer to the question on that point. The fact that the policy provides that the insurance company shall not be liable if any part of the property be incumbered does not affect the question because the appeal does not rest on that provision of the policy; on the contrary, defendant rests its case on the position that the plaintiff by signing the application in blank put it in the power of Dodd to commit a fraud on the insurance company by representing the property to be unincumbered. There was no evidence of anything said or done by the plaintiff on which Dodd could base any representation to the defendant, except the written application signed by him, and that contained no representation at all as to incumbrances. There is therefore no ground to say the plaintiff enabled Dodd to deceive the defendant into believing there was no incumbrance on the property.

By the third exception it is submitted the circuit judge erred in refusing to grant a new trial on the ground that the verdict was clearly excessive. The insurance company was liable by the terms of the policy for only three-fourths of the value of the personal property. The defendant contends the evidence shows conclusively the value of the entire personal property was not over \$390, and that, therefore, the verdict based on an insurance of \$934 was necessarily excessive. As already said, there was some evidence that the value stated in the application was the true value. This being so, it was not error of law on the part of the circuit judge to refuse to set aside the finding of the jury as excessive.

The judgment of this court is that the judgment of the circuit court be affirmed.

(32 S. C. 427)

FORT v. FIRST NAT. BANK OF BATESBURG.

(Supreme Court of South Carolina. April 13, 1909.)

1. BANKS AND BANKING (§ 153*)—CONDITIONAL DEPOSIT—CLAIM OF THIRD PERSON.

Plaintiff deposited the purchase price of land with a bank under an agreement with the grantor that the deposit was to be subject to the payment of a mechanic's lien claim against the property, if such claim was established in a suit then pending. The bank was informed of the agreement, but subsequently paid out all of the deposit on the order of the grantor. Held, that the agreement made the deposit special to the extent of the lien claim, and the bank was liable to the purchaser for the amount of the judg-

ment recovered in the lien suit, and which was paid by the grantor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 484, 494; Dec. Dig. § 153.*]

2. EVIDENCE (§ 171*)—BEST AND SECONDARY EVIDENCE—CONTENTS OF WRITING—CHECKS.

In an action against a bank on its liability on a deposit made by plaintiff for the vendor of property, on condition that the deposit be subject to a mechanic's lien claim against the property, evidence to show the money was paid to the bank by a check is not inadmissible as evidence tending to prove its contents without proof of the loss of the check, as the check is a collateral matter, and a question as to its contents or form is not the principal matter in dispute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.*]

3. BANKS AND BANKING (§ 153*)—SPECIAL DEPOSITS—EFFECT OF DEPOSIT SLIP.

A deposit slip is a mere acknowledgment by the bank that the amount named has been received, and does not purport to embody the contract between the parties, and cannot affect the rights of a person depositing money with the bank for another under an agreement between the depositor and the person for whose benefit the deposit was made that the deposit should be subject to a lien against property purchased by the depositor, where the bank has knowledge of the agreement and receives the deposit subject to the payment of the lien.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 153.*]

4. BANKS AND BANKING (§ 227*)—DEPOSITS—ACTIONS AGAINST BANK—EVIDENCE—AMOUNT OF RECOVERY.

Evidence, in an action against a bank to recover on a contract between the depositor, who was the purchaser of property, and the grantor, under which the deposit was to be subject to the payment of a mechanic's lien against the property, held to show that the contract was for the payment, not only of the original amount of the mechanic's lien, but for the costs and fees incident to a suit to enforce the lien.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 227.*]

Appeal from Common Pleas Circuit Court of Lexington County.

Action by James C. Fort against the First National Bank of Batesburg. Judgment for plaintiff, and defendant appeals. Affirmed.

Barrett Jones and Efrid & Dreher, for appellant. Graham & Sturkie and E. L. Asbill, for respondent.

JONES, J. The testimony tends to show these facts: In December, 1903, S. B. Coats offered to sell James C. Fort a house and lot in Batesburg, S. C., for \$850, and Fort was informed that the First National Bank of Batesburg had a mortgage on the premises, and that Rogers Bayly was claiming a mechanic's lien thereon for \$58. A suit was then pending in the common pleas court for Lexington county by Bayly as plaintiff against Coats and the First National Bank as defendants for the enforcement of the alleged mechanic's lien. Not desiring to assume the risk of this controversy, on December 8, 1903, plaintiff with Coats went to the

defendant bank, and the parties, at the suggestion and approval of the president of the bank, Dr. W. H. Timmerman, agreed that the purchase money should be paid into the bank, and that the bank should retain a sufficient amount of the funds to pay the Bayly claim after the settlement of the controversy. At this meeting Bayly notified plaintiff of his claim. The cashier at that time, Mr. W. W. Watson, was informed of the situation, and was asked by the president whether a portion of the purchase money could be left in the bank pending the settlement of the alleged mechanic's lien, to which the cashier replied that it could be done, provided the parties agreed, and he was instructed to that effect. The cashier then knew that Coats was willing to make such agreement, but he testified that Fort said he did not attach any importance to the Bayly claim. After the agreement mentioned, the plaintiff accepted the deed of the premises, and in the presence of the cashier delivered to Coats a check drawn by himself on the National Loan & Exchange Bank of Columbia for \$850, payable to the order of Coats. Coats immediately indorsed this check, and deposited it with the bank, after signing his name to the usual deposit slip, which recited the deposit of the check and its amount, and contained at the foot these words: "Paid Dec. 8, 1903,—First National Bank of Batesburg, S. C." There was other testimony showing that the check was promptly paid. Coats thereupon gave his check on the fund to the cashier for \$76.55 in settlement of the mortgage on the premises held by the bank. On December 16, 1903, the bank cashed his check on the fund for \$50, and on December 23, 1903, cashed his check for the remainder of the fund, \$723.45. Afterwards judgment was recovered in favor of Bayly establishing a mechanic's lien upon the premises to the amount of \$122.42, which plaintiff was compelled to pay to prevent sale of the premises. This action was brought to recover that sum from the defendant bank upon its agreement above mentioned, and resulted in a judgment for plaintiff for \$100.

From the foregoing statement it is manifest that there was no error, as alleged in the second exception, in refusing to direct a verdict in favor of the defendant. There can be no doubt of the bank's liability if it accepted the deposit with knowledge of and assent to the alleged agreement subjecting it to the claim of Bayly. The agreement made the deposit special to the extent of the Bayly claim, and it was the duty of the bank to retain of the deposit a sum sufficient to pay the Bayly claim.

Nor was there error, as alleged in the first exception, in admitting parol evidence tending to show that money was paid defendant bank by a check. The objection that the check is a written instrument, and evidence of its contents cannot be given without proof of loss, is not tenable as applied to this case. The check is a collateral matter, and the

question is not as to the contents or form of a check, but as to the making of a special or conditional deposit to protect plaintiff against the Bayly claim. It is not disputed that the deposit was made of a check for \$850, which was in fact duly cashed.

The third exception alleges error in the court's instruction to the jury substantially that, if the bank officer knew of the alleged agreement to subject the deposit to the payment of a particular claim, the mere fact that the deposit slip may be in the name of the depositor would not compel the bank officer to honor the checks of the depositor to the extent of the whole fund without retention for such claim.

Appellant's contention is that the deposit slip is the contract between the bank and the depositor, and the bank is bound to honor the depositor's checks to the extent of the deposit. The deposit slip is a mere acknowledgment by the bank that the amount named has been received (3 Ency. Law, 830), and does not purport to embody the contract between the parties, and cannot affect the rights of plaintiff under his alleged agreement with the depositor and the bank officers. The contemporaneous agreement among the plaintiff, the depositor, and the bank officers affected the deposit, with the trust assumed by the bank to hold sufficient of it to protect plaintiff against the Bayly claim. This case differs from *Bank v. Mahon*, 78 S. C. 412, 59 S. E. 31, as in that case the bank had no control over the deposit as it was in the name of parties not bound by any contract affecting the disposition of the deposit, whereas in this case the depositor and the bank agreed to protect the plaintiff, and thus induced the plaintiff to pay over the money deposited. The principle of *Livingstain v. Banking Co.*, 77 S. C. 309, 57 S. E. 182, 122 Am. St. Rep. 568, is more applicable, as it affirms the right of a depositor to make an express contract with the bank that his deposit account shall be applied to his debts to the bank and to any other legitimate purpose. Under the last exception, it is contended that the court erred in not charging the jury plaintiff's request: "That, if the jury come to the conclusion that the bank is liable at all, then it is liable only for the amount of which Fort had notice, \$58, and not for the amount sued for, \$122.42." The amount of the recovery on the Bayly claim included, not only the original claim of \$58, but the costs and fees of the suit. Dr. Timmerman, the president of the bank, testified that the money was left in the bank "subject to the adjudication of the Bayly claim." W. H. Sill testified that the parties agreed to leave "the amount in the bank, and let Mr. Bayly and Mr. Coats fight it out to get Mr. Fort a clear title to the place." The plaintiff testified that Mr. Watson, the cashier, filled out the check given by him in payment of the premises; that he told the cashier to be sure to hold enough money to pay the Bayly claim; that "he put

it (the check) in with the condition that they would hold him clear and have no further trouble about the Bayly claim." It is true there was evidence that the Bayly claim was \$58, but the suit thereon was pending and the bank was a party thereto, and all parties were bound to know that, if judgment was recovered, it would include the incidental costs and fees. In the situation of the testimony the court was correct in declining to limit the bank's liability to \$58.

The judgment of the circuit court is affirmed.

(32 S. C. 436)

PYROSS v. FRASER.

(Supreme Court of South Carolina. April 24, 1909.)

1. MORTGAGES (§ 300*)—PAYMENT—TENDER BEFORE MATURITY.

A tender before maturity of the amount of a mortgage, with interest to maturity, which the mortgagee refuses to accept, is not a legal tender so as to discharge the lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 885; Dec. Dig. § 300.*]

2. MORTGAGES (§ 300*)—PAYMENT—TIME OF TENDER.

The acceptance of a partial payment of a mortgage debt before maturity is not a waiver of the mortgagee's right to refuse to accept a tender of the balance before maturity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 885; Dec. Dig. § 300.*]

3. MORTGAGES (§ 300*)—PAYMENT—TENDER BEFORE MATURITY.

Civ. Code 1902, § 2375, requiring satisfaction of a mortgage on payment or legal tender of the debt, does not apply to a tender made before maturity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 885; Dec. Dig. § 300.*]

Appeal from Common Pleas Circuit Court of Georgetown County.

Action by Richard Pyross against John W. Fraser. From a judgment for plaintiff, defendant appeals. Affirmed.

T. St. Mark Sasportas, for appellant. M. W. Pyatt, for respondent.

WOODS, J. This action was brought for the foreclosure of a mortgage on land in the city of Georgetown given by the defendant to the plaintiff to secure a bond for the sum of \$250, the purchase money of the land. The complaint alleged the balance due at the time of the commencement of the action to be \$117, with interest and attorney's fees. The defense alleged in the answer was tender on March 14, 1905, of the sum of \$67, as the full amount then unpaid. The issues were referred to a referee, who reported that the last installment of the bond became due on July 20, 1905, and on that day the entire sum due by the defendant was \$47, and that the defendant's tender on March 14, 1905, was not a legal tender, and did not discharge the lien of the mortgage, because the tender was made before

the last installment fell due, and the mortgages could not be compelled to accept his debt until maturity. The circuit court sustained the referee and made a decree of foreclosure.

Few adjudications of the question here made as to the right of a debtor to pay his debt before maturity are to be found, for the reason that a creditor rarely refuses to accept a premature tender of his debt when it includes interest to the date of maturity. In all the cases, however, where the question has been decided under the common law, it has been held that the creditor cannot be compelled to give up his investment before maturity. *Quynn v. Whetcroft* (Md.) 3 Har. & McH. 136, 1 Am. Dec. 375; *Abbe v. Goodwin*, 7 Conn. 377; *Brown v. Cole*, 14 Sim. 427, 60 Eng. Reprint. 424. To hold otherwise would be to change the contract of the parties. The creditor may, however, waive his right to insist on strict compliance with the contract.

In this case it was admitted the plaintiff received from the defendant without objection a partial payment of \$15 of the last installment on 15th February, 1904, long before it became due. The argument is that this showed waiver of right to insist on postponement of payment of the remainder until maturity. But this favor, extended to the defendant as to part of the debt, did not bind the creditor to extend a like favor as to the remainder. Each party had an equal right to require the other to perform the contract as it was written. Paying a part of the debt before maturity would not have been a waiver by the debtor of his right to postpone payment of the remainder until maturity. So receiving a part of the debt before maturity was not a waiver of the right of the creditor to hold the remainder of his investment until maturity. The provisions of section 2375 of Civil Code of 1902, requiring satisfaction of mortgages on payment or legal tender of the debt, though relied on by the appellant, does not affect the matter, for the reason that the tender before maturity was not a legal tender.

The judgment of this court is that the judgment of the circuit court be affirmed.

(32 S. C. 506)

PEARSON v. MILLS MFG. CO.

(Supreme Court of South Carolina. May 4, 1909.)

1. STATUTES (§ 158*)—REPEALS BY IMPLICATION.

Repeals of statutes by implication are not favored.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 228; Dec. Dig. § 158.*]

2. STATUTES (§ 159*)—REPEALS BY IMPLICATION—REPUGNANCY.

To effect a repeal of a statute by implication on account of repugnancy, the repugnancy

cy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 231; Dec. Dig. § 159.*]

8. MASTER AND SERVANT (§ 83*)—WAGES—PAYMENT—STATUTES—CONSTRUCTION.

Civ. Code 1902, § 2719, requires every corporation, person, or firm issuing any evidence of indebtedness in payment of wages to redeem the same in goods or money on demand within 30 days from delivery, provided that if such corporation, etc., has a regular pay day once in every 30 days, it need not redeem such token in cash until the first pay day after the same becomes payable. Section 2720 provided that any person, firm, or company engaged in manufacturing or mining who shall issue any check or token not payable at the option of the holder in goods or money as required by section 2719, or who shall fail to redeem the same on presentation within 30 days after delivery, shall forfeit to the employé \$50, etc. This was amended by Acts 1904 (24 Stat. at Large, p. 442), which added the words: "Provided, that in establishments for manufacturing lumber or brick such checks shall not be redeemable in cash except on regular pay days." *Held*, that the proviso to section 2720 is not repugnant to the proviso to section 2719, and did not repeal it by implication, and hence an employé in a cotton factory was not entitled to recover the penalty provided by section 2720 on the ground that a discount had been deducted from checks given him on tender on other than a regular pay day.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 83.*]

Appeal from Common Pleas Circuit Court of Greenville County; J. C. Klugh, Judge.

Action by B. F. Pearson against the Mills Manufacturing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. R. Martin, for appellant. Cothran, Dean & Cothran, for respondent.

HYDRICK, J. Plaintiff brought this action under sections 2719 and 2720 of Civil Code of 1902 to recover of defendant \$50, the penalty provided by section 2720, and \$1.13 discount, which had been deducted from the face value of certain memoranda, tokens, or evidences of indebtedness, commonly called merchandise checks, which had been issued to him by defendant in payment for the labor of his minor children in the defendant's cotton factory. Plaintiff testified, in substance, as follows: In the fall of 1906 he had four children working in defendant's mill. Some dissatisfaction arose, and he gave two weeks' notice of his intention to quit, and did quit accordingly. He applied to defendant's bookkeeper for his time, and the bookkeeper gave him \$11.25 in metal checks, which were good for merchandise only at defendant's store. He took them to the manager of defendant's store, who gave him \$10.12 in cash for them. Defendant had two regular pay days in each month. This transaction did not occur on a regular pay day. He did not present the checks on a regular pay day, and demand cash for them. He did not demand their face value in merchandise. He was not required to take the

checks, but took them rather than go back to the mill on a regular pay day, and get the money due him. Upon the close of plaintiff's testimony the trial judge granted defendant's motion for nonsuit.

The sections of the Code referred to are as follows: Section 2719: "It will not be lawful for any corporation, person or firm in this state to issue, pay out or circulate for payment of the wages of labor, any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, unless the same is negotiable or redeemable at its face value, without discount, in cash or goods, wares or merchandise or supplies, at the option of the holder, at the store or place of business of such firm, person or corporation, or at the store of any other person on whom such paper may be drawn, where goods, wares or merchandise are kept for sale; sold or exchanged, and the person who, or corporation, firm or company which, may issue any such order, check, memorandum, token or other evidence of indebtedness, shall, upon presentation and demand, within thirty days from the date of delivery thereof, redeem the same in goods, wares, merchandise or supplies, at the current cash market price for like goods, wares, merchandise or supplies, or in lawful money of the United States, as may be demanded by the holder of any such order, memorandum, token or other evidence of indebtedness: Provided, that if said corporation, person or firm engaged as specified in this section have a regular pay day once in every thirty days, then said corporation, person or firm shall not be required to redeem such token or evidence of indebtedness in cash until the first pay day after the same becomes payable, as herein provided, and such token or evidence of indebtedness shall be presented for payment in cash only on such pay days: Provided that the provisions of this section shall not apply to agricultural contracts, or advances made for agricultural purposes." Section 2720: "Any officer or agent of any corporation, or any person, firm or company, engaged in the business of manufacturing or mining in this state, who by themselves or agent shall issue or circulate in payment for wages of labor any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States without being negotiable and payable at the option of holder in goods, wares, merchandise, supplies or lawful money of the United States as required by section 2719, or shall fail to redeem the same when presented for payment within thirty days from date of delivery thereof, by said company or its agents, at his or their office or place of business, in lawful money of the United States, or who shall

compel or attempt to coerce any employé of any such corporation, shall forfeit to the employé or legal owner and holder of such order, check, memorandum, token or evidence of indebtedness, fifty dollars, to be recovered in any court of competent jurisdiction: *Provided, that in establishments for manufacturing lumber or brick such checks shall not be redeemable in cash except on regular pay days.*" As was originally enacted, section 2720 did not contain the words which have been italicized. These were introduced by way of amendment by the act of 1904 (24 Stat. at Large, p. 442).

The plaintiff contends that the proviso to section 2720 is repugnant to the proviso to section 2719, and, being the later statute, repeals the former by implication. This contention is clearly untenable. Repeals by implication are not favored. In *State v. Alexander*, 14 Rich. Law, 251, the court quotes with approval from *Goddard v. Boston*, 20 Pick. (Mass.) 407, as follows: "A later statute on a given subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject-matter." The authorities agree that, to effect a repeal by implication on account of repugnancy, the repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation; for, if they can be construed so that both can stand, the court will so construe them. We are unable to see any repugnancy between the provisos to the two sections above quoted, and hence there is no room for the application of the principle of repeal by implication.

There is no testimony tending to sustain either of the other points made by appellant, to wit, that defendant did not have regular pay days, or that the defendant compelled or attempted to coerce the plaintiff to receive the checks.

The judgment of the circuit court is affirmed.

(82 S. C. 415)

LYLES v. KINARD et al.

(Supreme Court of South Carolina. April 13, 1909.)

1. PLEADING (§ 51*)—SEPARATE CAUSES OF ACTION.

A complaint alleged that plaintiff delivered her mare to defendant K., authorizing him to sell it for cash; that K. sold the mare to the other defendants, members of a firm of which K. was a member, agreeing to allow them as a credit a bill then due from K. to the other defendants without plaintiff's knowledge; that the other defendants thereafter sold the mare to another, and offered to pay to K. the difference between the supposed price of the mare and the amount due from K. to them without plaintiff's authority; and that defendants refuse to pay plaintiff the value of the mare. *Held*, that only one cause of action against all the defendants

was alleged; the allegation that the defendants other than K. paid a part of the price by allowing credit to K. on a debt being only an allegation of the method by which the primary wrong was accomplished.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 112; Dec. Dig. § 51.*]

2. PLEADING (§ 367*)—DEMURRER—MOTION TO MAKE DEFINITE AND CERTAIN.

Where a complaint did not state a cause of action against the defendants other than one K., the remedy was by demurrer, and not by motion to make the complaint more definite and certain.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1173; Dec. Dig. § 367.*]

Appeal from Common Pleas Circuit Court of Richland County; Ernest Gary, Judge.

Action by Mary E. Lyles against J. M. Kinard and others, copartners. A motion was granted requiring the complaint to be made more definite and certain, and plaintiff appeals. Reversed.

El. L. Craig, for appellant. J. Wm. Thurmond, for respondents.

WOODS, J. The defendants H. C. Watson and W. C. Tompkins, copartners trading as Watson & Tompkins, contending that the plaintiff had blended two causes of action, one against the defendant Kinard and the other against Watson & Tompkins, made a motion to require the complaint to be made more definite and certain by the statement of the alleged causes of action against the defendants separately. The circuit judge took the defendant's view, and granted the motion. The plaintiff appeals.

We think only one cause of action is stated in the complaint, and that the motion should have been refused. The complaint alleges: "That heretofore, to wit, on the _____ day of December, 1907, the plaintiff was the owner of a certain bay mare of the value of one hundred and fifty dollars (\$150), which she was desirous of selling, and for that purpose put it into the hands of the defendant J. M. Kinard, then the manager of Martin's Livery Stables, in the city of Columbia, authorizing and directing him to sell the same for her account. That this plaintiff is informed and believes that the said J. M. Kinard offered to sell the said mare to the defendants Watson & Tompkins, but, without the knowledge and approval of this plaintiff, agreed to allow the said Watson & Tompkins a credit on account of said purchase a certain bill that was then due by the said J. M. Kinard to the said Watson & Tompkins, which said agreement was entirely without the knowledge or authority of this plaintiff, the said horse being put in the hands of said J. M. Kinard for sale for cash, and, in pursuance of said agreement between said Kinard and said Watson & Tompkins, said mare was turned over to said Watson & Tompkins, who thereafter, as the plaintiff is informed and believes, sold the

said bay mare to some person unknown to this plaintiff, and offered to pay over to the said Kinard a small sum of money, which is alleged to be the difference between the supposed figure at which the said mare was sold and the amount due by the said J. M. Kinard to the said Watson & Tompkins, which transaction was wholly without the authority or consent of this plaintiff, and the defendants now neglect and refuse to pay over to this plaintiff the value of the said mare sold."

The only primary right of the plaintiff stated in the complaint is the right to have the value of her bay mare which the defendant Kinard was authorized to sell as her agent for cash. The only primary wrong of the defendants is the sale of the mare by Kinard in violation of his contract to sell as agent of the plaintiff for cash, and the alleged participation of Watson & Tompkins in Kinard's breach of his contract. The allegation that Watson & Tompkins paid a part of the purchase price by allowing credit to Kinard on a debt due to them is nothing more than an allegation of the method by which the primary wrong was accomplished. *Du Bose v. Kell*, 72 S. C. 208, 51 S. E. 692; *Wright v. Willoughby*, 79 S. C. 438, 60 S. E. 971. If the complaint does not allege facts sufficient to constitute a cause of action against the defendants Watson & Tompkins, the remedy is by demurrer. On that point we express no opinion.

The judgment of this court is that the judgment of the circuit court be reversed.

(32 S. C. 500)

WILLIS v. WHITTLE et al.

(Supreme Court of South Carolina. April 26, 1909.)

CHattel Mortgages (§ 261*) — BREACH OF CONDITIONS—RIGHT OF SEIZURE.

The authority in a chattel mortgage to seize and sell the property on default in payment is a license, coupled with an interest, which cannot be revoked after breach of condition, and includes, by necessary implication, the right to take the property from the mortgagor's premises, provided it can be done without a breach of the peace.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 261.*]

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. E. Prince, Judge.

Action by D. F. Willis against J. D. Whittle and another. Judgment for defendants. Plaintiff appeals. Affirmed.

T. R. Morgan and Davis & Best, for appellant. R. C. Holman and J. E. Hardey, for respondents.

HYDRICK, J. This is an appeal from a judgment of nonsuit in an action of damages for trespass.

The plaintiff gave the defendant Whittle a chattel mortgage over a horse. The mort-

gage contained the usual clause, authorizing the mortgagee or his agent to seize and sell the property on default of payment of the debt, and deduct from the proceeds of sale the costs and expenses of seizure, etc. The condition of the mortgage having been broken, the defendant Sprawls was appointed by the defendant Whittle as his agent to seize the horse. Before the seizure, Sprawls went to plaintiff and demanded payment of the debt, and, on plaintiff's failure to pay, told him that he was going to seize the horse. Plaintiff objected to his doing so, without his taking out claim and delivery proceedings. Nevertheless Sprawls went to plaintiff's house during his absence, and told plaintiff's mother, who was living with plaintiff, that he had come to seize the horse. She told him that both her sons and her husband were absent from home, and that her son, the plaintiff, had instructed her to object to any one taking the horse, and she did object to his doing so. Notwithstanding her objection and the previous objection of the plaintiff, Sprawls went to the stable, took the horse out, and carried him away. A few days afterwards the plaintiff paid the balance due on the mortgage debt, and \$10 in addition, the amount charged by the defendants as the costs and expenses of collection and seizure, whereupon the defendants returned the horse to him. The plaintiff then brought this action to recover \$1,000 damages for the alleged trespass in seizing the horse, and compelling him to pay \$10, besides the mortgage debt, to regain possession of him. There is no testimony tending to show that the charge of \$10 was unreasonable. On the other hand, it showed that the plaintiff voluntarily paid it.

It is well settled that, after condition broken, the legal title to mortgaged chattels vests in the mortgagee. The right of the mortgagee to seize mortgaged chattels after condition broken is a license coupled with an interest, which cannot be revoked by the mortgagor. It is a part of the consideration of the mortgage, and to allow the mortgagor to revoke it would be a fraud upon the rights of the mortgagee, and would very much impair the value of chattel mortgages as securities. The right to seize carries with it by necessary implication the right to do whatever is reasonably necessary to make the seizure, including the right to peaceably enter upon the premises of the mortgagor. There is one restriction, however, which the law imposes upon this right. It must be exercised without provoking a breach of the peace; and, if the mortgagee finds that he cannot get possession without committing a breach of the peace, he must stay his hand, and resort to the law, for the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possession of it.

Satterwhite v. Kennedy, 3 Strob. 457; Harris v. Marco, 16 S. C. 573. In this case there was no breach of the peace, and, as we have seen, the defendants had an irrevocable license to enter upon the plaintiff's premises to make the seizure. They did so in an orderly manner, and were not trespassers. The judgment of the circuit court is affirmed.

(32 S. C. 474)

ATHERTON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. April 20, 1909.)

1. COSTS (§ 184*)—WITNESS FEES—NECESSITY OF SUBPOENAING WITNESS.

Civ. Code 1902, §§ 2863, 3130, provides for the payment of certain fees to persons "summoned" as witnesses. Section 2861 authorizes the issuance of subpoenas for witnesses, and requires a subpoena to state at whose request the witness is "summoned." *Held*, that a party may not tax witness fees against the adverse party unless the witnesses were subpoenaed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 717; Dec. Dig. § 184.*]

2. COSTS (§ 205*)—WITNESS FEES.

Witness fees which have not been paid by the party seeking to tax them against the adverse party are not taxable, in the absence of affidavit of the witnesses as to their per diem and mileage; the affidavit of counsel not being sufficient.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 775; Dec. Dig. § 205.*]

3. COSTS (§ 184*)—WITNESS FEES—MATERIALITY OF TESTIMONY.

Fees of witnesses may not be taxed against the adverse party, where they were not sworn, unless it appears by affidavit that their attendance was procured in good faith, and, if required, it should be made to appear at least prima facie that they were material, or intended to be so.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 718, 719; Dec. Dig. § 184.*]

Appeal from Common Pleas Circuit Court of Charleston County; D. E. Hydrick, Judge.

Action by Thomas H. Atherton, Jr., against the Atlantic Coast Line Railroad Company. From an order setting aside a taxation of costs by the clerk, defendant appeals. Affirmed.

T. Moultrie Mordecai, for appellant. J. P. K. Bryan, for respondent.

JONES, C. J. This appeal is from an order of Judge Hydrick setting aside the clerk's taxation of costs in the above-stated case.

On plaintiff's motion a nonsuit had been ordered, with costs taxable against plaintiff. The clerk taxed, among other things, the per diem and mileage of nine witnesses, aggregating \$158.10, the matter in dispute. The claim was supported by the affidavit of one of the counsel for defendant declaring the number of days each witness had been in attendance upon court and the number of

miles each one had traveled in so doing. It appears that none of the witnesses were summoned by subpoena, and it also appears that none of them were sworn, as the nonsuit was ordered upon the call of the case for trial. Counsel for plaintiff contended before the clerk that the affidavit of each witness should be required to show the per diem and mileage to which he is entitled. The clerk held that the affidavit submitted was sufficient and taxed the costs as claimed. Defendant moved the circuit court to set aside said taxation: (1) Because the witnesses were not summoned by subpoena; (2) because there were no affidavits of the several witnesses as to their per diem and mileage; (3) because it was not shown that the witnesses were material; (4) because the affidavit of counsel was not the best evidence.

Judge Hydrick overruled the first contention, holding that, when a witness has attended court voluntarily at the request of a party, he is entitled to his costs upon proof of the fact, and cites the opinion of Chief Justice McIVER in *Lewis v. Brown*, 16 S. C. 63. While this ruling is not brought under direct review by any exception, both parties have argued it in this court as if involved, and, it being important to indicate the law on this subject, we will not decline to consider it. The right to tax fees and costs depends wholly upon statute. Section 2863, Civ. Code 1902, provides: "Every person summoned to appear as a witness in the common pleas or probate court shall be paid by the person or persons at whose suit the summons is issued one dollar for every day's attendance on such summons. . . ." Section 3130 provides for fees of witnesses in the courts of common pleas and probate "one dollar for every day's attendance on summons." The summons here referred to is not a mere verbal or written notice from the party, but is the subpoena referred to in section 2861, authorizing the clerk of the circuit court, at the request of either party, to issue subpoenas for the attendance of witnesses, directing what shall be expressed in the subpoena, and stating "at whose request they are summoned," showing that "subpoena" and "summons" in this connection mean the same thing. The statute allows \$1 for every day's "attendance on such summons." It is therefore manifest that a voluntary attendance on court by a witness at the mere request of a party is not an attendance on the summons or subpoena required by the statute. The object of the statute is to give the court greater control over the attendance of witnesses under subpoena and in some measure to check improper taxation for witness fees. In the case of *Lewis v. Brown*, supra, the question before the court was whether the production of a subpoena writ is essential to entitle a

witness to the taxation of his fees, and the court said: "In the absence of any showing to the contrary, we would, of course, take it for granted that the clerk had satisfactory evidence before him that the witnesses had been subpoenaed and had attended court in obedience to such mandate. The production of the subpoena writ was not essential, as it may have been lost, and, if so, secondary evidence would have been competent and sufficient." The court then proceeds to use the language relied on by the circuit judge: "Indeed, we are not prepared to say that it is necessary that a witness who has attended court should be able to show that he has been duly subpoenaed in order to entitle him to charge the fees allowed by law, for if he attends voluntarily we do not see why he should not be just as much entitled to his fees as if he had been compelled to attend." Notwithstanding this view of the learned Chief Justice McIver, we are constrained to think that, whatever may be the right of a witness attending voluntarily at the request of a party as against that party for compensation, it is a different question when attempt is made to tax fees against the adverse party, in which case the claimant must bring himself strictly within the terms of the statute. Under the practice before the adoption of the present statute, in order to tax the costs of a witness, it was necessary that the witness be subpoenaed. *Clark v. Linsser*, 1 Bailey, 190; *Love v. Ingram*, 2 Speer, 87. We know of no statute authorizing a different rule, and there is no good reason for departing from it now.

The circuit court sustained the second contention of plaintiff under the authority of *Clark v. Linsser*, 1 Bailey, 187, in the absence of any showing as to why the affidavits of the witnesses could not be obtained, and we concur in this ruling. The witness knows better than any one else how many days he attended court pursuant to the summons or subpoena, and how many miles he traveled, and the law requires the best evidence available. The affidavit of some one else would likely be based more or less upon the information and belief. The affidavit of the witness would tend to purge his conscience and be the best evidence that he intended to make claim for his fees. It is not contended that the defendant has paid these fees, and is claiming them, as disbursements.

Upon the third ground of objection to the taxation of costs, the circuit court held that, if it appeared that the witnesses were not sworn, then it should appear by affidavit that their attendance was procured in good faith, and, if required, it should be made to appear at least prima facie that they were material, or intended to be so. The ruling was correct and is supported by *Love v. Ingram*, 2 Speer, 87; *Farr v. Farr*, 2 Hill,

554; *Taylor v. McMahan*, 2 Bailey, 181; *Winsmith v. Dewberry*, 14 S. C. 554.

The remaining ground of objection is involved and disposed of in the foregoing considerations.

The judgment of the circuit court is affirmed.

(82 S. C. 502)

TURNER v. BOLTON et ux.

(Supreme Court of South Carolina. April 28, 1909.)

1. JUDGMENT (§ 143*)—OPENING DEFAULT—EXCUSE FOR DEFAULT.

Under Code Civ. Proc. 1902, § 195, providing that the court may in its discretion "within one year after notice thereof relieve a party from a judgment * * * taken against him through his inadvertence, surprise, or excusable neglect," a default judgment should be opened on application of the wife, where it appears that the summons and complaint against husband and wife were delivered to the husband while sick with a disease from which he died two months later, that the husband instructed the wife to keep the papers until he was able to examine them; but the wife, not knowing the nature of the papers or that she was a party thereto, kept the papers in a trunk until after the husband's death and execution was issued on the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 272, 275, 288, 289; Dec. Dig. § 143.*]

2. JUDGMENT (§ 143*)—SETTING ASIDE DEFAULT—"EXCUSABLE NEGLECT."

The failure of the wife to examine papers served on her husband while he was sick and incapable of attending to business, and thereby learn that they were a summons and complaint in commencement of an action in which she was a party, is "excusable neglect" within Code Civ. Proc. 1902, § 195, entitling her to have a default judgment in such action set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 272, 275, 288, 289; Dec. Dig. § 143.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2556-2557.]

Appeal from Common Pleas Circuit Court, Edgefield County; J. W. De Vore, Judge.

Action by M. Toney Turner against W. L. Bolton and Annie H. Bolton. From an order setting aside a default judgment, plaintiff appeals. Affirmed.

N. G. Evans and E. H. Folk, for appellant. J. Wm. Thurmond, for respondents.

HYDRICK, J. This action was brought against W. L. Bolton and his wife, the defendant Annie H. Bolton, for \$500 damages for breach of contract. The defendants failed to demur or answer, and the plaintiff proved his case in open court at the Spring term, 1908, of the circuit court for Edgefield, and obtained a verdict for the full amount claimed, upon which judgment was entered and execution issued. After levy by the sheriff the defendant Annie H. Bolton moved the court, on affidavits, at the Summer term, 1908, to set aside the judgment and allow

her to answer. Her motion was granted, and the plaintiff appealed. The exceptions charge error in the findings and conclusions of the circuit court, and abuse of discretion.

Numerous affidavits were submitted in support of the motion and in opposition thereto. For the consideration of the appeal it will be necessary to state, in substance, only the undisputed facts as found by the circuit court, and as they appear in the affidavits submitted, and the contentions of the parties upon the points involved in the motion. On February 8, 1908, copies of the summons and complaint for each of the defendants were delivered by the deputy sheriff to W. L. Bolton at his residence. At that time he was sick, suffering from nervous indigestion, from which he afterwards, on April 8, 1908, died. He went to the door and received the papers, and went back to his room and handed them to his wife, and told her to put them up, and, when he got well enough, he would examine them. He told her nothing as to the nature of the papers. She did not examine them, but, in obedience to his instructions, put them in a trunk, where they remained until after his death. She knew nothing of the nature of the papers, or that either of them was intended for her, or that it was intended thereby to institute suit against her or her husband. She did not know that she had been sued until April 11, 1908, when the sheriff went to her residence to levy the execution. She is a woman of limited education, and had had no experience in legal matters. At the time of the service she was greatly distressed on account of the condition of her husband. The respondent also submitted affidavits tending to show that at the time of the service, and for some time prior thereto and thereafter, until the time of his death, her husband's mind had become affected, so that he was non compos mentis, and also that she had a good defense to the action on the merits. Upon the last two grounds there was conflicting evidence. The circuit court found against her contention as to the condition of her husband's mind, but held under the undisputed facts and circumstances above stated as to the service and the manner thereof, and the conditions then existing, that she was entitled to the relief prayed for.

Section 195, Code Civ. Proc. 1902, gives the circuit court power, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect. * * * This court had frequently held that it will not review the findings of fact in the circuit court in cases like this, and that the granting or refusing of motions made under section 195 of the Code is within the discretion of the circuit court,

and that it will not interfere with the exercise of that discretion, unless it is made to appear that it has been abused. See *Manufacturing Co. v. Smith*, 70 S. C. 160, 49 S. E. 226; *Dunton v. Harper*, 64 S. C. 338, 42 S. E. 153, and cases cited by the court.

The appellant contends that from the findings of fact that W. L. Bolton was of sound mind it necessarily followed that the service was legal and valid; and also, from the respondent's own showing as to the condition of her husband's mind, it necessarily followed that she was under the circumstances guilty of negligence. Admitting both contentions, it does not follow that she was not entitled to relief. Clearly it was not the intention of the Legislature to limit relief to cases where the service was bad or defective; nor was it intended to confine the relief to cases where the parties had exercised proper diligence, for one of the grounds of relief mentioned in the statute is "excusable neglect." So that the question is not so much whether the party was negligent, but whether his negligence was "excusable." In this case the circuit court finds, as a fact, that the respondent was not guilty of negligence at all, but, on the contrary, finds that under the circumstances her conduct was natural; that is, that of an ordinarily prudent person.

The order appealed from is therefore affirmed.

(22 S. C. 468)

McMEEKIN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. April 15, 1909.)

1. CARRIERS (§ 51*) — BILL OF LADING — RECEIPT — CONSTRUCTION.

A bill of lading is in form nothing more than a receipt for freight, issued to the consignor by the carrier, containing the contract of shipment, so that, in an action against a carrier for failure to deliver part of the shipment, a paper, which had been recognized as valid by the carrier's agent at destination, all the goods which had arrived being turned over on its presentation, and which was of the same effect as a regular printed bill of lading, it, in addition to being a receipt, containing the specification, "as per conditions company's bill of lading," thus supplying the essential that a mere receipt might lack, was properly admitted against the carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 51.*]

2. EVIDENCE (§ 179*)—SECONDARY EVIDENCE —FAILURE OF OTHER PARTY TO PRODUCE ORIGINAL.

A paper, purporting to be notice to a carrier of special damages to plaintiff, though only a copy, being identified by the carrier's agent, is admissible against it, on its failure to produce the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 595-599; Dec. Dig. § 179.*]

3. CARRIERS (§ 56*)—BILL OF LADING—TRANSFER OF TITLE.

The general rule is that the delivery, without indorsement, of a bill of lading, by the one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of special damages. Taking the view most favorable to the plaintiff, and assuming the date to be 14th August, it was only 23 days from that time to the arrival of the freight on 6th September. The plaintiff employed six hands, and paid them \$10 a month and board. There was nothing in the record to show that the interest on the capital invested in the sawmill outfit was very large; and the sum of these losses, even leaving out of consideration a reasonable return which the plaintiff might have derived by ordinary diligence in engaging his laborers in other work, must have been far less than \$617, and that finding by the jury was plainly excessive.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

(82 S. C. 273)

MAYRANT v. CITY OF COLUMBIA.

(Supreme Court of South Carolina. April 9, 1909.)

1. MUNICIPAL CORPORATIONS (§ 845*)—INJURY FROM RAISING GRADE OF STREET—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action against a city for flooding a lot by raising the grade of adjacent streets, and by insufficient drains, testimony as to the quantity of earth and cost of work which would be required to fill in the lot to the level of the street pavement, so that surface water flowing upon the lot from land above would pass into the street, was incompetent; the method being the most expensive one, and one that due care would not require the lot owner or the city to adopt.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1799; Dec. Dig. § 845.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

It being so obvious that the method of filling in the entire lot was unnecessary, and that throwing up the edges of the lot would be sufficient, the admission of the evidence was not prejudicial, as it would be unreasonable to impute to the jury a conclusion that the expense of filling in the lot should be charged to the city.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

3. MUNICIPAL CORPORATIONS (§ 845*) — INJURY FROM RAISING GRADE OF STREET — PLEADING AND PROOF.

Where the complaint, in an action against a city for flooding a lot by raising the grade of streets, and by insufficient drains, alleged as items of damage the loss of tenants, the effect of the flooding on the property itself, and the injury to the health of plaintiff and her family, and no motion was made to strike the items out, defendant could not complain of the admission of testimony to show such damage.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 845.*]

4. APPEAL AND ERROR (§ 1053*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE—ERROR CURED BY INSTRUCTION.

If there was error in admitting the testimony, it was cured, where the court charged that the measure of damages was the actual in-

jury to the property, and not consequential damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180-4182; Dec. Dig. § 1053.*]

5. MUNICIPAL CORPORATIONS (§ 845*) — INJURY FROM RAISING GRADE OF STREET—ACTIONS—INSTRUCTIONS.

In an action against a city for flooding a lot by the raising of the grade of streets and by insufficient drains, a charge that, if the city in changing its streets caused water that would not have otherwise flowed onto plaintiff's land to flow there, it was liable, and that for plaintiff to recover, the injury must be shown to have been caused by the casting of the waters from the city's drains onto plaintiff's property, and that such casting of the water was the direct and natural result of the negligent construction of the drains or streets, when considered as a whole was not objectionable as permitting a recovery by plaintiff without any showing of negligence or mismanagement by the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1801; Dec. Dig. § 845.*]

6. MUNICIPAL CORPORATIONS (§ 845*) — INJURY FROM CHANGING GRADE OF STREET—ACTIONS — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.

In an action against a city for flooding a lot by raising the grade of streets and by insufficient drains, a charge that the statute under which the action was brought permits a recovery for the actual damages suffered by plaintiff in case she has not contributed to, or in any way brought about, the injury by negligent action or nonaction on her part was a sufficient charge on contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 845.*]

7. MUNICIPAL CORPORATIONS (§ 845*)—INJURIES FROM CHANGING GRADE OF STREET—ACTIONS—DAMAGES.

In an action against a city for flooding a lot by raising the grade of streets and by insufficient drains, the city could not offset, against any liability for negligence in that respect, the increase in the market value of the property, due to the general advance in real estate values in the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 845.*]

8. MUNICIPAL CORPORATIONS (§ 845*)—INJURIES FROM CHANGING GRADE OF STREETS—ACTIONS—QUESTIONS FOR JURY—DAMAGES.

In an action against a city for flooding a lot by raising the grade of streets and by insufficient drains, the extent of damage, being a matter of judgment dependent upon knowledge of the property and all the surrounding conditions appearing from the evidence, rather than definite estimates of witnesses, is peculiarly within the province of the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1800; Dec. Dig. § 845.*]

9. MUNICIPAL CORPORATIONS (§ 841*) — ACTIONS FOR INJURIES—SPECIAL DAMAGES.

Where it did not appear that the community at large had suffered any damage from the flooding of land caused by the change of grade of streets by a city and its insufficient drains, the fact that three or four neighboring property holders of plaintiff whose lot was flooded suffered the same injury from the same cause would not preclude plaintiff's right to sue as for special damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1790; Dec. Dig. § 841.*]

Appeal from Common Pleas Circuit Court of Richland County; Geo. Johnstone, Special Judge.

Action by Mary G. Mayrant against the City of Columbia. Judgment for plaintiff, and defendant appeals. Affirmed.

Allen J. Green, for appellant. Thomas & Thomas, for respondent.

WOODS, J. An order of the circuit court overruling a demurrer to the complaint having been affirmed on appeal (77 S. C. 281, 57 S. E. 857, 10 L. R. A. [N. S.] 1094), this cause was brought to trial at the November term of the court of common pleas for Richland county before a jury, and a verdict was rendered in favor of the plaintiff for \$1,600. The respondent appeals, assigning error in the admission of testimony, in the instructions to the jury, and in the refusal of a new trial.

A statement of the pleadings will be found in the opinion rendered in the former appeal. It is sufficient to say here that the plaintiff, as the owner of a lot of land in the city of Columbia, seeks to recover damages for the flooding of her land, the allegation being that the city of Columbia so altered the surface drains and raised the sidewalks on the adjacent street that the water is collected from the lots and street above, and thrown on plaintiff's property, where it remains for some time because the drains on the street are not large enough, and not so constructed as to permit its escape. The allegation is that this defective grading of the street and defective and insufficient drainage is due to the negligence and mismanagement of the defendant, and, without fault of the plaintiff, has resulted, using the language of the complaint, "in rendering plaintiff's houses uninhabitable, thereby causing plaintiff's tenants, from time to time, to vacate the said houses, thereby causing loss of rentals to plaintiff, and thereby causing the plaintiff and the members of her family dependent upon her to become sick and unhealthy." The answer was a general denial.

The first point made by the appeal is that there was error in allowing the witness Hasell Thomas to testify as to the quantity of earth and the cost of the work which would be required to fill in plaintiff's lot to the level of the pavement as raised by the city, so that the surface water flowing upon plaintiff's land from the lands above would flow over her land into the street. We think this evidence was not competent. It is true the filling in of the whole lot above the level of the pavement would have effectually prevented the flow of the water from the street into and over the lot, and that was one way in which either the plaintiff or the city of Columbia might have protected the property. But it was the most expensive method, and clearly one that due care did not require either party to adopt. Indeed it was so very obvious that this was unneces-

sary, and that throwing up the edges of the lot next to the street would have warded off the water from the street, that it would be unreasonable to impute to the jury a conclusion that the expense of filling in the lot should be charged to the defendant. For this reason we think the admission of the evidence was not material error.

The next exception must be overruled for two reasons. Objection was made to this question: "Taking into consideration the loss of your tenants, the effect on the property itself, and the injury to your health and to the health of your family, how many dollars have you been injured?" In the first place the defendant could not complain of the question, because the items of damage here spoken of were all alleged in the complaint, and no motion was made to strike them out. *Martin v. Ry. Co.*, 70 S. C. 11, 48 S. E. 616; *Elms v. Power Co.*, 79 S. C. 502, 60 S. E. 1110. In the second place the circuit judge charged the jury that the measure of damages was the actual injury to the property, and not consequential damages; and, if there was error in allowing the question to be answered, it was cured by this instruction. *Hipp v. So. Ry. Co.*, 50 S. C. 129, 27 S. E. 623.

There are numerous exceptions imputing error to the circuit judge in instructing the jury that the defendant would be liable if, by its work on the street and its drains, it collected water that otherwise would not have flowed there, and cast it on plaintiff's property to her injury, without giving the further instruction that the defendant would not be liable unless the injury was due to defendant's negligence or mismanagement. The action was founded on section 2023, Civ. Code 1902, and under that statute it was essential to plaintiff's recovery that she should prove a defect from which the injury resulted, caused by the negligence or mismanagement of the city.

The trial was concluded under circumstances most distressing to the presiding judge and all others concerned, owing to the sudden death of Mr. Crawford, the eminent counsel for the plaintiff, while conducting the cause. If the part of the charge given to the jury on the 21st of November be considered alone, it would be subject to the criticism made in these exceptions; but, on the following morning, when the charge was resumed, the circuit judge explicitly and repeatedly charged that the plaintiff could not recover unless the evidence showed that injury to her property was due to a defect caused by the negligence or mismanagement of the defendant. The last instruction given on this subject at the conclusion of the charge was in this language, submitted as one of the defendant's requests: "In order for the plaintiff to recover the jury must be satisfied by the preponderance of the evidence that the injury complained of was caused by the casting of the water from defendant's drains onto plaintiff's property, and

that such casting of the water was the direct and natural result of the negligent construction of the drains or streets."

The exception alleging failure properly to charge on the subject of contributory negligence is also without foundation, for, on the request of defendant's counsel, this instruction was given to the jury: "The statute under which this action is brought limits the recovery to the actual damages suffered by the party injured, and only permits a recovery of such damages in case the party injured has not contributed to, or in any way brought about, the injury by negligent action or nonaction on her part."

There was no error of law in refusing the motion for a new trial on any of the grounds set out in the exceptions. There was evidence that the value of the property was lessened by flooding, due to defendant's defective pavement grade and insufficient drains, and obviously the defendant could not offset against any liability for negligence in this respect the increase in the market value of the property, due to the general advance in real estate values in the city.

There was evidence to support a substantial verdict against the defendant, and a careful examination of the testimony does not lead to the conviction that the amount was capriciously fixed. The extent of the damage was a matter of judgment, dependent upon knowledge of the property and all the surrounding conditions appearing from the evidence, rather than definite estimates of the witnesses, and was therefore peculiarly within the province of the jury.

The fact that three or four neighboring property holders suffered from the same causes and in the same way does not bring the case within the principle of *S. C. Steamboat Co. v. Wilmington, C. & A. R. R. Co.*, 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688, and other similar cases. There was no evidence here that the community at large suffered any damage at all, or was in anywise concerned in the matter.

The judgment of this court is that the judgment of the circuit court be affirmed.

(32 S. C. 478)

BLACK v. ATLANTIC COAST LINE R. CO.
(Supreme Court of South Carolina. April 22, 1909.)

1. DAMAGES (§ 49*)—MENTAL SUFFERING.

The common law in force in this state does not allow recovery for mental suffering in the absence of bodily injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 100; Dec. Dig. § 49.*]

2. CARRIERS (§ 277*)—PERFORMANCE OF CONTRACT OF TRANSPORTATION—ACTION FOR BREACH—DAMAGES—MENTAL SUFFERING.

Where plaintiff, a passenger, was merely required to transfer at Y. from a train of defendant railroad not scheduled to stop at P.,

the station for which she bought a ticket, was delayed only 1 hour and 13 minutes in reaching P., and was not delayed in reaching her ultimate destination, and it appeared that the waiting room accommodations at Y. were superior to those at P., and that plaintiff suffered no bodily injury, and was not subjected to any discourtesy, and there was no evidence of wanton or willful misconduct on the part of defendant railroad's servants, plaintiff was not entitled to recover for mental suffering.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1062-1084; Dec. Dig. § 277.*]

3. CARRIERS (§ 408*)—PASSENGER'S EFFECTS—DELAY IN DELIVERY—DAMAGES—PUNITIVE DAMAGES.

Where defendant railroad made an earnest effort to trace and deliver plaintiff's baggage which had miscarried, an inference of willful misconduct was not warranted, and plaintiff could not recover punitive damages for the delay in delivery.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1569; Dec. Dig. § 408.*]

4. CARRIERS (§ 271*)—PERFORMANCE OF CONTRACT OF TRANSPORTATION—STOPPING AT DESTINATION—DUTY OF PASSENGER TO INQUIRE.

A railroad company may adopt a rule that a certain train shall not stop at designated stations, and a passenger is bound to inquire whether the train on which he takes passage stops at his destination.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1068; Dec. Dig. § 271.*]

5. TRIAL (§ 191*)—ASSUMPTIONS BY JUDGE AS TO FACTS.

Where, in an action against a railroad for damages to plaintiff's baggage, plaintiff raised no issue as to the identity of the ticket issued to her as a passenger, and it was identified by the agent who issued it, and by the conductor who punched it, and was introduced in evidence without objection, the court had a right to assume that it was the ticket issued to plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 420; Dec. Dig. § 191.*]

6. CARRIERS (§ 408*)—PASSENGER'S BAGGAGE—INJURY—ACTION—QUESTION FOR JURY—CONSTRUCTION OF TICKET.

Where the complaint, in an action against a railroad for damages to plaintiff's baggage, alleged that defendant issued to plaintiff a ticket authorizing her to ride on its trains, as a part of her cause of action, and the ticket was introduced in evidence without objection, and its identity was not disputed, it was the province of the court to construe its terms as a matter of law responsive to the testimony, even if strict pleading required defendant to plead a limitation of liability stated in the ticket.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1571; Dec. Dig. § 408.*]

7. CARRIERS (§ 153*)—CONTRACTS LIMITING LIABILITY.

While a carrier cannot by contract exempt itself from liability for its own negligence, the carrier and shipper may make a special contract upon consideration, agreeing on a valuation of property shipped in case of loss or damage.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 663; Dec. Dig. § 158.*]

8. CARRIERS (§ 405*)—PASSENGER'S EFFECTS—LOSS OR DAMAGE—CONTRACTS LIMITING LIABILITY.

A passenger, not assenting to or receiving any consideration for a contract limiting the carrier's liability for baggage, is not bound

thereby, even though the limitation be reasonable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1544-1549; Dec. Dig. § 405.*]

9. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERROR CURED BY VERDICT.

In an action against a railroad for damages to plaintiff's baggage, error in holding plaintiff bound by a contract limiting defendant's liability, to which plaintiff did not assent, and for which she received no consideration, provided the jury believed the limitation reasonable, was harmless; the verdict in plaintiff's favor showing that the jury did not deem the limitation reasonable, and were not governed by it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4225; Dec. Dig. § 1068.*]

Appeal from Common Pleas Circuit Court of Colleton County; Geo. W. Gage, Judge.

Action by Mamie Black against the Atlantic Coast Line Railroad Company. Judgment for plaintiff for less than amount claimed, and she appeals. Affirmed.

J. G. Padgett and Howell & Gruber, for appellant. W. Huger Fitzsimons and Peunfoy Bros., for respondent.

JONES, C. J. On December 6, 1905, at Jacksonville, Fla., plaintiff became a passenger on defendant's fast train No. 82, with a full fare ticket from Jacksonville to Green Pond, S. C., and with check to her trunk to that point issued by defendant. The trunk never reached Green Pond, and when finally traced, it was found in defendant's depot at Hague, Fla., and was delivered to plaintiff March 4, 1906, with the contents badly damaged. When the train left Savannah, the conductor informed plaintiff that train No. 82 would not stop at Green Pond, and that she would have to get off at Yemassee and there await the local train No. 42 from Augusta to Charleston. Plaintiff demurred to this, and told the conductor that she wanted to go on to Green Pond by that train. On reaching Yemassee the porter came in and picked up her grip, and told her that was the place for her to get off, and walked out, and the plaintiff followed and got off the train. She remained at Yemassee about 73 minutes, and boarded the local train, and was carried to Green Pond on the original ticket, reaching Green Pond in time to take the train to Walterboro, her final destination. No. 82 was not scheduled to stop at Green Pond, but occasionally had done so for some reason of emergency, as for water, to let off a sick passenger, to pass another train, or when it was behind local train No. 42. Plaintiff brought this action in January, 1906, to recover \$5,000 as damages for alleged negligent and willful breach of duty in failing to carry plaintiff and her baggage to Green Pond, alleging that she was subjected to anxiety and humiliation in being required to leave the train at Yemassee, and remain there for some

time; and that the defendant's agent at Jacksonville informed her when she bought her ticket that her train would stop at Green Pond. The value of the trunk and contents was alleged to be \$500, and at the time of the commencement of the action the trunk had not been found and delivered. Plaintiff found in the trunk her money, about \$30, and her gold watch, but testified that the clothing was so damaged as to be practically worthless, and estimated her loss at \$900 or \$1,000. When the trunk was delivered, the defendant's agent at Hague, in presence of plaintiff and her father, made a list of the articles in the trunk, estimating their value, exclusive of money and watch, at \$304.80. About one dozen oranges were also in the trunk, and had become rotten, and this probably contributed to damage the clothing. The jury rendered a verdict in favor of plaintiff for \$300. Plaintiff moved for a new trial for alleged error in the charge to the jury, but the motion was refused, and plaintiff now appeals from the order refusing a new trial, and from the judgment upon exceptions to the charge.

1. It is contended that the court erred in charging the jury that plaintiff, having received no physical injury, and none having been alleged in the complaint, could recover no damages for worry and mental anguish caused by the alleged delay. The exception does not specify wherein there was error. The charge was in accordance with the common law enforced in this state, which does not allow recovery for mental suffering in the absence of bodily injury. *Mack v. R. R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Lewis v. Tel. Co.*, 57 S. C. 330, 35 S. E. 556; *Taylor v. R. R. Co.*, 78 S. C. 559, 59 S. E. 641. It is argued that this rule does not apply when the carrier's breach of duty was willful, as alleged in this case. There was not a scintilla of evidence of any reckless, wanton, or willful misconduct on the part of defendant's servants in the treatment of plaintiff as passenger. At most plaintiff was subjected to a mere transfer, from a train not scheduled to stop at her station, to one scheduled to stop there, done without any rudeness, and with the least possible inconvenience to plaintiff, involving a delay in reaching Green Pond of only 1 hour and 13 minutes, and no delay whatever in her connection for Walterboro, her destination. She would have had the same wait at Green Pond as she had at Yemassee, and the waiting room accommodations at Yemassee were superior to those at Green Pond. But, if it be conceded that there was evidence of willfulness, the court covered that aspect fully in the general charge. In the particular charge complained of the court was instructing the jury as to whether they could give compensatory

damages for wounded feelings in the absence of bodily injury.

2. The court charged that, defendant having made reasonable effort to trace and deliver the trunk, no punitive damages could be recovered on that account, but only such actual damages, from injury to its contents and inconvenience from delay, as plaintiff sustained could be recovered. We think there was no error in withdrawing from the jury the question of punitive damages with respect to the trunk. On the morning of December 6, 1905, plaintiff and her husband traveled on the Seaboard Air Line from Highland to Jacksonville, and, while on board train, received baggage check No. 7,063 of that company for the trunk. On reaching Jacksonville plaintiff's husband, through a negro employé of the Union Station Company, procured in exchange for the Seaboard check, the Atlantic Coast Line baggage check No. 37,288. There was testimony that the baggage was never actually delivered to the defendant company, but we assume that it was, since it issued its check therefor, and the trunk was finally found to be in its possession. But immediately upon demand of plaintiff for the baggage an earnest effort was made to trace and deliver it. When finally located at Hague, Fla., the trunk had on it the Seaboard check, and no check of the Atlantic Coast Line, and no mark to indicate its origin or destination, and this, no doubt, rendered the tracing for baggage with the Atlantic Coast Line check more difficult. While the circumstances may warrant an inference of negligence in the transfer of the baggage at Jacksonville and its transportation to Hague, there is nothing to show any reckless or wanton disregard of plaintiff's rights. The delay in locating and delivering the baggage would not warrant an inference of willfulness, in view of the undisputed evidence of effort to trace and deliver. *Roberts v. Tel. Co.*, 73 S. C. 523, 53 S. E. 985, 114 Am. St. Rep. 100; *Butler v. Tel. Co.*, 77 S. C. 148, 57 S. E. 757.

3. It is excepted that the court erred in charging the jury that a railroad company has a right to adopt a regulation that a certain train shall not stop at designated stations, and one traveling as a passenger on such road is bound to inquire whether the train upon which he takes passage stops at the place to which he is going; the contention being that it is not the duty of the passenger to make such inquiry. There was conflict in the testimony as to whether plaintiff made any such inquiry. The instruction given is sustained by the case of *Carter v. Railway*, 75 S. C. 360, 55 S. E. 771, in which the court said: "There can be no doubt of the right of railroad companies to run passenger trains stopping only at important stations, provided reasonably adequate provision is made by other trains for the accommodation of local travel. Incident to this right of a railroad company is *the duty of a passenger, be-*

fore boarding a train, to use diligence to ascertain if it stops at his destination; and, if the passenger fails to use the means of information at his command, he cannot complain of the resulting inconvenience or damage, even if on his refusal to pay the additional fare to the next regular stopping place he is ejected from the train." (Italics added.) The court further said: "As a general rule, where a passenger on account of the mistake of the carrier's agent boards a train not scheduled to stop at his station, the carrier has a right to correct the mistake by letting the passenger off at a stopping of that train before passing the passenger's destination, so that he may take the next train scheduled to stop at his destination; and it is the duty of the passenger to stop off and wait for such train." There were no exceptional circumstances in this case to take it out of the general rule.

4. The court instructed the jury that the ticket or contract in this case limited the value of the baggage to \$100; that a railroad company has a right to limit its liability for baggage, and if the jury believed that the sum of \$100 was a reasonable limitation, then nothing more than \$100 can be recovered for the value of the baggage. It is alleged, first, that this was a charge in respect to a matter of fact, but we think this objection cannot be sustained. The ticket in question was identified by the agent who issued it and the conductor who punched it and was introduced in evidence without objection. The plaintiff raised no issue whatever as to the identity of the ticket issued to her as passenger. Under such circumstances the court has a right to assume as an undisputed fact that the ticket in evidence was the ticket issued to plaintiff. It is next contended that such charge should not have been given, as defendant had not pleaded any limitation of liability by contract. Judge Gage hesitated to so charge because of this. The complaint having alleged that defendant issued to plaintiff a ticket authorizing her to ride upon its train, as a part of her cause of action, and the ticket having been introduced in evidence without objection, and its identity not disputed, it was the province of the court to construe the terms of the ticket as a matter of law responsive to the testimony, even if strict pleading required defendant to plead the alleged limitation of liability as stated in the ticket. *Russell v. Arthur*, 17 S. C. 480; *Harbert v. R. R. Co.*, 78 S. C. 549, 59 S. E. 644. The more serious objection to the charge is the last contention: That, plaintiff having paid full rate for the ticket, the limitation of liability with respect to baggage is not valid, even though the jury might think it reasonable. It is a well-settled rule that a common carrier cannot by contract exempt itself from liability for its negligence; but it is equally well settled that the carrier and shipper may make a special contract upon consideration, agreeing

upon a valuation of property shipped in case of loss or damage. *Johnstone v. R. R. Co.*, 39 S. C. 56, 17 S. E. 512. In *Norman v. Southern Ry.*, 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809, this court held that a passenger paying full fare for a general ticket is not bound by limitations printed thereon, unless his attention has been especially called to them, and he has assented thereto. As there was no conclusive evidence that plaintiff had received any consideration, in reduced charges or otherwise, for such a contract, and no conclusive evidence that she had knowledge of, and consented to, such special limitation or condition, it was error to hold the plaintiff bound by the limitation, if the jury deemed the limitation reasonable, as it is not the reasonableness of the limitation alone which binds the passenger, but it is his assent thereto upon consideration which binds or estops him. Nevertheless we do not think the error should work a reversal, as it is manifest from the verdict of \$300 in favor of plaintiff that the jury did not regard the limitation of liability reasonable, and were not governed by it. There was no basis for punitive damages, as already shown, and there was no basis for more than a mere nominal sum for the slight delay involved in the transfer of plaintiff at Yemassee, hence it is fair to assume that the jury made their verdict upon their estimate of the loss to plaintiff by the delay in delivering the trunk and the damage to its contents.

The verdict is already for the plaintiff, and we see no good reason to believe that another trial would promote substantial justice in this case.

The judgment of the circuit court is affirmed.

(82 S. C. 432)

MARTIN v. HUTTO.

(Supreme Court of South Carolina. April 13, 1909.)

1. APPEAL AND ERROR (§ 425*)—NOTICE OF APPEAL—TIME FOR SERVICE.

Where a decree is filed out of term time, the 10 days allowed defendant to serve notice of intention to appeal does not commence to run until notice of the filing of the decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2135, 2157; Dec. Dig. § 425.*]

2. NOTICE (§ 10*)—SERVICE BY MAIL.

Though Code Civ. Proc. 1902, § 410, provides that "service by mail may be made where the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail," the rights of a party will be held not concluded by a notice mailed, but not received by him, where no injury is shown to be the result of such holding.

[Ed. Note.—For other cases, see *Notice*, Cent. Dig. § 24; Dec. Dig. § 10.*]

3. EXECUTION (§ 433*)—ARREST OF DEFENDANT—NOTICE TO SHOW CAUSE.

Code Civ. Proc. 1902, § 200, provides for the arrest of defendant in an action for fraudulent misapplication or embezzlement of plaintiff's property. Section 307 provides that no execution shall issue against the person of a judgment debtor unless an order of arrest has been served, or unless the complaint contains a statement of facts showing one or more of the causes of arrest. *Held*, that execution against a person may be issued without a rule to show cause when defendant has notice of the cause of action and the relief asked by service of the complaint on him, and he has had an opportunity in the trial to show why the allegations of fraudulent misappropriation or embezzlement are not well founded, and why the relief asked should not be granted.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1233; Dec. Dig. § 433.*]

4. EXECUTION (§ 426*)—ARREST OF DEFENDANT—RETURN OF EXECUTION AGAINST PROPERTY.

Under Code Civ. Proc. 1902, § 307, providing that an execution against the person of a judgment debtor may be issued after the return of an execution against his property unsatisfied in whole or in part, an execution cannot issue against the person until an execution against defendant's property has been returned unsatisfied.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1211; Dec. Dig. § 426.*]

Appeal from Common Pleas Circuit Court of Lexington County; Chas. G. Dantzler, Judge.

Action by A. W. Martin against Paul E. Hutto. From a judgment for plaintiff, and an order for execution for his arrest, defendant appeals. Modified.

See, also, 78 S. C. 560, 60 S. E. 34.

G. I. Graham, for appellant. De Pass & De Pass, for respondent.

WOODS, J. The facts in this case are fully set out in the circuit decree. The defendant did not appear at the reference or at the trial in the circuit court; but there can be no doubt of the correctness of the conclusion of Judge Dantzler that defendant was guilty of a fraudulent appropriation of plaintiff's one-half of the crops made by defendant on plaintiff's land under a share crop contract, and that the value of the property so appropriated was \$768.14. The only real issue made by the appeal is whether the circuit judge erred in decreeing that the plaintiff have leave to issue an execution for the arrest of the defendant.

Before reaching this question, however, it is necessary to dispose of a motion made by plaintiff to dismiss the appeal, on the ground that the defendant had not given notice of intention to appeal within 10 days after notice of the filing of the decree. The decree was filed out of term time, and therefore the 10 days allowed to defendant to serve notice of intention to appeal did not commence to run until notice of the filing of the decree. Plaintiff's counsel mailed notice of the filing of the

decree to the defendant and his attorney separately on the 1st day of October, 1907, under sections 410 and 411 of the Code of Civil Procedure of 1902, which provide:

"Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

"In case of service by mail, the paper must be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid."

The notice of intention to appeal was not served until November 30, 1907. There is no doubt of the mailing of the notice as required by statute, but the defendant and his attorney, Mr. Sharpe, submit affidavits that neither of the notices was received.

The important question is whether a party in such case is absolutely bound by the mailing of the notice to him, though he fails to receive it, and is thus shut out from his right of appeal. The point is not free from difficulty. There is strong reason for holding that the notice of the filing of the decree is not essential to the exercise of the right of appeal, for both parties might without hardship be held bound to take notice of the filing of the decree as an act taking place in a public office. Indeed, looked at from the technical legal standpoint, we think this the true view of the matter. Still the law contemplates that the losing party may rely on notice of the decree from the successful party, and we cannot think it was the intention to conclude the rights of a party by holding him bound by a notice mailed to him, but not received, where no injury has resulted to the other party, and the rights of third parties have not intervened. Service by mail in the manner required by the statute is good service, and all judgments and other completed legal proceedings resting thereon will be binding. Even in the course of the proceedings without a showing of injury to the adverse party, the service by mail in accordance with the statute will be regarded complete, and the party so served will not be relieved against the very strong presumption, except on clear proof that he was taken by surprise. There is no reason to doubt Mr. Sharpe's affidavit that notice failed to reach him. We have more hesitation in crediting the defendant's affidavit because of the very bad light in which he appears throughout the case. Nevertheless, as the plaintiff has lost no substantial right, we have concluded, though with hesitancy, to regard the presumption of the receipt of the notice overcome by defendant's sworn statement that it did not reach him. The motion to dismiss the appeal is refused.

The portion of the decree involved in the appeal adjudges: "That the plaintiff have leave forthwith to issue ca. sa. or execution

against the person of the defendant in accordance with sections 200 and 308 of the Code of Civil Procedure of 1902, for the arrest of the defendant for fraudulently obtaining and procuring the assignment to himself of the lease and demise of the Blackville Road Plantation for the purpose of depriving plaintiff of the use thereof and benefits thereunder, and for fraudulently taking, detaining, or disposing of plaintiff's one-half of all crops raised upon the Blackville Road Plantation during the year 1904, and that said defendant be forthwith imprisoned in the county jail of Lexington county until said judgment of \$768.14 and costs are paid, or until he be otherwise discharged in accordance with the provisions of law in such cases made and provided." The defendant contends that it was error to provide in the decree for an execution against the person of the defendant, first, because such an execution could not be issued against the defendant until he had been afforded an opportunity to show cause why the execution should not issue for his arrest; and, second, because the statute requires that execution against the person can be issued only after a return of execution against his property unsatisfied in whole or in part.

The first ground is untenable. The action, as clearly appears by the complaint, was for the fraudulent misapplication and embezzlement by the defendant of plaintiff's property, and therefore it fell under subdivision 1 of section 200 of the Code of Civil Procedure of 1902, which permits the arrest of the defendant in such case. Section 307 of the Code of Civil Procedure of 1902 provides: "If the action be one in which the defendant might have been arrested, as provided in section 200 and section 202, an execution against the person of a judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this Code of Procedure provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 200." This section of the Code evidently means that execution against the person may be issued without a rule to show cause when the defendant already had notice of the cause of action and the relief asked from the complaint served on him, and has had opportunity at the trial to show why the allegations of fraudulent misappropriation or embezzlement are not well founded, and why the relief asked should not be granted. The case of *Kennesaw Mills v. Walker*, 19 S. C. 112, is relied on by defendant as opposed to this conclusion; but that was a case of contempt under supplementary proceedings, involving different facts and principles of law.

The second point is more serious. Section 308 of Code of Civil Procedure of 1902 specifies the terms in which an execution against the person shall issue, but the condition on which it may issue is fixed by section 307, above quoted. The latter section in providing that it may issue "after the return of an execution against his (the judgment debtor's) property unsatisfied in whole or in part" clearly indicates that it may not issue until such return of an execution against his property. Indeed, there is no other statutory authority than section 307 for issuing an execution against the person, and hence such an execution can be issued only when the terms of that statute have been met. There was no return of an execution against the property of defendant unsatisfied in whole or in part. At the argument it was insisted that the defendant had gone into bankruptcy, and that bankruptcy was equivalent to a nulla bona return of an execution against the property of the bankrupt. This point, however, cannot be considered, as it does not appear from the case for appeal that the defendant is a bankrupt.

The judgment of this court is that the judgment of the circuit court be modified so as to provide for the issuing of an execution against the property of the defendant, and for an execution against his person in the terms provided by the statute, and stated in the circuit decree, in case the execution against the property of the defendant be returned unsatisfied in whole or in part.

(82 S. C. 378)

FOSTER v. BAILEY et al.

(Supreme Court of South Carolina. April 9, 1909.)

1. VENDOR AND PURCHASER (§ 238*)—PURCHASER FROM BONA FIDE PURCHASER—EFFECT OF NOTICE.

A purchaser for value without notice of a prior unrecorded deed can convey a good title to one having notice thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 530-532; Dec. Dig. § 238.*]

2. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—NOTICE—POSSESSION.

Under Civ. Code 1902, § 2457, providing that the possession of real estate described in an instrument required by law to be recorded shall not operate as notice of such instrument, and actual notice shall be sufficient to supply the place of registration only when it is of the instrument itself or of its nature and import, the exclusive possession of land by a purchaser under an unrecorded deed would not be notice to a subsequent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

3. VENDOR AND PURCHASER (§ 244*)—BONA FIDE PURCHASER—EVIDENCE—SUFFICIENCY.

In an action to recover possession of land, evidence held to sustain a finding that plaintiff's grantor did not have actual notice of a prior

unrecorded deed or of its nature and import at the time he purchased.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 244.*]

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Gary, Judge.

Action by Amanda E. Foster against W. G. Bailey and another. From a judgment for plaintiff on a directed verdict, defendants appeal. Affirmed.

Willson & Osborne, for appellants. Sanders & De Pass, for respondent.

JONES, J. This is an action to recover possession of land, and resulted in a verdict and judgment for the plaintiff by direction of the court.

Both parties claim under A. J. Chapman as the common source. In 1898 Chapman was owner of certain premises, being lots 4 and 5, as represented on plat of Wofford estate lands, and fronting 120 feet on North Church street, in the city of Spartanburg, S. C., and defendant Tucker was owner of lot No. 3 of said estate land lying north and adjacent to Chapman's premises. On March 5, 1898, Chapman conveyed to Tucker a portion of his said lot No. 4, being a strip adjacent to Tucker's lot and fronting 20 feet on North Church street, but the deed was not put on record until July 21, 1900. Tucker, however, immediately went into possession, and he and Chapman within a few days after the execution of the deed moved the fence formerly dividing their premises so as to place the said strip within Tucker's inclosure. Tucker has been in exclusive possession since the execution of his deed. In the meantime, on December 24, 1898, Chapman conveyed to Dr. Julian H. Allen in consideration of \$900 the said lots 4 and 5 described as fronting 120 feet on North Church street without making any reference to the portion thereof previously conveyed to Tucker, and this deed was recorded January 23, 1899. By deed dated December 4, 1904, recorded February 1, 1905, consideration \$1,075, Allen conveyed the premises to R. H. Foster, describing the same as in Chapman's deed to him. By deed dated July 22, 1906, recorded February 28, 1906, consideration love and affection and \$1, the heirs at law of R. H. Foster conveyed the premises with same description to plaintiff.

The real contest in this appeal is whether there was any testimony tending to show that Dr. Allen at the time of his purchase had notice of the previous unrecorded deed of Chapman to Tucker; for, if there was no such testimony, the direction of a verdict for plaintiff was proper under the undisputed facts. The fact that the deed from Chapman to Tucker was recorded before the conveyance to R. H. Foster would not prevent plaintiff's recovery if Allen had no no-

tice when he purchased, under the principle that a purchaser for value without notice can convey a good title to one with notice; the immunity of the grantor's title passing to the grantee. *Jones v. Hudson*, 23 S. C. 501; *Williams v. Jones*, 74 S. C. 262, 54 S. E. 558; 23 *Ency. Law* (2d Ed.) 477; 24 *Ency. Law* (2d Ed.) 134. There was testimony that Tucker was in exclusive possession of the lot in question at the time Allen purchased, but section 2457, Civ. Code 1902, provides: "No possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument; and actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself or of its nature and import." This statute, approved December 24, 1888, changed the rule declared in *Sheorn v. Robinson*, 22 S. C. 32, *Daniel v. Hester*, 29 S. C. 147, 7 S. E. 65, and like cases, that possession is notice of an unrecorded deed. The cases of *Harman v. Southern Ry.*, 72 S. C. 235, 51 S. E. 689, and *Southern Ry. v. Howell*, 79 S. C. 236, 60 S. E. 677, are not conclusive for appellant, as the possession under an unrecorded deed in each of those cases arose at a time when the rule in *Daniel v. Hester* was in force, and was a continuing possession at the time the subsequent deed was made. There was, however, testimony that before Allen bought he was shown the premises by Epton and Hottell, agents of Chapman, and knew that the property he was negotiating to purchase was the property lying between the fences; that some two or three years after Allen purchased and before he conveyed to Foster the fence to which Tucker claimed was repaired and Allen paid for one-half the expenses; that during his ownership Allen never made any claim against Tucker for the lot in dispute; and that Allen after his purchase declared to Chapman that, when he bought, he supposed there was a frontage of 120 feet between the fences. Dr. Allen testified that he had no notice of the unrecorded deed, that he gave no attention to the location of fence and paid for one-half of its repair at the request of Tucker without examination, and that he bought the property as described in the deed.

We agree with the circuit court that the testimony did not tend to show such actual notice of the unrecorded deed or its nature or import as required by statute to take the place of recording. We have hesitated to reach this conclusion because of the apparent hardship to defendant Tucker, but, after consideration, we see no way to avoid it under the terms of the statute. The case illustrates the danger of negligence in complying with the recording statute.

We do not regard the remaining exceptions

as presenting any matter justifying reversal. The judgment of the circuit court is affirmed.

(32 S. C. 278)

STATE v. TURNER.

(Supreme Court of South Carolina. April 9, 1909.)

1. SEDUCTION (§ 34*)—PROMISE OF MARRIAGE.

In order to establish seduction, the state must prove beyond a reasonable doubt that prosecutrix was induced to have unlawful sexual intercourse with accused by means of his deception and promise of marriage.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. § 58; Dec. Dig. § 34.*]

2. SEDUCTION (§ 46*)—PROSECUTION—EVIDENCE—CORROBORATION.

Under Act Feb. 22, 1905, 24 St. at Large, p. 937, providing that no conviction shall be had for seduction on the uncorroborated evidence of the woman upon whom the seduction is charged, a verdict of acquittal should have been directed, where prosecutrix's evidence was not corroborated.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

3. INDICTMENT AND INFORMATION (§ 109*)—REQUISITES—STATUTORY OFFENSES.

In charging a statutory offense, every essential ingredient of the crime must be alleged.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 286; Dec. Dig. § 109.*]

4. SEDUCTION (§ 37*)—INDICTMENT—ALLEGATIONS—CHASTITY.

Under Act Feb. 22, 1905, 24 St. at Large, p. 937, providing that no conviction shall be had for seduction if it is proved that prosecutrix was at the time of the alleged offense lewd and unchaste, her chastity need not be alleged in the indictment; the want of chastity being a matter of defense.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. § 64; Dec. Dig. § 37.*]

Appeal from General Sessions Circuit Court of Lexington County.

B. G. Turner was convicted of seduction, and he appeals. Reversed and remanded for new trial.

Nelson & Nelson and Graham & Sturkie, for appellant. G. B. Timmerman and W. W. Hawes, for the State.

WOODS, J. The defendant, B. G. Turner, was convicted of seduction by the court of general sessions for Lexington county. The appeal to this court involves two inquiries: First. Was there any corroboration of the testimony of the prosecutrix to warrant the submission of the case to the jury? Second. On the charge of seduction is the previous chastity of the prosecutrix a material ingredient of the crime to be established by the state?

The statute under which the defendant was indicted was as follows: "That any male person above the age of sixteen years, who shall, by any means of deception and promise of marriage, seduce any unmarried woman in

this state, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court; but no conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had if on trial it is proved that such woman was at the time of the alleged offense lewd and unchaste." Act Feb. 22, 1906, 24 St. at Large, p. 937. Save for the testimony of the prosecutrix, there was no evidence whatever of "any means of deception and promise of marriage" on the part of the defendant. In order to establish the crime of seduction, the state must prove beyond a reasonable doubt, with evidence corroborative of the testimony of the prosecutrix, that she was induced to have unlawful sexual intercourse with the accused by means of his deception and promise of marriage. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 181; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837; *McCullar v. State*, 36 Tex. Cr. R. 213, 36 S. W. 585, 61 Am. St. Rep. 847; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Ferguson v. State*, 71 Miss. 805, 15 South. 66, 42 Am. St. Rep. 492; *Cooper v. State*, 90 Ala. 641, 8 South. 821; *Russell v. State*, 77 Neb. 519, 110 N. W. 380; *Wilhite v. State*, 84 Ark. 67, 104 S. W. 531; *State v. Raynor*, 145 N. C. 472, 59 S. E. 344; *State v. Brown*, 65 N. J. Law, 687, 51 Atl. 1109, and others. There being no corroborative evidence on this material issue, the defendant was entitled to a direction of a verdict of acquittal.

The next exception, taken to the charge of the circuit judge, involves the proposition whether the chastity of the woman is presumed in the first instance, or whether it must be proved by the state as one of the ingredients of the crime. The portion of the charge excepted to is as follows: "That the defendant is bound to prove by the preponderance of the evidence that the prosecutrix was lewd and unchaste. If you have any doubt as to where the preponderance of the evidence is, that you will give the benefit of that reasonable doubt to the defendant. Understand me that the defendant must prove by the preponderance of the evidence, not beyond a reasonable doubt, that the prosecutrix was lewd and unchaste. If you have any doubt as to where the preponderance of the evidence is, then you will give the prisoner the benefit of that reasonable doubt." The conflict of authority as to whether in a case of seduction the chastity of the prosecutrix is to be presumed or proved by the state may be attributed in a measure to the different phrasing of the statutes of the several states, setting out the crime. In *Mis-*

statute requires the victim to be "any unmarried woman of good repute"; and it devolves upon the prosecution to allege and prove "good repute." This is the rule in some other states where the wording of the statutes is similar. *Zabriskie v. State*, 43 N. J. Law, 640, 39 Am. Rep. 610; *Oliver v. Commonwealth*, 101 Pa. 215, 47 Am. Rep. 704; *Commonwealth v. Whittaker*, 131 Mass. 224. In some states where the statute requires that the woman be "of previous chaste character" the same rule as to allegation and proof applies. *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; *Ex parte Vandiveer*, 4 Cal. App. 650, 88 Pac. 994; *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837. Where nothing is provided in the statute as to character, it has been laid down in some jurisdictions that previous chastity of the woman is essential to the offense and must be proved by the state. *Norton v. State*, 72 Miss. 128, 16 South. 264, 18 South. 916, 48 Am. St. Rep. 539; *West v. State*, 1 Wis. 209.

The following decisions uphold the view that the chastity of the woman upon whom the seduction is charged is presumed: *Kerr v. U. S. (Ind. T.)* 104 S. W. 809; *Wilhite v. State*, 84 Ark. 67, 104 S. W. 531; *Caldwell v. State*, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28; *Andre v. State*, 5 Iowa, 389, 68 Am. Dec. 708; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863; *Smith v. State*, 118 Ala. 117, 24 South. 55; *People v. Kenyon*, 26 N. Y. 203, 84 Am. Dec. 177; *McTyler v. State*, 91 Ga. 254, 18 S. E. 140. A close observation of our statute causes us to adopt this conclusion. It has been a settled rule of pleading in this state from early times that, in order to charge a statutory offense, every ingredient necessary to make up the crime must be alleged in the indictment and proved by the prosecution. *State v. Foster*, 3 McCord, 442; *State v. O'Bannon*, 1 Bailey, 144; *State v. Henderson*, 1 Rich. Law, 184; *State v. Coleman*, 17 S. C. 473; *State v. Evans*, 18 S. C. 137; *State v. Jeter*, 47 S. C. 2, 24 S. E. 889; *State v. Jeffcoat*, 54 S. C. 196, 32 S. E. 298. The portion of the statute now under discussion is: "No conviction shall be had if on trial it is proved that such woman was at the time of the alleged offense lewd and unchaste." The incorporation of the clause "if on trial it is proved" shows conclusively that the General Assembly did not intend the chastity of the injured woman to be an ingredient of the offense necessary to be set up in the indictment. The exception to the charge of the trial judge is overruled.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial. All concur.

(82 S. C. 405)

CLIO GIN CO. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. April 9, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 67*)—DELAY IN DELIVERY OF MESSAGE—DAMAGES.

A cotton oil company sent plaintiff, engaged in buying cotton seed, a telegram stating that the sender would pay a certain amount and commissions for seed purchased, and in an action for negligent delay in delivering the message plaintiff claimed that, if the message had been delivered within a reasonable time, it could have bought seed at a slight excess of the amount named in the telegram, which would have been allowable under its contract with the oil company, and that it had lost storage charges allowable to it under such contract. *Held*, that such elements were not recoverable in the absence of a showing that defendant had knowledge of such provisions.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 65; Dec. Dig. § 67.*]

2. APPEAL AND ERROR (§ 1177*)—NEW TRIAL—NECESSITY.

On January 4th a cotton oil company sent plaintiff a telegram, instructing it to buy cotton seed for shipment on the 15th. In an action for delay in delivering the message, there was no evidence that plaintiff could have procured the necessary cars and have loaded them within the required time. *Held*, on appeal by plaintiff, that as there was danger of loss in weights in handling, and as the court would notice that there would be expenses incurred in loading, there was no reasonable ground for believing that plaintiff could have suffered any material certain loss by being deprived of the privilege of storing or handling cotton seed at 15 cents per ton, and a new trial on such ground would not be ordered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4597; Dec. Dig. § 1177.*]

3. PLEADING (§ 237*)—AMENDMENT—CONFORMITY TO PROOF.

Code Civ. Proc. 1902, § 194, provides that amendments to conform a pleading to the proof may be allowed when the amendment does not substantially change the claim or defense. *Held*, that it was proper to deny a motion to amend the complaint to conform to the proof after argument on motion for a nonsuit, which was granted, when the amendment would involve striking out material allegations and inserting other allegations.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

Appeal from Common Pleas Circuit Court of Marlboro County; Robert Aldrich, Judge.

Action by the Clio Gin Company against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Livingston & Muller, for appellant. Willcox & Willcox and Townsend & Rogers, for respondent.

JONES, J. The plaintiff appeals from an order of nonsuit in this action to recover damages for negligent delay in delivering a telegram sent by South Carolina Cotton Oil Company, Columbia, S. C., to plaintiff at

Clio, S. C., on the afternoon of January 4, 1904, and not delivered until the morning of January 6, 1904; the message being as follows: "Will pay nineteen dollars and commissions for seed shipped by the 15th inst."

Assuming that there was a negligent delay in delivering the telegram, the real question was whether there was testimony that plaintiff sustained any damage as the direct and proximate result of such negligence.

The complaint alleged in part: "(7) That the plaintiff was engaged in, among other things, the purchase of cotton seed, and on the 5th day of January, 1904, had offered to it and had the option, privilege, and opportunity of purchasing 58,000 bushels of cotton seed at and for the price named in said telegram.

"(8) That by reason of the careless and negligent conduct of the defendant in failing to deliver said message within a reasonable time, conveying to the plaintiff the information therein contained, the plaintiff was prevented from offering, and did not offer, to pay \$19 per ton for cotton seed on said 5th day of January, A. D. 1904, in consequence of which plaintiff did not buy said 58,000 bushels of cotton seed, but the same were sold to other party or parties, who offered and paid such price for same.

"(9) That this plaintiff had a fixed and determined commission and profit by agreement on all cotton seed which it bought which would have included the lot hereinbefore mentioned, all of which the defendant well knew, and, owing to the careless and negligent conduct of the defendant in failing to deliver said telegram within a reasonable time, this plaintiff did not purchase said lot of 58,000 bushels, and thereby was deprived of making and realizing such profit and commission, to its damages \$1,160."

It appears that the market price of cotton seed at Clio, S. C., just previous to January 4, 1904, was from 22 to 25 cents per bushel, but that on January 4th it jumped to 30 cents per bushel; that plaintiff, who had been buying seed for the Southern Cotton Oil Company, telegraphed for instructions, and kept out of the market, awaiting response to its telegram. There was testimony that, if the telegram in question had been promptly delivered, plaintiff could have purchased about 30,000 bushels of cotton seed on January 5th at 30 cents per bushel, or \$20 per ton, \$1 per ton more than the telegram in terms authorized. According to the testimony, plaintiff's commission would have been \$1 per ton, so that, to have purchased at all, plaintiff would have been compelled to sacrifice the entire amount of the commission, and have its trouble and expense for nothing. But it is contended that plaintiff had an agreement with Southern Cotton Oil Company to buy seed for them at \$1 per ton for commission and 15 cents per ton for storage,

and that in any event plaintiff sustained a loss of 15 cents per ton. In the first place, there was no evidence that the defendant company had any knowledge that plaintiff was liable to sustain any loss by reason of storage, and certainly the face of the telegram negatives any idea that loss of storage was within the contemplation of the parties. Loss of compensation for storage was not a necessary result of defendant's delict, and would fall within the class of special damages, due to special circumstances, as to which it was necessary for plaintiff to allege and prove that defendant had knowledge at the time of the filing of the telegram. *Mood v. Telegraph Co.*, 40 S. C. 528, 19 S. E. 67. But, in the next place, if it should be conceded that a loss of 15 cents per ton for storage was in contemplation of the parties, it must be remembered that plaintiff, in order to avail itself of the contents of the telegram, was required to ship the cotton seed by the 15th of January. This required the procuring of the necessary cars and loading same by that date from wagons or warehouses. There was no evidence that plaintiff within the time allowed could have procured the necessary cars, 30 or more, an average car load being probably about 1,000 bushels or 15 tons of seed, and have loaded them within the time required. The court is bound to take notice that cotton seed cannot be loaded upon cars from warehouses or wagons without expense. There was also danger of loss to plaintiff by waste or in weights in the handling, except by the greatest care and oversight. Now, in view of all these matters, the court cannot say there is reasonable ground for believing that plaintiff could have suffered any material certain loss by being deprived of the privilege of storing or handling cotton seed at fifteen cents per ton when such privilege was burdened with a certain loss and expense reasonably equal to if not greater than that amount. A new trial on this ground would not comport with the practical administration of justice.

It is finally argued that there was evidence of an agreement between the Southern Cotton Oil Company and plaintiff that plaintiff in buying cotton seed for that company could give the designated market price for seed and still have a leverage or margin of two cents per bushel; that is to say, if the Southern Cotton Oil Company authorized plaintiff to buy seed at 28½ cents per bushel, plaintiff could stay in the market and buy for them as long as cotton seed did not advance beyond 30½ cents per bushel, the point being that, if the telegram had been promptly delivered, plaintiff could have paid the price of 30 cents per bushel, and still have been entitled to the commission of \$1 per ton, and that by the delay in delivery plaintiff lost the commissions on the seed it would have purchased. There was nothing on the face of the message to show, nor does it appear

to have been within the knowledge of defendant, that there was such a contract between the sender and sendee of the message. The plain terms of the message negatives the idea that plaintiff was authorized to pay more than \$19 per ton for seed and receive therefor the commissions. The case in this aspect fails because of the rule stated that, in order to affect the telegraph company with liability for injury arising out of a special circumstance, notice of such circumstance should be brought home to the defendant by allegation and proof. The complaint alleged, in conformity with the natural import of the telegram, that, by reason of the delay in delivering the telegram, plaintiff was prevented from purchasing cotton seed at \$19 per ton. On this theory of the complaint there was a failure of proof, as it was undisputed that seed on that day could not have been purchased for less than \$20 per ton. But we have considered the complaint as if it alleged that plaintiff was prevented from purchasing seed at \$20 per ton; that is \$19 per ton and \$1 additional consuming commissions, as embraced within the terms of the telegram and the knowledge of the defendant.

At the close of argument by plaintiff's counsel on the motion for nonsuit, plaintiff's counsel moved that, in case the court reached the conclusion that there was any variance between the allegations and proof, leave be granted to amend the complaint to correspond with the proof. The terms of the proposed amendment do not appear, and we are left to speculate as to the exact amendment sought. Judge Aldrich held that the motion came too late under the authority of *Cuthbert v. Brown*, 49 S. C. 513, 27 S. E. 485. In that case the court held that a motion to amend an answer by withdrawing an admission of a material fact and substituting a denial thereof, changing the nature of the defense, comes too late after the trial gone into and motion for nonsuit refused. This was in principle the situation in the case at bar. To have amended the complaint to conform to the facts proved after argument on motion for nonsuit which was granted, when the amendment would involve striking out material allegations of the complaint and inserting other material and essential allegations, would have changed plaintiff's claim in conflict with section 194, Code Civ. Proc. 1902, which expressly provides that amendments to conform the pleading to the facts proved may be allowed "when the amendment does not change substantially the claim or defense." *Taylor v. Atlantic Coast Line R. R. Co.*, 81 S. C. 574, 62 S. E. 1118.

But, even if the complaint had been amended to conform to the facts proved so as to allege the special circumstances brought out in the testimony, still nonsuit was proper, as there was a total failure of testimony to show that defendant company had any knowledge that the telegram, which was plain and

intelligible itself, meant something other than the natural import of its terms.

The judgment of the circuit court is affirmed.

(150 N. C. 493)

BLEVINS v. ERWIN COTTON MILLS CO.
(Supreme Court of North Carolina. April 21, 1909.)

1. JURY (§ 92*)—JURORS—COMPETENCY—EMPLOYEE OF PARTY.

An employé is an incompetent juror in a cause involving a right or interests of the employer.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 420; Dec. Dig. § 92.*]

2. APPEAL AND ERROR (§ 1045*)—HARMLESS ERROR—OVERRULED OBJECTION TO JUROR.

Error in overruling a challenge to a juror for cause was harmless where he was peremptorily challenged, and no prejudice appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4126; Dec. Dig. § 1045.*]

3. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—MACHINERY—SUBSEQUENT AND PRECEDENT CONDITION—EVIDENCE.

On an issue as to the condition of an object at a given time—e. g., machinery claimed to have been defective—its precedent or subsequent condition may be shown when the circumstances make it probable that no change has occurred, but the rule does not affect the rule that voluntary changes by an employer made after injury to an employé are not admissible to impute negligence to the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 916-918; Dec. Dig. § 270.*]

4. MASTER AND SERVANT (§ 101*)—PLACE OF WORK AND MACHINERY—EMPLOYER'S DUTY.

One must provide for his employé a reasonably safe place to work, and machinery, etc., safe and suitable for their work, and such as are approved and in general use, and is liable for any injury caused by a breach of such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 180, 181; Dec. Dig. § 101.*]

5. MASTER AND SERVANT (§ 125*)—DEFECTIVE MACHINERY—LIABILITY OF EMPLOYER.

An employer is not liable for injury caused by defective machinery, unless he knew of the defect, or it had existed long enough to give constructive notice thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

6. MASTER AND SERVANT (§ 180*)—VICE PRINCIPALS—SCOPE OF STATUTE.

The statute making co-employés vice principals of their employer respecting injuries caused by their negligence applies to railroads only.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

7. TRIAL (§ 253*)—INJURY TO EMPLOYÉ—INSTRUCTIONS.

An instruction in an action for injury claimed to have been caused by a defective catch used to fasten a door in a revolving cylinder was not erroneous for ignoring evidence tending to show absence of another device which does not appear to have been, nor to have been used as, a safety device.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

8. NEGLIGENCE (§ 59*)—WHEN ACTIONABLE—PROXIMATE CAUSES—"ACTIONABLE NEGLIGENCE."

Negligence is not actionable unless some legal duty has been neglected, tending to the result in continuous and natural sequence, so that one of ordinary prudence would foresee that the result would naturally and probably follow.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 1, pp. 148, 149; vol. 8, p. 7563.]

Appeal from Superior Court, Durham County; E. B. Jones, Judge.

Action by Rufus Blevins, by Columbus Blevins, next friend, against the Erwin Cotton Mills Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff objected to a juror because an employé of defendant company. Objection overruled, and plaintiff excepted. The juror was then challenged peremptorily. The challenge was allowed. The negligence alleged against the defendant, as indicated in the complaint, was that the door of one of the machines where the plaintiff was required to work, and at which he was injured, "was defective, and had been for many weeks, in that the catch on said door was very weak, so that the door was liable to fly open, and that defendant well knew, or ought to have known, the dangerous condition of the cylinder when said door was open, and well knew, or ought to have known, the dangerous condition of the fastenings on said door, and that said machine was old and had been used for many years; but defendant negligently and carelessly failed to warn plaintiff of the danger of working thereat, and carelessly and negligently failed to equip said door with proper and suitable fastenings, and that the defective condition of the door was unknown to plaintiff." During the trial the defendant was allowed, over plaintiff's objection, to show by a witness, John Burroughs, and some others, that they had examined the machine a short time before the trial, and the door was all right, and the catch thereon in good order. This in connection with the statement of a witness E. K. Poe, manager of defendant, who had testified that the catch and door were in exactly the same condition as they were at the time of the injury: "The same catch there now that was then, same knobs and same latch. No repairs or changes had been made, and nothing done to them since." Plaintiff excepted. There was evidence on the part of plaintiff tending to show that on or about December 26, 1906, the plaintiff, an employé of defendant company, had his hand caught in a carding machine, where he was at work, and crushed and mangled to such an extent that amputation was necessary; that the cards were on a cylinder some six feet

in diameter, and which revolved when the machine was in operation 160 to 200 times per minute; that this cylinder was inclosed in a casing, and in front there was a door some 10 inches wide and extending across the frame, forming, when closed, a part of this casing. This door was on hinges and opened downwards, and as it was raised and closed, and when in 2½ or 3 inches of the closing point, it would fall shut of itself, and was held shut by gravity, and also by a latch and catch which held it securely when in place and in good order; that the door was for the purpose of enabling a person to open the same and clean the cylinder, and was kept shut except when the cylinder was being cleaned; that above the door there was in some of the machines a stripping stick, which also revolved when the machine was in motion, its service being to catch and hold the waste cotton rejected by the cards, and thrown from the machine through a slight opening by the movement of the cylinder. At the time of the injury plaintiff, in the line of his employment, was engaged in running fronts on cards; i. e., "doffing out the cans, taking down the stripplings from over the cylinders, and taking off the waste from over the sticks." Making an excerpt from the plaintiff's own testimony: "While so engaged, was hurt in the cylinder of a carding machine. My hand was cut off at the wrist. Over the cylinder was a steel or iron case. There was a door in the case which fitted over the cylinder. I was taking down the stripping, and went to card off the stripping with my left hand, when the cylinder caught my fingers. The door was open. I did not know it was open. If the door had been closed, my hand would not have gotten in the cylinder, could not see that the door was open, because cotton waste was lying over it. I did not open the door. If the stripping stick had been on, this waste cotton would have rolled around the stripping stick, and not fallen on the face of the machine," etc. That, when he went to work in the evening, the stripping stick was off, and there was a lot of waste cotton lying on the machine, and in brushing this away his hand was caught and mangled by reason of the open door, as stated, and that this cotton piled on the machine prevented him from seeing that the door was open. Will A. Carden, a witness for the plaintiff, testified, among other things: "That in operating these carding machines, when the spring is in position as it ought to be, there is nothing that will knock the door down, but if the spring is weak and up, and the door does not catch, a lump of cotton will knock it down and cause the door to fall open on the machine. When the door is closed, it is a part of the casing that covers the cylinders. If there is no stripping stick over the card, the waste cotton falls down in the casing, and, when it does, it conceals the door."

There was evidence on the part of the defendant that the machine at which plaintiff was injured was a standard machine, and in good order at the time of the injury; that it had been continuously in use since, and that no change or repairs had been made; and that it was in good order now. Several witnesses who examined the machine testified to its being in excellent condition. E. K. Powe, manager of defendant, testified to the good condition of the machine on the day of the injury, and no notice or complaint had ever been made concerning it. R. P. Kirley, overseer of the card department, testified as to the good condition of the machine; that he was continuously in the room and passed the machine frequently during the day; that its condition was all right and no defect in it, and no notice or complaint had ever been made by any one. This witness further testified that it was no part of defendant's duty to strip this machine, and nothing in the line of his work that called him to go nearer than two feet of it; the work plaintiff was engaged in at the time being the work of one S. C. Howell, a co-employee. There was further evidence on part of the defendant that the stripping stick was there more for gathering the waste cotton and putting it in a more compact form; and both plaintiff's and defendant's witnesses testified that the stripping stick was in no way connected with the door or its uses as a structural part of the machine, and that, when the door was closed, there was no danger in doing the work at which plaintiff was engaged when the injury occurred.

There were four issues submitted: (1) As to the negligence of defendant. (2) As to contributory negligence on part of plaintiff. (3) As to assumption of risk. (4) Damages. The jury answered the first issue, "No." Judgment on the verdict, and plaintiff, for errors properly assigned, excepted and appealed.

Manning & Foushee, for appellant. Aycock & Winston and Bryant & Brogden, for appellee.

HOKE, J. (after stating the facts as above). We have carefully considered the exceptions noted in the record, and find no reversible error to plaintiff's prejudice. It is very generally held that an employé is an incompetent juror for the trial of a cause involving the right or interests of the employer, and the plaintiff's objection should have been sustained. *Railroad v. Mitchell*, 63 Ga. 173; *Railroad v. Mask*, 64 Miss. 738, 2 South. 360. But the juror was challenged peremptorily, and it does not appear that the plaintiff's rights were in any way prejudiced by this ruling of the court. We have uniformly held that this right of challenge is given to afford a party litigant fair opportunity to remove objectionable jurors, and was not intended to enable them to se-

the trial of this case. In order to prevent subjecting a person charged with crime to the harassment of several trials the statute allows the state to appeal from the judgment of the court in only four instances: (1) Upon a special verdict; (2) upon a demurrer; (3) upon motion to quash; (4) upon arrest of judgment. The statute does not provide for an appeal from a judgment upon a demurrer to the evidence, but only upon a demurrer. The word is used in the statute in its usual and ordinary significance as understood and defined in criminal pleading. In criminal law "a demurrer is a pleading by which the legality of the last preceding pleading is denied and put in issue, and the issue is then determined by the court. A demurrer is pleaded either to the indictment, or to a special plea." 1 Archbold, Crim. Prac. & Pldg. 354. The reason the state is permitted to appeal from the judgment upon demurrer to an indictment is because it has the effect, in criminal cases, of opening the whole record to the court, and under it the jurisdiction of the court may be challenged, as well as the sufficiency of the subject-matter of the indictment itself.

The expression "demurrer to the evidence" is not strictly accurate as applied to criminal proceedings, for the reason that the trial judge, if he overruled the demurrer, could not direct a verdict against the defendant or give judgment against him upon the demurrer, as it has been held he could do in civil actions. In a criminal trial the jury must still pass on the weight of the state's evidence. In reference to a demurrer to evidence Black says: "This proceeding (now practically obsolete) was analogous to a demurrer to a pleading. It was an objection by one of the parties to an action at law, to the effect that the evidence which his adversary had produced was insufficient in point of law to make out his case or sustain the issue. Upon joinder in such demurrer the jury was discharged, and the case was argued to the court, who gave judgment upon the facts as shown in evidence." Law Dictionary, title "Demurrer to Evidence." The practice of demurring to the evidence appears to be of ancient origin, and is thus described by Blackstone: "But a demurrer to evidence shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence concerning the legal consequences of which there arises a doubt in law, in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue; which draws the question of law from the cognizance of the jury to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bills of exception, are

at present so much in use as formerly, since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at nisi prius." After joinder in the demurrer to the evidence, if the proper facts or admissions have been made to appear, the court may direct a verdict. 6 Enc. Pldg. & Pract. 451. This the court is inhibited from doing upon the trial of a criminal action.

Our statutes use both the word "demurrer" and the phrase "demurrer to the evidence," and in declaring what is meant by the latter, the statute confines its use to the trial of issues of fact in civil actions exclusively. Revisal 1905, § 539. From the statute it is plain that the General Assembly, when it adopted the Revisal, did not use the word "demurrer" in section 3279 in the sense that it used the phrase "demurrer to evidence" in section 539. Demurring to the evidence is now regulated by statute, and is peculiar to civil actions, and has no place in criminal proceedings, and tends only to delay. In this state there is no such procedure as trying a defendant upon an "agreed state of facts," or upon a demurrer to the evidence. He must be tried by the jury, and a verdict rendered. If it is a special verdict, it must nevertheless be rendered by the jury, and it is their finding, and not that of the judge. *State v. Holt*, 90 N. C. 750, 47 Am. Rep. 544.

Inasmuch as his honor stopped the trial, and no verdict was rendered, the case is still pending in the superior court, and it is the duty of the solicitor, as upon a mistrial, to proceed to try the defendant again under the indictment.

Appeal dismissed.

(150 N. C. 536)

ALEXANDER v. METROPOLITAN LIFE INS. CO.

(Supreme Court of North Carolina. April 23, 1909.)

INSURANCE (§ 291*)—LIFE POLICY—REPRESENTATIONS—MATERIALITY—UNTRUTH—"MATERIAL REPRESENTATION."

A statement in an application for life insurance that applicant had never had any disease of the kidneys is a material representation within Revisal 1905, § 4808, the untruth of which is a defense to the policy, irrespective of whether the statement was fraudulently made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681, 687; Dec. Dig. § 291.*]

For other definitions, see Words and Phrases, vol. 5, p. 4407.]

Appeal from Superior Court, Cabarrus County; Justice, Judge.

Action by Caroline Alexander against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

This action was based on a life insurance policy, issued by the defendant company on the life of Pearl Alexander in favor of Caroline Alexander, the appellee, as beneficiary. The defense to the action was based on certain provisions of the policy, declaring it void if the insured, before its date, had been attended by a physician for any serious disease or complaint, or had any disease of the kidneys.

The following findings were made by the jury: (1) Did Pearl Alexander, the insured, in her application for insurance, falsely represent that she had not been attended by a physician for any complaint within two years prior to making such application? Answer: No. (2) Was Pearl Alexander attended by a physician for any serious disease or complaint within two years before the policy was issued for the plaintiff? Answer: Yes. (3) Did Pearl Alexander falsely represent that she had not had kidney disease? Answer: No. (4) Had Pearl Alexander, prior to making application for the policy sued on, had kidney trouble? Answer: Yes.

The defendant moved for judgment upon the issues and assigns the refusal to grant same as error. The court denied the motion and gave judgment for plaintiff. Defendant excepted and appealed.

Adams, Armfield, Jerome & Maness, for appellant. W. G. Means, for appellee.

BROWN, J. The insured, Pearl Alexander, was a child about 15 years of age, whose life was insured on March 18, 1907, by defendant for the benefit of plaintiff, her mother by adoption and great-aunt by blood. Insured died in April, 1908, according to the evidence, of an abscess in the kidney. There is a statement in the application, which is the basis of the policy, that insured had never had any disease of the kidneys. The evidence fully sustains the finding of the jury that prior to the application for insurance the girl had kidney disease and was being treated for it by a physician. The insurance contract contains the following clause: "This policy is void if the insured before its date (meaning date of policy) had been rejected for insurance by any other company, or has been attended by a physician for any serious disease or complaint, or has had before said date any pulmonary disease or chronic bronchitis, or cancer, or disease of the heart, liver or kidneys," etc. It must be conceded that the representation is a most material one, within the meaning and scope of the statute. Revisal 1905, § 4808; *Bryant v. Insurance Co.*, 147 N. C. 181, 60 S. E. 983. Such a representation undoubtedly influenced the judgment of the company in accepting the risk, and it is therefore a material representa-

tion. Under the facts of this case, it matters not that the insured made no false representation. She made a most material representation which was untrue, for she had kidney disease before the application for insurance, was being treated for it at the time, and died of the disease 13 months thereafter. The company was imposed upon (whether fraudulently or not is immaterial) by such representation and induced to enter into the contract. In such case it has been said by the highest court that, "assuming that both parties acted in good faith, justice would require that the contract be canceled and premiums returned." *Life Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. The case at bar is governed by the principles laid down in *Bryant v. Insurance Co.*, supra.

It appears in the record that the premiums have been voluntarily paid into the superior court by the defendant. It is ordered that they be applied to the costs of this appeal, and that the remainder, if any, after paying costs below, be paid to plaintiff.

The motion for judgment for defendant is allowed. Let costs be taxed against plaintiff.

Reversed.

(150 N. C. 539)

QUANTZ v. CITY OF CONCORD.

(Supreme Court of North Carolina. April 28, 1909.)

EMINENT DOMAIN (§ 69*)—GRADING STREET.

On a proceeding to condemn land for widening a street under Priv. Laws 1907, p. 934, c. 344, § 90, the owner is entitled to damages from the taking of and injury to the property, allowing deduction for benefits, irrespective of whether the work is done in a skillful manner.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 172; Dec. Dig. § 69.*]

Appeal from Superior Court, Cabarrus County; Council, Judge.

Action by Mrs. C. J. Quantz against the City of Concord. From a judgment for plaintiff, defendant appeals. Affirmed.

W. G. Means and L. T. Hartsell, for appellant. Montgomery & Crowell, for appellee.

WALKER, J. This is a proceeding for the condemnation of a part of the plaintiff's lot on East Corbin street, in Concord, for the purpose of widening the street, under Priv. Laws 1907, p. 934, c. 344, § 90. The court charged the jury that the plaintiff is entitled to recover the damages which resulted from taking the property, and laid down the correct rule as to the facts and circumstances they might consider, and which the evidence tended to establish, in determining the amount of the damages. In this respect the charge was as favorable to the defendant as the law allowed. It is not necessary to set

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

out the instructions to which exceptions were taken, as the defendant's contention is that the city of Concord is not liable for damages resulting from the grading of streets unless the work is done in an unskillful manner, and for this position counsel cite the following cases: *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264; *Wright v. Wilmington*, 92 N. C. 156; *Meares v. Wilmington*, 81 N. C. 73, 49 Am. Dec. 412; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894. In those cases the plaintiffs did not sue for compensation rightfully due for the taking of their property, under the power of condemnation given by the charters of the respective cities, but in tort for the damages resulting from the negligent and unskillful manner of repairing or grading the streets. They were seeking to recover damages, not due by the defendants in the lawful exercise of the right of eminent domain, but for those which were caused by acts not authorized to be done in the appropriation or condemnation of property for public purposes, and the cases cited do not, therefore, apply to the facts of this case.

Here the plaintiff has recovered only such damages as resulted from the taking of and injury to the property, without regard to the manner of doing the work, allowing the defendant a deduction from the damages of any special benefits to the plaintiff's property derived by her from the improvement of the street, and in this respect the court instructed the jury correctly. *Railroad v. Platt Land*, 133 N. C. 266, 45 S. E. 589, in which the rule for measuring the damages in such cases is fully stated and considered by Justice Connor, for the court. The plaintiff has recovered nothing more than the just compensation to which she is entitled for the land appropriated by the city for widening and grading the street.

After a careful examination, we find no error in the trial of the case.

No error.

(150 N. C. 533)

NAIL v. BROWN & WILLIAMSON.

(Supreme Court of North Carolina. April 28, 1909.)

1. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of evidence is harmless where the court at the close of all the evidence offers to allow its introduction, and there is no suggestion that the witnesses that were to give the evidence had been discharged.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

2. TRIAL (§ 257*)—REQUESTS FOR INSTRUCTIONS—WRITTEN REQUESTS.

Where a party fails to ask an instruction in writing in apt time, the court is not bound to give the instruction, even if the party was entitled to it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 642-645; Dec. Dig. § 257.*]

3. MASTER AND SERVANT (§ 101*)—MASTER'S LIABILITY FOR INJURIES—CARE REQUIRED IN FURNISHING PLACES AND APPLIANCES.

An employer does not insure the safety of his workmen, nor is it his duty to furnish them an absolutely safe place in which to work, but only to exercise reasonable care and prudence in providing such a place, and he is not obliged to furnish the very best appliances, but only such as are reasonably fit and safe for the purposes for which they are used, and he satisfies the requirements of the law as to appliances if he uses that degree of care which a person of ordinary prudence would use if he were supplying them for his own use, and, when there is only one appliance which is approved and in general use for performing a certain function, it is the master's duty to use it, but, if there are several appliances which are approved, the master is not negligent if he exercises reasonable care in making a selection, and his liability is not based on a mere error of judgment, but on culpable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 180-184, 192; Dec. Dig. § 101.*]

Appeal from Superior Court, Forsyth County; Ward, Judge.

Action by John P. Nail against Brown & Williamson. Judgment for defendant, and plaintiff appeals. Affirmed.

J. E. Alexander, A. E. Holton, and Lindsay Patterson, for appellant. Watson, Buxton & Watson and Manly & Hendren, for appellee.

BROWN, J. The plaintiff while working in the factory of the defendants was injured by the breaking of a belt, causing one of the hooks which fastened the belt together to strike him on the head and imbed itself therein. The belt was running parallel with the ceiling, some 4 or 5 feet above the head of the plaintiff, and some 20 feet from where he was standing. While the machinery was in motion in the usual manner, the belt parted with a report like the sound of a gun, the belt hooks flying in several directions, one of them striking the plaintiff. It was the duty of the plaintiff to run the machine. The evidence tended to prove that the belt was nearly new, having been in use only six months at the machine run by plaintiff. The allegation of negligence stated in the complaint in different forms of expression is a failure by defendants to furnish reasonably safe machinery and instrumentalities. It is admitted in the brief of the learned counsel for plaintiff that the belt was new and without fault, but it is claimed that its ends were fastened together with belt hooks, and that they were not reasonably safe appliances for fastening belts. The negligence averred relates not so much to the quality of the hooks used as to the method employed.

1. Among other exceptions to the evidence, it is contended that his honor erred in refusing to permit plaintiff to offer evidence tending to prove that on other occasions

similar hooks had been seen flying out of the same belt and also out of similar belts. We find evidence of this character in the record admitted without objection, and, if further testimony along that line was desired or permissible, his honor opened the door for it by offering at the close of all evidence to permit plaintiff to offer it. There is no suggestion that plaintiff had discharged his witnesses at the time, and we therefore think, if the exception had merit in it, the offer of the judge destroys it. The remaining exceptions to evidence we think upon examination are untenable, and need no discussion by us.

2. The plaintiff assigns as error the failure of the court to instruct the jury that, if they believed the evidence, they should answer first issue "Yes." This issue relates to the alleged negligence of the defendants. As the plaintiff failed to ask such instruction "in writing in apt time," as stated in the record, the trial judge was not bound to give it, even if the plaintiff were entitled to it. We fail to see, however, upon the evidence that the plaintiff would have been entitled to any such instruction had he duly asked it. The employer does not insure the safety of his workmen. He does not contract expressly or impliedly to furnish them an absolutely safe place to work in, but is bound only to exercise reasonable care and prudence in providing such a place. He does not contract to furnish the very best appliances, but only such as are reasonably fit and safe for the purposes for which they are used. He satisfies the requirements of the law if in the selection of his appliances he uses that degree of care which a person of ordinary prudence would use, having regard for his own safety, if he were supplying them for his own use. Where there is one appliance only which is approved and in general use for performing a certain function, it is the master's duty to use it. Where there are several appliances used for the same purpose, all of which are approved and in general use, the master fills the measure of his duty if he exercises reasonable care in making a selection. It is culpable negligence which makes him liable, not a mere error of judgment. We think this is the consensus of the best authorities. *Horne v. Power Co.*, 141 N. C. 50, 53 S. E. 658; *Phillips v. Iron Works*, 148 N. C. 217, 59 S. E. 660; *Young v. Const. Co.*, 109 N. C. 618, 14 S. E. 58; *Harley v. Car Co.*, 142 N. Y. 31, 38 N. E. 813; *O'Neal v. Railway Co.*, 66 Neb. 638, 92 N. W. 781, 60 L. R. A. 443. Mechanical devices are almost as numerous as medicinal remedies; and the only sure test of either is that of experience. Until that has pronounced a definitive judgment, a master who in the exercise of ordinary care selects that which in his opinion is best calculated to accomplish the purpose cannot be held

responsible for the consequences. This record discloses that there are four ways of fastening belts: With hooks, leather lacing, wire lacing, glue or cement, all of which methods are approved and in general use. When an employer of labor is confronted with this condition of affairs, he cannot be held negligent if he selects one of these known methods. We think that the instructions of the learned judge are clear and full, and that they fairly and accurately presented to the jury the contentions of the plaintiff and defendants and the law bearing thereon.

No error.

(150 N. C. 540)

BILLINGS v. CHARLOTTE OBSERVER
et al.

(Supreme Court of North Carolina. April 23, 1909.)

1. APPEAL AND ERROR (§ 70*)—DECISIONS REVIEWABLE—FINALITY.

An appeal from an order setting aside the award of damages in an action for libel as excessive is premature, and, instead, plaintiff, should note an exception, proceed with the trial, and appeal from the final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 378; Dec. Dig. § 70.*]

2. NEW TRIAL (§ 6*)—RIGHT TO—DISCRETION OF COURT.

Unless some question of law is involved, the granting or refusing of a new trial upon all or any one of the issues rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

3. APPEAL AND ERROR (§ 979*)—DISCRETION OF COURT—NEW TRIAL—EXCESSIVE DAMAGES.

The setting aside by the trial court of an award of damages as excessive, being discretionary, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3873; Dec. Dig. § 979.*]

4. NEW TRIAL (§ 76*)—GROUNDS—EXCESSIVE DAMAGES.

Though the question and amount of punitive damages is for the jury, its finding may be set aside by the court, if excessive.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

Appeal from Superior Court, Rockingham County; Ward, Judge.

Action for libel by C. M. Billings against the Charlotte Observer and others. From an order setting aside the award of damages as excessive, plaintiff appeals. Appeal dismissed.

Civil action to recover damages for alleged libel. There was allegation, with evidence, on the part of plaintiff tending to show the publication of a libelous article in defendant paper, charging plaintiff with improper conduct at Blackville, S. C., and at Waynesville, N. C. Defendant company, admitting the publication of the articles in question, averred the truth of the facts con-

tained therein, and introduced testimony tending to support its position.

On issues submitted the jury rendered the following verdict:

"(1) Did the defendants publish of and concerning the plaintiff the matters and things alleged in the complaint? Answer: Yes.

"(2) Were the matters and things published of the plaintiff and alleged to have occurred at and around Blackville, S. C., true? Answer: Yes.

"(3) Were the matters and things published of the plaintiff as happenings at Waynesville, N. C., true? Answer: No.

"(4) What damages, if any, is the plaintiff entitled to recover? Answer: \$5,000."

Upon the coming in of the verdict, the defendants moved for a new trial on the last issue, on the ground that the amount was excessive, and order was thereupon made as follows: "The court, being of opinion that the amount of damages was excessive, hereby sets aside in its discretion said issue of damages, and awards a new trial thereon." Plaintiff moves the court to set aside second issue for errors to be assigned in the case on appeal. Overruled, and exception by plaintiff. Plaintiff appeals to the Supreme Court.

Morehead & Sapp, Justice & Broadhurst, Glidewell & Lane, and A. D. Ivie, for appellant. Osborne, Lucas & Cocke, Burwell & Cansler, and Scott & Reid, for appellees.

HOKE, J. (after stating the facts as above). We do not advert to the questions chiefly raised in the plaintiff's case on appeal, for the reason that, under numerous and well-considered decisions of this court, the appeal must be dismissed as having been prematurely taken. This position is well established, and the question has usually been raised on an issue as to damages, the very case presented here. Rogerson v. Lumber Co., 136 N. C. 266, 48 S. E. 647; Benton v. Collins, 121 N. C. 66, 28 S. E. 59; Hilliard v. Oram, 106 N. C. 467, 11 S. E. 514; Hicks v. Gooch, 93 N. C. 112.

In Benton v. Collins, supra, Faircloth, C. J., delivering the opinion, said: "The appeal is premature. He should have noted his exception and proceeded with the trial, and brought the whole case to this court on final judgment. This course would not affect any substantial right. This question has been so often decided as to need only a reference to Hilliard v. Oram, 106 N. C. 467, 11 S. E. 514, and the numerous cases cited." In Hilliard v. Oram, supra, Clark, J., said: "The appeal of the defendants is premature. They should have noted their exceptions, and, after the trial is completed by a finding upon the other issue and a final judgment, an appeal will lie. The court will not try causes by 'piecemeal.'" And, to like effect, Smith, C. J., in Hicks v. Gooch, supra, referred to the question as follows: "The general prin-

ciple is that, when a trial is entered upon, it should embrace and determine the whole subject-matter in controversy, so that a final judgment may be entered, any errors committed in its progress being open to revision and correction in one appeal, while the court could not tolerate a succession of appeals upon separate and fragmentary parts. The ruling has been frequently since recognized and acted on. We refer to but a few of them; the most recent: Commissioners v. Satchwell, 88 N. C. 1; Lutz v. Cline, 89 N. C. 186; Jones v. Call, 89 N. C. 188; Grant v. Reese, 90 N. C. 3; Arrington v. Arrington, 91 N. C. 301. The practice thus established upon its intrinsic merits, and to avoid useless and prolonged litigation, must be upheld."

The authorities with us are also to the effect that, unless some question of law or legal inference is involved, the granting or refusing a new trial, upon all or any one of the issues, rests in the sound discretion of the lower court; and, where it appears that the question has been determined in the exercise of this discretion, the action of the court thereon is not subject to review. Abernethy v. Yount, 138 N. C. 337, 50 S. E. 696; Benton v. Collins, 125 N. C. 94, 34 S. E. 242, 47 L. R. A. 33; Carson v. Dellinger, 90 N. C. 226; Moore v. Edmiston, 70 N. C. 481. True, as stated in Jarrett v. Trunk Co., 144 N. C. 302, 56 S. E. 937, and in Benton v. Collins, 125 N. C. 94, 34 S. E. 242, 47 L. R. A. 33, the issues in a case may be so involved the one with the other that the granting of a new trial on one issue and not the other might present a question of law or legal inference, but no such case is presented on an issue as to damages. That was the only question presented and decided in the Benton Case, where Montgomery, J., for the court said: "There are conflicting decisions on this question in the courts of several of the states, but we believe that the conclusion arrived at by the English Court in the case quoted from is the correct conclusion, and we will adopt it as the conclusion of this court. Holding then, as we do, that the Superior courts of this state have the power to set aside verdicts for inadequacy of damages, we logically conclude that such power is discretionary with them, and that it is not reviewable by us. The power to correct prejudiced and grossly unfair verdicts must be vested somewhere, and in our judgment it is best that such power be confined to the judges who preside over the trials. They are presumed to be learned in the law, impartial in their judgments and upright in their conduct, and, with most rare exceptions, they have measured up to the standard of that presumption." And, while approving the caution expressed by the court in Jarrett's Case, supra, as to the careful use of this power in any class of cases, it is, as stated, only in those where a matter of law or legal inference is presented that the exercise of

the judge's discretion can be reviewed. As said by Bynum, J., in *Moore v. Edminston*, supra: "He is clothed with this power because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the judge will exercise it to further the ends of justice, and though, doubtless, it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere."

The position of the plaintiff, that the power to grant a new trial in the present case did not exist because the determination of the issue involved to some extent an award of punitive damages, is without merit. In numbers of cases expressions will be found to the effect "that the question and amount of punitive damages is for the jury, or always for the jury," etc.; but these expressions have reference to the established principle that the court can never direct the award of punitive damages as a matter of law, but, where an award of such damages is permissible on the facts, the judge shall lay down the law applicable, and it is for the jury to determine in all cases whether or not they shall be allowed, and also the amount, but it was never intended to withdraw issues of this character and verdicts upon them from the supervisory power of the courts. Accordingly in one of the authorities cited and relied on by plaintiffs (*Canfield v. Railway*, 59 Mo. App. 355), it was held "that the amount of punitive damages is always left with the jury, subject to be reviewed by the court if excessive." This power of the court to supervise verdicts to the extent indicated is one of the most commendable features of our system of trials by jury. It is on issues of the kind presented here that its influence is chiefly desirable, and, when wisely and fearlessly exercised by a just and learned judge, it is one of the surest safeguards to a true and righteous deliverance.

For the reasons indicated, the appeal must be dismissed as having been prematurely taken, and it is so ordered.

Appeal dismissed.

(150 N. C. 545)

GEO. D. WITT SHOE CO. et al. v. PEACOCK et al.

(Supreme Court of North Carolina. April 28, 1909.)

1. GUARANTY (§ 60*)—CONSTRUCTION—SCOPE OF LIABILITY—PAYMENT OF INDEBTEDNESS.

Defendant and P., or either of them, agreed in writing to pay to plaintiff \$1,000, to be applied by him to the payment of all claims he then had against P. and to such others as he might receive for collection against him, until the full amount was paid, the note stating that it was

executed to secure and guarantee the payment of the claims to the extent of \$1,000. Other claims were afterward placed with plaintiff for collection, and P. thereafter sold to plaintiff an equity of redemption, the sum paid therefor being applied on the claims in his hands, which sum, by P.'s agreement, was applied to the claims of all the creditors pro rata. Held, that defendant's guaranty was that P. would pay \$1,000 on all the claims against him in plaintiff's hands, and that any payments when received by plaintiff should be applied to such claims, so that the sum received for the equity of redemption should be applied as a part of the \$1,000 which defendant guaranteed should be paid.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 70; Dec. Dig. § 60.*]

2. GUARANTY (§ 36*)—LIABILITY OF GUARANTOR—CHANGE.

The debtor could not change or enlarge the guarantor's liability by a subsequent agreement with the creditor.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 38.*]

3. CONTRACTS (§ 153*)—CONSTRUCTION—CONSTRUING WHOLE INSTRUMENT.

It is an elementary rule of construction that every part of an instrument should be effectuated if possible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

4. GUARANTY (§ 27*)—GUARANTOR'S LIABILITY.

The liability of a guarantor or surety should not be enlarged by construction beyond the terms of his contract.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 28; Dec. Dig. § 27.*]

Appeal from Superior Court, Davidson County; E. B. Jones, Judge.

Action by the Geo. D. Witt Shoe Company and others against J. L. Peacock and another. From a judgment in part for plaintiffs, they appeal. Affirmed.

Plaintiff company sues upon the following instrument: "\$1,000.00. Dec. 7, 1907. Sixty days after date, we or either of us promise to pay to Emery E. Raper, attorney or order, the sum of one thousand dollars for value received which money when received by him to be applied to the payment of all claims he has now in his hands for collection against the said J. L. Peacock and to such others as he may receive for collection until the full amount is applied. This note executed for the purpose of securing and guaranteeing the payment of the said claims to the extent of one thousand dollars. Said claims now in hand are as follows: J. L. Peacock. [Seal.] R. W. Fuller. [Seal.]" A list of the claims is attached, aggregating \$896. Defendant R. W. Fuller admitted the execution of the obligation, and by way of defense alleged: "That he has never been indebted to the plaintiffs in any sum whatever, except as surety on an obligation in the amount of \$1,000, guaranteeing the payment of \$1,000 to plaintiffs and other creditors of J. L. Peacock. That he is informed and believes that, since the execution of said obligation as surety afore-

said, the said Emery E. Raper has received other claims for collection than those mentioned and set out in the complaint, and that he has received moneys from J. L. Peacock and his agents to be applied to said accounts and the accounts mentioned in the complaint to more than a sufficient amount to relieve this defendant from any obligation or responsibility as surety aforesaid." It was in evidence that other claims against Peacock were placed in the hands of Mr. Raper for collection amounting to \$1,016.87, aggregating about \$1,800. Peacock paid \$50 on the note which was duly credited. The following is the only evidence introduced: "About February 10, 1908, J. L. Peacock sold to Z. I. Walser and Emery E. Raper his equity of redemption in his home, there being mortgages on same, and on account of the price of this lot the sum of \$647.50 was paid on the claims in hands of Emery E. Raper, which amount was by express agreement of J. L. Peacock applied to all the creditors pro rata on their claims of \$1,816.33; the creditors being those set out in complaint. After February 10, 1908, other claims were placed with Emery E. Raper, but nothing has been collected on them, and no claim is made for them." The following issue was submitted to the jury: "What amount has been paid on said note of \$1,000 by J. L. Peacock and R. W. Fuller or others since the execution of the note December 7, 1907?" The court instructed the jury that, if they believed the evidence, to answer the issue "\$730.50"; that there should not only be included in the amount paid the \$50 admitted, but that the further amount paid by Peacock—the \$647.50. Plaintiff expects to the charge on the issue as to item \$647.50. There was an item of \$33 credited on the note, not necessary to be noted. Judgment was rendered for \$270. Plaintiff appealed.

E. E. Raper and Walser & Walser, for appellants. J. A. Spence and H. M. Robins, for appellees.

CONNOR, J. (after stating the facts as above). The sole question presented by plaintiff's exception is whether the \$647.50 received by Mr. Raper shall be applied to the obligation of defendant Fuller in reduction of his liability for \$1,000, the amount of the bond. Plaintiff insists that Peacock had the right to apply the \$647.50 to the payment pro rata of all of the debts against him in the hands of Raper for collection, including those received subsequent to the execution of the bond. Applied in this way to the total amount of the debts, \$1,816, there remains due on them \$1,181.81, for which, to the extent of \$1,000, plaintiff insists defendant Fuller is still liable. The obligatory words of the bond "promise to pay" are explained by the last clause: "This note is

executed for the purpose of securing and guaranteeing the payment," etc. The obligation, therefore, assumed by Fuller is to secure and guarantee the payment by Peacock of \$1,000, "which money, when received by Raper, to be applied to the payment of all claims he has now in his hands for collection against the said J. L. Peacock, and to such others as he may receive for collection until the full amount is applied." It is evident that the words "full amount" refer to the claims then in Mr. Raper's hands, and such others as he might receive for collection. Thus Fuller's liability is expressly restricted to \$1,000, and the guaranty is, by the last words of the note, limited to "the payment of the claims to the extent of one thousand dollars."

It was immaterial to Fuller what amount of claims came into Raper's hands for collection subsequent to the execution of the bond. This was doubtless uncertain. The evident meaning of the language is that Fuller guaranteed that Peacock would pay on all of the claims against him in Raper's hands so much as \$1,000, and that, when paid or "received by him" it was to be applied to such claims. When, therefore, the \$647.50 was paid by Peacock, his express agreement that it should be applied pro rata to all of the claims had no other effect than to comply with the terms of his bond. He could not change or enlarge Fuller's liability. If the payment be applied, as contended for by plaintiff, Peacock could impose upon Fuller the obligation to pay the full amount of the bond, disregarding the express provision that the money, "when received," should be applied to the debts until the full amount is applied; in other words, Peacock may have paid the whole amount for which Fuller was liable, and yet leave him liable for the balance of his indebtedness to the extent of \$1,000. This would do violence to the language and evident purpose of the parties when the bond was executed. It is an elementary rule of interpretation that, where there is no repugnancy, every part of an instrument must be given effect. It is also well settled that the liability of a guarantor or surety is not to be enlarged by construction. His obligation is to be fixed by the language of his bond, and not carried beyond its terms. It is *strictissimi juris*. No question of the right of the debtor to make such application of a payment by him from his general funds as he wishes is presented in this appeal. It was a matter of no concern with Fuller how the \$647.50 was applied as between the creditors of Peacock. His right under the terms of his contract was to have it applied to the reduction of his guaranty. We concur with his honor in the instruction given the jury.

There is no error.

(150 N. C. 539)

BORDEAUX v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. April 28, 1909.)

1. TRIAL (§ 168*)—MOTION FOR NONSUIT—WAIVER OF EXCEPTIONS.

Under Revisal 1905, § 539, providing that defendant may move for a nonsuit after plaintiff has introduced his evidence, but after such motion is refused defendant may waive his exception, and introduce evidence, and again move to dismiss after all the evidence on both sides is in, an exception to the refusal of the court to grant a nonsuit after the plaintiff rests is waived by not renewing it at the end of all the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 168.*]

2. MASTER AND SERVANT (§ 144*)—RULES—HABITUAL DISOBEDIENCE—EFFECT.

A rule by a master, which has been habitually violated with his knowledge or acquiescence, is regarded as waived or abrogated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 287; Dec. Dig. § 144.*]

3. MASTER AND SERVANT (§ 144*)—LIABILITY FOR INJURIES TO SERVANT—PLACES FOR WORK—RAILROAD TRACKS.

Defendant railroad company adopted a rule requiring the placing of a blue flag on a car being repaired, but this rule had not been observed by car repairers when the job was a very short one, and the engineer in charge of the switch engine knew of the custom of the repairers not to observe this rule, and he ran in on a track a car at a rate in excess of the speed limit allowed in the yards, and it hit a car on which plaintiff's intestate was at work, causing his death. *Held*, that the running in of the car at such excessive speed was culpable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 287; Dec. Dig. § 144.*]

4. MASTER AND SERVANT (§ 289*)—ACTIONS FOR INJURIES—EVIDENCE—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

Evidence, in an action to recover for the death of a servant, *held* to make the question of the servant's contributory negligence one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1069-1132; Dec. Dig. § 289.*]

Appeal from Superior Court, Wayne County; Biggs, Judge.

Action by J. T. Bordeaux, administrator of L. W. Bordeaux, deceased, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

These issues were submitted to the jury:

"(1) Was the plaintiff's intestate killed by the negligence of the defendant company? Answer: Yes.

"(2) Did the plaintiff's intestate by his own negligence contribute to his death? Answer: No.

"(3) What damages, if any, is plaintiff entitled to recover? Answer: \$8,000 (six thousand dollars)."

W. C. Munroe and Geo. E. Hood, for appellant. Aycock & Daniels and R. W. Winston, for appellee.

BROWN, J. The evidence discloses a state of facts which, with the exception hereinafter noted, is practically uncontested. Plaintiff's intestate was a car repairer, employed in defendant's switching and repair yards at South Rocky Mount, whose duty it was to repair cars standing on the numerous tracks therein. For the protection of its workmen the defendant had long since adopted and published rules which required those employed in repairing cars on tracks in the yards to place a blue flag on the car, so as to give notice to the switch enginemen not to move such cars, or run other cars in on them, so as to endanger the workmen employed in repairing them. On March 18, 1907, the intestate, with Denby and Wilkens, fellow workmen, went out to repair a tank car on track No. 1, carrying with them a blue flag furnished by the defendant. There was much shifting going on at the time on the yard tracks. Instead of putting out the flag, the repairers discussed the matter, and decided that this was a short job, and to put Denby out to watch, who failed to keep proper lookout. While Bordeaux, the plaintiff's intestate, was under the car repairing it, the engineer of a switch engine kicked or pitched a box car loaded with lumber onto track No. 1, which struck another car, and forced that against the tank car, running it over intestate and killing him.

1. It is contended by defendant that his honor erred in denying the motion to nonsuit. We are precluded from considering this exception because, while made at close of plaintiff's evidence, it was waived by not renewing it at end of all the evidence. Revisal 1905, § 539; *Parlier v. Railway*, 129 N. C. 263, 39 S. E. 961.

2. It is contended that there is no evidence of negligence. This contention would be well founded but for the fact that there is evidence in the record sufficient to go to the jury that the rule, promulgated by defendant for the protection of those engaged in working around and under cars in its yards, had been allowed by the superintendent and foreman of defendant to relapse into "innocuous desuetude," especially as to "short jobs." We admit that the rulings of the courts in regard to kicking cars, or making flying switches at public or much frequented crossings, do not apply to the constant changing or switching of cars that is inevitable in the extensive repair and switch yards of a large railway system. But while such methods may be necessary, it is equally necessary that the company should not only establish proper rules for the protection of employes on the yards, but also should enforce them. A rule to protect employes should be so framed as to guard them, to a reasonable extent, against the consequences, not only of the carelessness of co-employes, but of their own carelessness.

ness also. It is well known that men are prone to run risks in order to save time and trouble, especially where the risks last but a moment, and the precaution necessary to guard against it requires a considerable period of time. A rule which has been habitually violated, with the knowledge or acquiescence of the master, actual or implied, is almost universally regarded as waived or abrogated. *Wright v. Southern Pac. Railway*, 14 Utah, 383, 46 Pac. 374; *Biles v. Railroad*, 139 N. C. 528, 52 S. E. 129; *Haynes v. Railroad*, 143 N. C. 185, 55 S. E. 516; *Railroad v. Nickles*, 50 Fed. 722, 1 C. C. A. 625; *Devoe v. Railway*, 174 N. Y. 1, 66 N. E. 568. There is evidence pro and con upon the question of the waiver of the rule, which was submitted to the jury by the learned judge in a well-considered, clear, and correct charge as to the law bearing thereon. It is doubtless true, as contended, that defendant's superintendents and foreman in charge of the yards cannot tell whether a job will be a long or a short one. Therefore it follows that the only safe course to pursue is to enforce obedience to the rule in respect to all jobs done on the yards, whether long or short, by discharging those who fail to observe it. It appears in evidence that, notwithstanding the printed and bulletined rule, it was a custom of long standing in these yards, and well known, that if the workmen found the job a short one that could be done in from two to five minutes, they would not put up flags, and if it was a longer job, they would put them up. *Mozingo*, the engineer who caused the catastrophe by kicking in the loaded box car, knew of the custom, for he states in his testimony: "I could see car repairers at work, and I know the customary way of repairing the cars for a month previous to the death of the plaintiff's intestate. For short jobs in repairing cars the repairers didn't put up any flags. It was the custom not to put them up. It would seem that they took the chances on short jobs. The flags were the only guides I had. If no flag up, I would run the cars right in; wouldn't know whether long or short jobs, and so had to rely on flags." There is further evidence that the speed limit fixed by rule for the yards is six miles per hour, and that the box car was pitched onto track No. 1 at a much faster rate of speed, so that it rolled uncontrolled over 100 yards, and crashed into the intervening car with such force that it was thrown violently against the tank car which the intestate was repairing. With the rule in abeyance, and the custom of the workmen well known to the engineer, to kick the car in on track No. 1 under such conditions, and at such speed, is undoubtedly culpable negligence. *Hudson v. Railroad*, 142 N. C. 198, 55 S. E. 103; *Wilson v. Railroad*, 142 N. C. 336, 55 S. E. 257; *Allen v. Railroad*, 145 N. C. 214, 58 S. E. 1081; *Ray v. Railroad*,

141 N. C. 84, 53 S. E. 622; *Doing v. Railway*, 151 N. Y. 579, 45 N. E. 1028; *Dowd v. Railway*, 170 N. Y. 459, 63 N. E. 541; *Railroad v. Lowe (Ky.)* 66 S. W. 736.

3. It is contended that the uncontradicted evidence shows that the plaintiff's intestate was guilty of contributory negligence, and that his honor erred in refusing so to charge. Upon this issue he charged the jury: "Even though you should find that the rule requiring the putting out of the blue flags when the employes were engaged in such work as the plaintiff's intestate was engaged in when he was injured was habitually violated, yet if the work in which the plaintiff's intestate was engaged at the time of the injury was of so dangerous a character that an ordinarily prudent man would not have undertaken to have done the work without putting out blue flags, then in such case the plaintiff could not recover, and you should find the second issue 'Yes.'" It appears in evidence that upon examination the repairers all agreed that the job would be a very short one, from half a minute to two minutes, and that they discussed the matter, and decided not to put out the flag, but to have one of their number keep a lookout. Of course, if there was no evidence of a waiver or abrogation of the rule, such clear disobedience of it would effectually bar a recovery, but if the rule is taken to be in abeyance, then it practically did not exist, and the question must be determined accordingly. With the rule out of the way we are not prepared to hold as matter of law, in any view of the evidence, that the intestate was guilty of such contributory negligence as will prevent a recovery. Whether under such circumstances a man of ordinary prudence, having to go under the car for such a short space of time, would have reasonably trusted to the vigilance of his companion, instead of the more certain and reliable signal flag, is a question properly and fairly submitted to the jury.

We have examined all the exceptions in the record, and find no error.

(65 W. Va. 436)

MICHAEL v. ELKINS.

(Supreme Court of Appeals of West Virginia.
March 30, 1909.)

INJUNCTION (§ 26*)—RESTRAINING PROSECUTION OF ACTION BEFORE JUSTICE.

Equity has no jurisdiction of a bill to restrain the prosecution of an action before a justice merely on the ground that the justice has no jurisdiction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Preston County.

Bill by P. B. Michael against S. B. Elkins. Decree for plaintiff, and defendant appeals. Reversed.

Neil J. Fortney, for appellant. Wm. G. Conley, for appellee.

BRANNON, J. S. B. Elkins brought an action before a justice of Preston county against P. B. Michael to recover back \$200 paid as part payment for coal in a tract of land, on the ground that Michael represented that the tract extended in a certain course to lands of W. O. Walls, whereas it did not do so, and, moreover, that Michael had not good title. Judgment was rendered for Elkins, and Michael appealed the case to the circuit court. While the appeal was pending Michael brought a chancery suit against Elkins to restrain and prohibit the further prosecution of the action pending in said appeal, and a decree was entered adjudicating that the justice, "in the law case heard herewith, was without jurisdiction in the premises," and that the suit at common law be dismissed, and decreeing costs against Elkins. Elkins appeals.

Whence comes jurisdiction in equity for this bill? If the justice, and the circuit court on appeal, had no jurisdiction, was not that question triable in the justice's court and on appeal? Equity does not entertain a suit to stop an action at law only for want of jurisdiction. If, as the theory is, the justice had no jurisdiction because title to land would come in question, that could be tried before the justice and on appeal in the circuit court. Resort to equity in such case would be unwarranted. The bill shows no equity jurisdiction. It is said that the decree is not final, so as to warrant an appeal. It disposes of the law action—adjudicates all the bill sought. What more to be done? Certainly not to try the right of recovery of the money claimed by Elkins. It is suggested that the appeal was allowed a few days after two years from the decree. The decree dates 1st June, 1905, the appeal 17th June, 1907; but our court order allowing the appeal states that the petition for appeal was presented 27th May, 1907.

Decree reversed and bill dismissed.

ROBINSON, J., absent.

(65 W. Va. 437)

HOGI v. AACHEN & MUNICH INS. CO.
(Supreme Court of Appeals of West Virginia.
March 30, 1909.)

1. INSURANCE (§ 622*) — ACTION ON POLICY — TIME IN WHICH TO BRING.

Though a fire insurance policy provide that suit must be brought on it within 12 months from the fire, yet, as it also provides that no suit shall be brought before 60 days after proof of loss, the 12 months does not begin until the end of the 60 days.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544-1551; Dec. Dig. § 622*]

(Syllabus by the Court.)

2. INSURANCE (§ 146*) — CONSTRUCTION OF POLICY — "AFTER LOSS" — "AFTER THE FIRE."

The phrases "after loss" and "after the fire," as used in an insurance policy, are synonymous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 234; Dec. Dig. § 146*]

Error to Circuit Court, Ohio County.

Action by Matilda C. Hogl against the Aachen & Munich Fire Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

G. J. Schuck and R. M. Addleman, for plaintiff in error. Handlan & Reymann, E. F. Moore, and J. P. Arbous, for defendant in error.

BRANNON, J. Matilda C. Hogl sued the Aachen & Munich Fire Insurance Company to recover for loss of her house by fire, and recovered. The insurance policy provides that no suit on it shall be sustained "unless commenced within 12 months next after the fire." This suit was not begun within that period; but the policy contains another clause saying that the loss should not become payable until 60 days after proof of loss furnished. The only question is: Shall the 12 months' limitation begin from the fire or from the close of the 60 days?

The policy forbids suit for 60 days. Is it reasonable to say that the company shall have the benefit of the 60 days in exemption from suit and for its purposes in investigating the loss, and yet count that time as part of the 12 months? We must take both clauses together. There are conflicting cases upon this question; but why discuss it, when this court has held that the suit may be within 12 months from the end of the 60 days? *Barber v. Insurance Co.*, 16 W. Va. 675, 37 Am. Rep. 800; *Murdoch v. Insurance Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572. In support of our decisions I cite the Circuit Court of Appeals, in *Steel v. Phoenix Ins. Co.*, 51 Fed. 715, 2 C. C. A. 463, affirmed by the United States Supreme Court in 154 U. S. 518, 14 Sup. Ct. 1153, 38 L. Ed. 1004; also *Firemen's Friend v. Buckstaff*, 34 Neb. 150, 56 N. W. 397, 41 Am. St. Rep. 727; *German Co. v. Fairbank*, 32 Neb. 750, 40 N. W. 711, 29 Am. St. Rep. 459, and note; *Friezen v. Allemania Co. (C. C.)* 30 Fed. 352; *Hong Wing v. Royal Co.*, 8 Utah, 125, 30 Pac. 207; *Sample v. London Co.*, 43 B. C. 491, 24 N. E. 334, 47 L. R. A. 696, 57 Am. St. Rep. 701; *Insurance Co. v. Heales*, 101 Tenn. 624, 49 N. W. 743; *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1004.

There is in the case a discussion as to difference between policies prescribing a time limit "after loss" and those fixing it "after the fire." We see no difference.

There is a cross-assignment of error, based on the claim that the amount for which the

house was insured is \$1,500, and the verdict \$1,866.50. It is said the circuit court ought to have given judgment for \$1,500, under Code 1906, § 1108, making an insurance company liable for the policy amount in case of total loss, and we are asked to do so. Why should we be called to pass on this when the circuit court was not asked to render such judgment, and no exception taken as to this, and, on the contrary, the record shows the plaintiff's counsel twice stated the loss at \$1,866.50, and asked a verdict for that amount?

We affirm the judgment.

(65 W. Va. 409)

WHITE v. SOHN.

(Supreme Court of Appeals of West Virginia.
March 30, 1909.)

LANDLORD AND TENANT (§ 115*) — HOLDING OVER—RENEWAL OF TENANCY.

Where, under a lease for a term of years, with reservation of a monthly rent and stipulation that the tenancy shall not be by the year, the tenant holds over after the term, merely making payment of the monthly rent, which the landlord accepts, the renewal of the tenancy thereby implied is by the month only, not by the year, nor for the original term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 391-394; Dec. Dig. § 115.*]

(Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Action by M. Z. White against Eli Sohn. Judgment for plaintiff, and defendant brings error. Affirmed.

Stokes & Bronson, for plaintiff in error. Sheppard, Goodykoontz & Scherr and Brown & Wiles, for defendant in error.

ROBINSON, J. This case was once before in this court. 62 W. Va. 80, 59 S. E. 890. New trial having been had in the lower court, the case comes here again, but in an entirely different light. The questions are not similar, nor are they related to those before involved.

Defendant went into possession of a store-room belonging to plaintiff, situated in Williamson, Mingo county, under a lease containing the following provisions: "It is further understood that this lease is to run for the term of one month from * * * April 1, 1904, and to continue for the term of twenty-four months, should the party of the second part so elect, at the same monthly rental and upon the same conditions, provided said party of the second part has complied with all the stipulations in this contract. And it is further understood and agreed that this tenancy is not to be a tenancy from year to year; but that the party of the second part expressly waives any notice whatsoever from the party of the first part of his intention to terminate this tenancy." The rent stipulated

in this lease was \$60 per month, payable in advance, at the beginning of each month. At the end of the term of 1 month provided in the lease, defendant elected to continue for the term of 24 months. Following the expiration of the 24 months, defendant held over, paying each month the monthly rental stipulated in the lease, for an additional period of 12 months, or until April 1, 1907. Payment of the rentals for that period was accepted by plaintiff. On February 15, 1907, plaintiff notified defendant to quit and deliver possession of the premises on April 1, 1907. Defendant did not vacate on that date. Very shortly thereafter, plaintiff instituted his suit, an action of unlawful detainer, demanding possession of the premises and damages for their detention. Despite the notice aforesaid and the institution of this suit, defendant remained in possession of the property 11 months longer, tendering rent at \$60 per month. This tender plaintiff refused. Plaintiff testified that the rental value of the property for those 11 months was \$75 per month; that he could have rented it at that price. The foregoing is substantially the case, as presented by plaintiff's evidence.

The only evidence introduced on behalf of defendant was his own testimony to the extent that the rental value of the premises for the 11 months aforesaid was \$60 per month. Defendant rested his case upon his demurrer to plaintiff's evidence. In that demurrer plaintiff joined. The jury returned a verdict for the possession of the premises and \$875 damages, if the law be for the plaintiff; otherwise, for the defendant. The court held the law to be for plaintiff, and entered judgment on the verdict.

Defendant's contention is that his holding over beyond the expiration of the 24 months, and the acceptance by plaintiff of the monthly payment of rent for such holding over, implied a new contract for another full period of 24 months. If this claim be tenable, defendant was entitled, at the original monthly rental, to possession of the premises when the suit was instituted, and the judgment is wrong. On the other hand, plaintiff maintains that such holding over implied only a tenancy by the month, and that, having given said notice to terminate such monthly tenancy, notwithstanding that by the stipulations of the original lease no notice was necessary, he was entitled to the possession of the premises after April 1, 1907, and for damages at \$75 per month for the 11 months after said date during which he was deprived of the premises by defendant's refusal to surrender the same, as found by the verdict. So we see that the case is narrowed to this question: What term of tenancy was implied or created by such holding over by defendant?

"If the tenant holds over by consent, given expressly or constructively, after the termination of a lease for years, it is held to

be evidence of a new contract without any definite period, and to be a tenancy from year to year." 1 Lomax's Digest, side page 163. It may be said to be the generally accepted rule that if a lessee for a year, or for a term of years, holds over after the expiration of his term, by consent of the landlord, the law presumes or implies that the new holding is that of a tenant by the year. Tucker's Com. book 2, page 81; 2 Minor's Inst. (2d Ed.) 173; Jones on Landlord and Tenant, § 201; 24 Cyc. 1017, 1081; Allen v. Bartlett, 20 W. Va. 46; Voss v. King, 38 W. Va. 607, 18 S. E. 762; Arbenz v. Exley, 62 W. Va. 476, 44 S. E. 149; 61 L. R. A. 957. In such case, the implied new holding is by the year, not by periods equal in length to the term of the previous lease. But such presumption or implication may be repelled. 24 Cyc. 1033; Taylor on Landlord and Tenant, § 55; Jones on Landlord and Tenant, § 210; Williamson v. Paxton, 18 Grat. (Va.) 475.

The foundation upon which the selection of a year as the unit was based seems to be that an annual rent was reserved in farming leases—the prevalent ones in England from which this doctrine mostly sprung. It was the natural and fair period for that character of lease, including all the seasons, so as to permit sowing, cultivation, harvesting, and garnering. But the reasons to sustain the presumption or implication that by a holding over there is a renewal for a year in a lease for agricultural purposes, with annual rent reserved, do not necessarily apply to one of different character, governed, as it should be, by the considerations actually related thereto. "It is often stated that tenancies from year to year have been implied from the earliest times, whenever there was a general holding, without regard to annual rent or other circumstances pointing to a yearly tenancy."

* * * But such a proposition is not borne out by authority." Taylor on Landlord and Tenant, § 55, note 3. It may be noticed that Mr. Minor expressly recognizes the implication aforesaid as arising from the reservation of a yearly rent. 2 Institutes (2d Ed.) 173.

Arising from the original demise itself there may be other implication than that recognized in the aforesaid generally accepted rule, indicating a renewal for a term shorter than the period of a year, where the tenant holds over by consent of the landlord. So it is said: "The doctrine that, where the lessee holds over and the lessor receives rent accruing after the expiration of the term, a new tenancy arises for a further term, subject to the covenants and conditions of the original lease, is true as a rule; and the reason is that the receipt of the rent is considered as an acknowledgment of a subsisting tenancy. But it does not follow that the new term must necessarily be a year. Where the former lease was for less than a year, as a quarter or a month, or where the term, though extending to a year or more, was composed of such periods, there is no ground for holding

that the new term, presumed from the holding over of the tenant and the receipt of the rent by the landlord, extends beyond one of the periods of the original tenancy." McAdam on Landlord and Tenant, § 39. And another high authority puts it this way: "So the unit is not any particular period of time, but the rent period, whatever that may be in any given case." Jones on Landlord and Tenant, § 215. Accordingly it has been held: "If, on the expiration of a lease for a year or for years, with rent payable monthly, the tenant retains possession of the premises and pays the same rent each month, this does not in law create a new term for a year, without any agreement to that effect, but only creates a tenancy from month to month." Skaggs v. Elkus, 45 Cal. 154. The reservation of rent, with its payment at stated periods, is, in the absence of express stipulation as to the length of the holding over, one of the principal criteria to determine the duration of the term. Jones on Landlord and Tenant, § 215; Coffin v. Lunt, 2 Pick. (Mass.) 76; Rich v. Bolton, 46 Vt. 84, 14 Am. Rep. 615; Hurd v. Whitsett, 4 Colo. 77.

The acts and conduct of the parties in reference to the holding over may control over the implication expressed in the generally accepted rule to which we have referred. Illustrative of this fact is the enunciation in Shipman v. Mitchell, 64 Tex. 174: "If, however, at or before the expiration of the former lease, the tenant was informed that he would not be permitted, after the expiration of that lease, to occupy the rented premises otherwise than as a tenant from month to month, and not for a year, then no contract that he should occupy the property for a year could be implied, for an implied contract derives its existence from the presumed intention of the parties, induced by and arising from their course of dealing, and can never be presumed, if it be shown that the tenant was informed by the landlord that the holding after the expiration of the term, if continued, must be from month to month." To the same effect is Blumenberg v. Myres, 32 Cal. 93, 91 Am. Dec. 560. There we find: "But when the parties have made an express agreement relating in any respect to the new tenancy, then in that respect there is no room for implication. If the parties specify the rent, the time of payment, the term, or any of the usual covenants or conditions of a lease, whether they agree or disagree with the terms of the former lease, they enter into the new lease and determine the rights of the parties while the tenant is holding over. The receipt produced by the plaintiff showed the payment by him of \$400 for one month's rent, thus establishing both the rent and the term. He has no better right to recur to the former lease, in disregard of the time, than of the rent specified in the receipt."

So we see that there is not always an

implied renewal by the year, when the tenant for a year or a term of years holds over by consent of the landlord. It may depend upon other things, among them being the rent periods fixed in the original lease and agreements and conduct of the parties in reference to the holding over. And it is not consistent with reason and authority that any implied renewal of a tenancy by a holding over is periodically longer than a year. The authorities say, in effect, that if the original demise be for a year, or for a term of years, with annual rent reserved, there is an implied renewal by the year, unless such implication is repelled by considerations more controlling than that upon which it is sought to be based.

Whether defendant, in the case before us, was originally a tenant by the month, with the right to elect to continue as such until 24 months expired, or was a tenant for a term of the 24 months, or 2 years, we really need not decide. If by the original lease he held by the month, the implied renewal by his holding over could be but by the month. We shall, however, accept his claim that he held by the lease originally for a term of 2 years. This fact being so, and nothing else controlling, the implied renewal by his holding over would be only by the year. But, by the very terms of that original lease which he invokes to sustain an implied term, he cannot be a tenant by the year. He therein stipulated not to be. And surely, if the lessor required a stipulation against the lessee's being a yearly tenant, we are not, in reason, justified in making that lessee a biennial tenant, simply because the original lease permitted him to remain in possession of the premises for 2 years. If, in sense and right, we could do so, there is no authority, as we have said, nor is there reason, justifying, by defendant's holding over, an implied tenancy by periods of greater length than a year. What term, then, had defendant by his holding over and paying monthly rental? Plainly he was thereby only a tenant by the month. He had stipulated that he should not be in by the year. Similarly to *Shipman v. Mitchell*, supra, the tenant had notice, by this stipulation, before the expiration of the original lease, that he would not be permitted to occupy the premises as he claims the right to do. In his claim of implied renewal, he is bound by that stipulation; for he must invoke the original lease, in which that stipulation is contained, to raise the implication upon which he relies. The law gives no implication for a holding by periods longer than yearly ones; by the year, under his agreement, defendant cannot hold; therefore he can be nothing but a tenant by the month. In his original lease a distinctive monthly rental was reserved, not an annual rental, nor a rental payable specifically

by an aliquot part of a year. A month, without relation to a year, was the rent period. He can be that only which the unit of the rent periods and his payment of a monthly rent in fact made him—a tenant by the month; if, indeed, the acts and conduct of the parties in the payment and acceptance of one month's rent, thereby fixing such term, at the first of his holding over, did not make him such.

Since, by the holding over, defendant could be nothing but a tenant by the month, he was plainly in default when this suit was begun. After the termination of his aforesaid monthly tenancy, on April 1, 1907, he was a trespasser on plaintiff's premises, for which actual damages could be recovered. Those damages were sufficiently proved to be \$875 for the 11 months that he continued as such trespasser. The circuit court did not err in overruling the demurrer to the evidence and entering judgment for plaintiff on the verdict.

It is said that the case was not tried by a legally constituted tribunal. It was tried before a special judge. The order shows his election to preside in lieu of the regular judge. The record shows no objection to his acting. That objection cannot be made here for the first time, since there is nothing to show that he was illegally elected. *State v. Low*, 21 W. Va. 782, 45 Am. Rep. 570; *Jarrell v. French*, 43 W. Va. 457, 27 S. E. 263; *State v. Newman*, 49 W. Va. 724, 39 S. E. 655; and other cases.

It is also insisted that the record does not establish the fact that the premises were within the jurisdiction of the court, Mingo county. The evidence clearly shows that the premises sought to be recovered are located in Williamson. Counsel in interrogation of witnesses, and the witnesses in their answers, referred to the premises as being so situated. The courts of this state judicially know that Williamson is in Mingo county.

The judgment is affirmed.

(65 W. Va. 395.)

BUCKEYE SAW MFG. CO. v. RUTHERFORD.

(Supreme Court of Appeals of West Virginia.
March 30, 1909.)

1. PRINCIPAL AND AGENT (§ 177*)—NOTICE TO AGENT—EFFECT.

Notice to an agent in the course of his employment in relation to a matter within the scope of his authority is notice to his principal, whether he communicates his knowledge to his principal or not.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 670; Dec. Dig. § 177.*]

2. PRINCIPAL AND AGENT (§ 178*)—SALE OF GOODS—DEFECTS—NOTICE TO AGENT.

An agent authorized to sell personal property and collect the purchase money under a printed form of contract, furnished him by his

principal, which contains a clause warranting, for a limited time, the quality of the article sold and binding the principal to make the article good, or to supply another in the place of it if notice of its defect be given within the time named in the contract, may be notified that the article is not as it was warranted to be; and such notice to him is notice to his principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 680; Dec. Dig. § 178.*]

3. BILLS AND NOTES (§ 352*)—TRANSFER—BONA FIDE PURCHASER—NOTE TO AGENT—INDORSEMENT TO PRINCIPAL—DEFENSES.

If an agent who is authorized to sell and collect takes from the purchaser a negotiable note payable to himself, and before it is due, and without consideration indorses it over to his principal, the principal takes it subject to the conditions, made within the scope of the agent's employment, affecting its execution. Such assignment will not defeat the maker's equities.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 898; Dec. Dig. § 352.*]

(Syllabus by the Court.)

Error to Circuit Court, Webster County.

Action by the Buckeye Saw Manufacturing Company against A. J. Rutherford. Judgment for defendant, and plaintiff brings error. Affirmed.

W. T. Talbott and Hall Bros., for plaintiff in error. E. H. Morton, J. S. Cogar, and W. C. Wooddell, for defendant in error.

WILLIAMS, J. On the 20th of October, 1903, A. J. Rutherford bought of the Buckeye Manufacturing Company, through its traveling agent, E. E. Simons, and its local agent, A. B. Elbon, who resided at Webster Springs, W. Va., one 58-inch, inserted tooth, circular saw. This purchase was made upon a printed order blank, which contained the following provision: "Saw is to be made of best quality of steel, free from flaws and practically true. Should it prove defective in any particular during time of trial, you are then to put in good shape, or, if necessary, replace it with a new saw, * * * and it is understood and agreed by us that if no complaint is made within 30 days after receipt of saw, that your warranty on same ceases and we will pay full amount as herein agreed. It is agreed that the title to saw shall not pass until notes given for same are paid or saw paid for in cash, but shall remain your property until that time, and you not be to held responsible for any verbal arrangement made with your agent, and not incorporated in this order. This order subject to your approval and not to be countermanded." Pursuant to this order, plaintiff shipped the saw, and defendant received it on the 13th day of January, 1904. About the last of January or the 1st of February, 1904, defendant tested the saw, and found it was unsatisfactory; that it would not saw a true line; that it would snake through the log, as sawmill men expressed it. The evi-

dence shows that within 30 days after receiving the saw the defendant notified A. B. Elbon, the local agent, of the defect in the saw. The saw was returned to plaintiff. After being hammered with a view of bettering its condition, it was reshipped to Rutherford, and again tested and found to work no better than it did at first. He again within the 30 days after he had received it the second time notified the local agent that it would not work. On the 2d day of April, 1904, Rutherford executed his negotiable note payable in 60 days at the Webster County Bank to A. B. Elbon & Co. for the sum of \$108.50, which sum was equal to the price of the 58-inch saw, including \$1 for the board on which the saw was shipped. It was agreed at the same time between Rutherford and the agent that the 58-inch saw should be returned and a 62-inch saw furnished in the place of it, and that this note was to be treated as a payment on the price of the new saw, the price of which was \$145. A new order was made out for the 62-inch saw on the same kind of printed form, blank order, containing the same warranty clause above quoted. This order was signed by Rutherford, and the above note was delivered to the agent. After making the contract of April 2, 1904, for the 62-inch saw, and executing the above note, Rutherford returned the 58-inch saw; but, instead of shipping to him the new saw, plaintiff returned the old one about April 29th, after trying to repair it. Rutherford says he received it on reshipment, thinking it was the new saw which he had ordered, and did not discover that it was the old one until he had taken it to his mill and unpacked it. He further states that he put it on his mill and tested it again, and found its condition no better, but worse, if any difference, than it was the first time it was tested. He thereupon again notified the agent, Elbon, within 30 days of the time he had received it that it was defective. The defect in the saw is further proved by two other witnesses who were experienced sawyers. Rutherford again shipped it to plaintiff on May 24, 1904, and plaintiff again returned it to Rutherford, and he refused to accept it. The evidence shows that it was in the depot at Webster Springs at the time this action was tried. The president of plaintiff company testified that he knew of no other order having been received from Rutherford than the one for the 58-inch saw; and that the first notice he had concerning Rutherford's complaint was by letter from E. E. Simons, agent, on April 4, 1904. But this latter part of his testimony was stricken out by the trial court, apparently without objection from plaintiff. The note above described was indorsed by Elbon, the agent, and turned over to plaintiff, who brought suit on it against said A. J. Rutherford and A. B. Elbon before a justice of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peace. On September 14, 1904, the action was dismissed as to Elbon and tried as to the defendant Rutherford, and resulted in a judgment against him. He thereupon appealed to the circuit court of Webster county. A trial by jury was had in the circuit court, resulting in a verdict and judgment for the defendant on the 5th day of April, 1906. To this judgment plaintiff obtained a writ of error and supersedeas from this court.

The case turns upon the following points, viz.: (1) Whether or not defendant gave notice to the agent of the defect in the saw within 30 days after he had received it; (2) whether, if notice was given to the agent, it was concerning a matter within the scope of the agent's employment so as to be notice to his principal; (3) whether or not the agreement of April 2, 1904, that the note should be a credit on the price of the new saw for which defendant on that day gave the agent an order, was binding on the principal; and (4) whether or not the assignment of the note by Elbon to plaintiff before maturity prevents defendant from setting up failure of consideration.

As to the first point, it is stated by Rutherford that he gave notice to the local agent, Elbon, within 30 days after he received the saw that it was defective. Elbon says he does not think he received such notice. This does not amount to a positive denial; and, besides, it is a fact which the jury must have determined in favor of defendant, and we should not disturb its finding on this point even if the notice had been expressly denied, and we had thought its finding wrong. It was a matter of fact peculiarly within the jury's province.

As to the second point, A. B. Elbon, who was a witness for the plaintiff, says that he was its local agent for the sale of saws, and had authority to collect. He and the traveling salesman, Simons, were both present when the first order was made, and also when the second order was made on April 2d. Plaintiff does not deny Elbon's agency. The president of plaintiff company, in his deposition taken and read as evidence in the case, does not state whether Elbon was or was not such agent. Witness Elbon further says that the only interest he had in the note given by Rutherford was his commission on the sale; that he took this note, and turned it over to the plaintiff only as its commission agent. This is certainly sufficient proof to show that he was agent with power to sell and to collect the purchase money. The contract embodied in the order for the saw signed by Rutherford and hereinbefore quoted shows that the agent made all the sales subject to the approval of the principal, and that the agent was prohibited from making any arrangement with the purchaser not incorporated in the printed form of order. The shipment of the saw by plaintiff shows that it approved the

first order; and the order on its face binds the plaintiff upon a warranty that the "saw is to be made of best quality steel, free from flaws and practically true." This warranty, however, is limited in time to 80 days after the saw is received by the purchaser, and, unless within this time complaint was made of its quality, the warranty was to cease; but, on the other hand, if complaint was made within said 30 days, the plaintiff was to make good its warranty by putting the saw in good shape, or by furnishing another in its place. Anything, therefore, that the agent could do to assist the principal in carrying out its contract of warranty would be for the purpose of enabling him to collect the purchase money for the saw, and would certainly be within the scope of his authority. He was agent to sell under a contract of warranty of the quality for the limited time above described. He could not collect if there was a breach of the warranty and notice within the time. It was therefore both in the scope of his employment and in the line of his duty to receive such notice and communicate it to his principal. We therefore conclude that notice to Elbon was notice to the plaintiff company. 1 A. & E. L. 1144-1149; Newlin v. Beard, 6 W. Va. 110; Peterson v. Wood Mowing & Reaping Co., 97 Iowa, 148, 66 N. W. 96, 59 Am. St. Rep. 399; Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400; Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732; Littauer v. Houck, 92 Mich. 162, 52 N. W. 464, 81 Am. St. Rep. 572; McClelland v. Saul, 113 Iowa, 208, 84 N. W. 1034, 86 Am. St. Rep. 370; Ross et al. v. Houston, 25 Miss. 591, 59 Am. Dec. 231; Clark & Skyles on Agency, 1044; Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Merrill v. Packer, 80 Iowa, 542, 45 N. W. 1076; Reed's Appeal, 34 Pa. 207.

In regard to the third point, this is largely answered by the discussion of the second point above. The agreement of April 2, 1904, was made in pursuance of plaintiff's warranty on the sale of the first saw, by which it bound itself to either make the first saw good or to supply another in its place, and the note of April 2, 1904, was given with the express understanding that it was to be applied as a credit on the price of the new 62-inch saw, the price of which was \$145. If it was not to be so applied, there was no consideration for it. That it was given for the exact amount of the price of the first saw is only a fact tending to prove that it was given as a payment for the first saw; and this fact the jury must have determined was rebutted and entirely overcome by the direct testimony of both Rutherford and the agent, Elbon. In addition to this testimony, there is a memorandum indorsed on the order for the second saw that is made on the same kind of order blank as the first, which is as follows: "A.

B. Elbon & Co. hold A. J. Rutherford note for \$108.50 for (1) 58 inserted tooth saw, which the above mentioned note is to be credited on the within orders as per guarantee." Whether or not this agreement is binding on plaintiff is immaterial, because plaintiff would either be bound to accept this contract, or otherwise make its warranty good, before it could enforce collection of the note. It could not claim the benefit of the note and at the same time refuse to comply with the contract, or to fill the order for which the note was given. If it chose to accept the benefits of this contract made by its agent, it must also bear its burdens. *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670.

As to the fourth point, the note is negotiable and was made payable to the agent Elbon, who assigned it to his principal before maturity. There was no consideration for this assignment, and plaintiff is not a purchaser of the note for value. Elbon says in his testimony that he simply held it as a matter of accommodation for the plaintiff, and that he had no interest in it except as commission agent. Plaintiff, therefore, is in no better position in respect to the note than if it had been the payee. The agent in such case is simply an accommodation indorser for his principal who holds the note subject to the equities in favor of the maker.

A number of instructions were given on behalf of the defendant and a number asked for by plaintiff refused, and objections made which are saved by bills of exceptions. But, inasmuch as the judgment appears to be plainly right upon consideration of the whole record, we do not deem it necessary to discuss the questions raised by the instructions. They appear, however, to define the law of the case as it is expressed in this opinion. *Goode v. Love's Adm'r*, 4 Leigh (Va.) 635; *Bank v. Napier*, 41 W. Va. 481, 23 S. E. 800; *Davis v. Living*, 50 W. Va. 431, 40 S. E. 365; *Davis v. Webb*, 48 W. Va. 6, 33 S. E. 97; *Corder v. Talbott*, 14 W. Va. 284; *Oxley's Instructions to Juries*, p. 35.

We find no error affecting the judgment of the lower court, and affirm it.

(55 W. Va. 429)

COMLEY et ux. v. FORD.

(Supreme Court of Appeals of West Virginia.
March 30, 1909.)

1. MINES AND MINERALS (§ 62*)—LEASE—ESTATE FOR YEARS.

An instrument, granting the right to mine and remove the coal in a tract of land for a period of years, and "to take all necessary, usual, or convenient means for working and taking away the said coal," creates an estate for years in the land.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 176-180; Dec. Dig. § 62.*]

2. MINES AND MINERALS (§ 64*)—LEASES—ESTATE FOR YEARS—ASSIGNMENT.

If the term, so created, be for more than five years, it cannot be assigned otherwise than by deed or will.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 181-184; Dec. Dig. § 64.*]

3. MINES AND MINERALS (§ 64*)—LEASE—LIABILITY OF LESSEE.

The assignee of the lessee is liable to the lessor for the rent reserved in the lease if he covenant or agree to pay the same, or privity of estate between him and the lessor be established, but not otherwise. He is not liable to the lessor unless privity of contract or estate between him and the latter exists.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 182; Dec. Dig. § 64.*]

4. MINES AND MINERALS (§ 64*)—LEASE—ASSIGNMENT.

To constitute privity of estate, the assignee must acquire the legal title to the term or take possession of the premises. In the latter case his possession constitutes sufficient title to establish the relation of privity of estate, and makes him liable for the rent as long as it continues, unless he shows he is in merely as undertenant.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 182; Dec. Dig. § 64.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5609; vol. 8, p. 7764.]

5. DEEDS (§ 46*)—"SEALED INSTRUMENTS."

The mere recital in the testimonium clause of an instrument, signed and delivered for a deed, that the parties have affixed their seals, is not sufficient to make it a sealed instrument, if no seal or scroll, mark, or word equivalent thereto is annexed to the signatures, and the instrument is not a deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 99-103; Dec. Dig. § 46.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6373.]

(Syllabus by the Court.)

Error to Circuit Court, Monongalia County.

Action by James A. Comley and wife against Wesley Ford. Judgment for defendant, and plaintiffs bring error. Affirmed.

Lazzelle & Stewart, for plaintiffs in error. Goodwin & Reay, Moreland & Moreland, and Cox & Baker, for defendant in error.

POFFENBARGER, J. James A. Comley and wife brought an action of assumpsit in the circuit court of Monongalia county to recover from Wesley Ford the sum of \$2,000 as a minimum royalty reserved upon a lease of a certain tract of coal. A demurrer to the original declaration was sustained, and it was amended. The court overruled the demurrer to the amended declaration and each count thereof, whereupon certain special pleas were tendered and rejected. Then the case was submitted to the court on an agreed statement of facts, and there was a finding for the defendant. The court seems to have thought the declaration insufficient, since leave was given to amend, and the order recites that it was amended because the plaintiffs may have been misled by the overruling

of their demurrer. They declined to amend and obtained a writ of error to the judgment against them. Ford was not the lessee. The lease had been executed to William T. Coburn, who, with his wife, assigned it to Ford by a written instrument, in which they recited that they had affixed their seals, but which bears none. The lease granted to Coburn, for a period of 12 years from the date thereof, the right to mine and remove all the coal under a certain tract or parcel of land containing 95 acres and 155 poles. This coal the lessors had reserved and excepted from a conveyance of the land which they had executed to one Millholland. The reservation of the coal and mining rights was expressed in the deed to Millholland in the following terms: "But the grantors save and except from the operations of this conveyance all coal * * * under the premises hereinbefore described, with powers for the parties of the first part, their heirs and assigns, to take all necessary, usual or convenient means for working and taking away the said coal * * * excepting that the said parties of the first part agree that the mining rights and privileges so saved and excepted from the operations of this conveyance, shall not be exercised in such manner as to interfere with the construction and operation of any railroad which may be built over the said premises by the said party of the second part, his heirs and assigns." After incorporating this provision of the Millholland deed, the lease proceeds as follows: "The said parties of the first part do, therefore, grant unto the said party of the second part all the rights, privileges, and easements for the purpose of mining and removing said coal from the tract of land hereinbefore described, which the said parties of the first part have by reason of the reservation in the conveyance to the said James A. Millholland." The lessee covenanted and agreed to mine and remove all the coal under the land, consisting of three veins, known as the Pittsburgh, Red Stone, and Sewickley or Mapletown, paying at the rate of eight cents per ton for the coal in the first, six cents for the coal in the second, and five cents for the coal in the third, and also to mine not less than 25,000 tons each year after the year 1905, and to pay the royalty on said quantity each year after 1905 during the life of the term, whether he mined any coal or not, with the understanding that the sum paid in any year in which no coal should be mined was to be credited upon coal mined in any subsequent year. The lease was dated February 15, 1905, and was to become void if the lessee did not on or before the 15th day of September, 1905, pay to the lessors the sum of \$500, to be credited as a payment on the first coal mined. Before this became due, Coburn assigned the lease to Ford, who paid said sum of \$500 on the 15th day of September, 1905. Neither Coburn nor Ford entered upon the land or did any mining under the lease.

The case may be treated as upon a demurrer to the special count in the declaration founded upon the lease, it being admitted that there is no right to recover under any of the common counts, since there is no covenant on the part of Ford to pay any rent. So treating it, the attorneys for the defendant in error say (1) there is no privity of contract, nor (2) privity of estate, and that, therefore, there can be no recovery from the assignee. The contention against the privity of estate is based upon the double view that the instrument relied upon as a lease grants a mere mining privilege, and creates no estate in the land to which there could be succession, and that the term, if any, is for more than five years and can be conveyed only by deed or will, and the instrument of assignment, not being under seal, is not a deed.

The paper executed by Comley to Coburn differs from the ordinary mining lease, such as was construed in *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 928, 6 L. R. A. (N. S.) 628, and *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915, and other cases referred to in those decisions, in this: that it does not in terms demise, let, and lease a tract of land for mining purposes. It grants the right to mine and remove the coal, and all the rights, privileges, and easements reserved in the Millholland deed, which include all the necessary, usual, or convenient means for working and taking away the coal. The use of a portion of the surface is both necessary and convenient in the mining of coal. A grant of the coal or a right to mine the coal carries with it, by implication, the right to use so much of the surface as may be necessary. This deed expressly gives, not only what is necessary, but what may be convenient as well. The right to use a portion of the surface as well as to mine and take away the coal is given for the period of 12 years. Therefore a term or period of use of the surface land is granted. That it is not granted in express terms is immaterial. A grant by necessary implication is as complete and effective as one made in express terms. Our conclusion, therefore, is that this lease differs from those above referred to in form only, and not in substance, and though it may carry some of the features or elements of a license or privilege, it also carries an estate for years in the land.

That there can be no recovery from the assignee of the lessee until either privity of contract or privity of estate is established on the part of the assignee is uniformly asserted by the authorities. In *Railroad Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696, the assignee is said to be liable to the lessor because of his privity of estate. If there were an express covenant on the part of the assignee to pay the rent, there would be privity of contract. *Taylor on Landlord & Tenant*, § 436, says the mere assignment of the

lease does not transmit to the assignee any succession in respect to the contract, and therefore does not create privity of contract. But, since he takes the estate of his assignor, the lessee, by an assignment, he becomes liable because of privity of estate, or succession to the estate vested in the lessee by the lease. If the assignment is valid and complete, passing the legal title to the lease, the assignee is liable by reason of his succession, whether he enters into possession or not. *Negley v. Morgan*, 46 Pa. 281; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; *Fennell v. Guffey*, 139 Pa. 341, 20 Atl. 1048; *Fennell v. Guffey*, 155 Pa. 38, 25 Atl. 785; *Sanders v. Partridge*, 108 Mass. 556; *Babcock v. Scoville*, 56 Ill. 466. If the assignee be put in possession of the leased premises, his possession raises a presumption of an assignment, and he may be liable for the rent by reason of his possession alone. The pivotal question in such case is whether he is an assignee or a mere under-tenant. If the intention or contract between him and the lessee was that he should take the whole interest in the lease, and he has taken possession under such a contract, he becomes a tenant of the lessor and is liable for the rent, whether the legal title be vested in him or not; possession alone being regarded as title sufficient to impose liability for the rent. *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88; *Moores v. Choat*, 8 Simon, 508; *Carter v. Hammett*, 12 Barb. (N. Y.) 253. This view is sustained by legal principle. One in possession of real estate may hold it against everybody who cannot show a right to possession in himself. *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 53 S. E. 409. The assignee of a lessee may defend his possession against the lessor. The lease shows a right of possession in somebody other than the lessor, and the party having possession is not bound to yield it until the rightful owner demands it. As long as the lessee permits another to hold the possession, the lessor cannot complain. Whether there is a valid assignment is a matter of no interest or concern to him. That question arises between the lessee and the assignee. As the lessor cannot disturb the possession of the person admitted thereto by the lessee, such person cannot deny that he is tenant, and, being tenant, he cannot escape liability to pay the rent as long as he continues to be tenant. Being tenant in fact and in law, the element of privity exists. As between him and the lessor, he has a legal right of possession, which he derived mediately from the latter. In other words, as regards the lessor, he succeeded the lessee in the ownership of the term for the time being. "The occupant, being thus in possession in a way that the landlord cannot disturb, and having all the benefits of an actual assignee, is estopped from setting up that he is assignee only by parol agreement, and not by a valid

written instrument." *Carter v. Hammett*, 12 Barb. (N. Y.) 253, 262. But, if the assignee is not in possession and has merely an equitable assignment, there is no succession to the estate in law and no right of recovery. In other words, there must be either possession by the assignee or he must hold the legal title to the term by an assignment. "If a lessee contracts to sell his lease, and another party contracts to purchase it of him, it would be contrary to the established principles of a court, either of law or equity, to say that thereupon any right or equity arose to the landlord either to compel the purchaser to take an assignment of the lease, or to compel the seller to assign it. No such case ever arose; for no equity could arise to the landlord to interfere in consequence of such a contract between the lessee and the intended assignee. The depositary of a lease for securing a debt has a right to file a bill for a foreclosure and to have the lease assigned to him, or, if he has an agreement for a sale, he may file a bill for specific performance, but he is not bound to do either; and, until he exercises his option, or takes possession of the tenements comprised in the lease, he stands to all intents and purposes in the character of an entire stranger to the tenancy, and the landlord has no right whatever to interfere with him." *Moores v. Choat*, 8 Simon, 508, 523.

Coburn having been vested with a legal estate in the land by this deed, the next inquiry is whether Ford has become owner of it as against Coburn; for, not having taken possession and not having covenanted to pay the royalty or rent, he is not liable therefor to the lessor, according to the weight of authority, unless he has succeeded Coburn in ownership of the estate vested in him. The term is for 12 years. Section 1 of chapter 71 of the Code provides that "no estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed, unless by deed or will." That this statute is applicable to assignments seems clear. By its terms it is not limited to the mere creation of a term. It says no term for more than five years shall be conveyed otherwise than by deed or will. The statute of frauds, inhibiting sales of interests in real estate otherwise than by written instruments, applies to assignments of leases. *Briles v. Pace*, 35 N. C. 279; *Johnson v. Reading*, 36 Mo. App. 306; *Hunt v. Coe & Wells*, 15 Iowa, 197; *Chicago Attachment Co. v. Sewing Machine Co.*, 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; *Brown on Stat. Frauds*, § 41. It logically follows that a deed is necessary under a statute, saying no conveyance of a term shall be made otherwise than by deed or will. In some states, probably most of them, a deed is not necessary; a note in writing being sufficient. The Pennsylvania statute requires a deed or note in writing. If the instrument by which Coburn attempted to as-

sign the lease to Ford expresses the intention to convey, by the use of appropriate terms, and would be regarded as a deed, if it were under seal, a question we are not called upon to decide, it is nevertheless no deed, because it is not a sealed instrument. It bears no scroll, seal, letter, or mark that the parties could have referred to in the testimonium clause. That clause says: "In witness whereof we have hereunto set our hands and seals." This is not sufficient as is insisted in the brief for the plaintiff in error. Something must appear on the paper to which the word "seals" may be referred. "The word 'sealed,' inserted in the body of an instrument, promising to pay money, will not make it a specialty, without a seal, an (L. S.), or some equivalent mark annexed." Mitchell v. Parham, Harp. (S. C.) 3; Patterson v. Galliher, 122 N. C. 511, 29 S. E. 773; Vance v. Funk, 3 Ill. 263; Taylor v. Glaser, 2 Serg. & R. (Pa.) 502. On this question there seems to be no precedent or rule in any of the decisions of this court or the Virginia court. A number of decisions by both courts say it is necessary to recognize the seal or scroll in the body of the instrument, if it be one which is not required by law to be under seal, and that it is not absolutely necessary to do so, if it be one which the law requires to be under seal, but in neither class is there any intimation that the seal itself may be omitted. Hence, they have no application to the question here presented. As the instrument cannot be regarded as a deed, it does not pass the legal title to the lease, and there is no privity of estate, from which it follows there can be no recovery from the defendant.

As the declaration shows no election on the part of the defendant, in respect to the vein from which coal shall be taken, it is urged that, even if the legal title had passed to him, uncertainty of the contract, as set forth in the declaration, would prevent recovery. This question we do not pass upon. Anything we might say on the subject would be obiter.

For the reasons stated, the judgment must be affirmed.

Affirmed.

(65 W. Va. 415)

JACKSON v. WHEELING TERMINAL RY. CO. et al.

(Supreme Court of Appeals of West Virginia. March 30, 1909.)

1. MASTER AND SERVANT (§ 142*)—PROMULGATION OF RULES—SUFFICIENCY.

In adopting and using the standard railroad rules, generally observed in the operation of railroads, so far as they are applicable to its business, a railroad company sufficiently discharges the legal duty to protect its employees from injury by the promulgation and enforcement of rules for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 285; Dec. Dig. § 142.*]

2. MASTER AND SERVANT (§ 142*)—PROMULGATION OF RULES—SUFFICIENCY.

The necessity for such rules, and the character thereof, depend on the nature and extent of the master's business, and such of the approved rules as apply to classes of trains and railroad operations, not used in the business, may be discarded or ignored.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 285; Dec. Dig. § 142.*]

3. MASTER AND SERVANT (§ 85*)—INJURIES TO SERVANT—MEASURE OF MASTER'S DUTY.

The measure of the master's duty to the servant, in respect to affirmative action for his safety, depends upon the extent to which he is allowed opportunity, and has the means or power, for his own protection. As limitations are imposed upon him and his freedom restrained, his power of self-protection is diminished, and the master's duty increased. As limitations and restraints are removed, withheld, or relaxed, the servant's power of self-protection is enlarged, and the duty of the master correspondingly reduced.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 135; Dec. Dig. § 85.*]

4. MASTER AND SERVANT (§ 142*)—PROMULGATION OF RULES—REASONABLENESS.

In view of the duties imposed by the standard railroad rules upon train crews for their own protection, and that of their fellow servants, the provision in said rules for running two or more trains, one after another, in the same direction, over a single track, without giving the crews thereof telegraphic information of the relative positions of the trains, is reasonable, and not violative of duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 285; Dec. Dig. § 142.*]

5. MASTER AND SERVANT (§ 141*)—DUTY TO PROMULGATE RULES.

A railroad company, operating only a small terminal railroad, is not bound to run scheduled or limited trains, nor to adopt or observe rules applicable to such trains. It may require all of its trains to run extra, and be kept under control in the sense that they may be instantly stopped to avoid collision or other causes of injury, and devolve upon the crews the duty of protecting themselves and one another by their diligence, caution, prudence, and the use of the signals prescribed by the standard rules.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 141.*]

6. MASTER AND SERVANT (§ 145*)—INJURIES TO SERVANT—RULES—SUPERSEDING.

The partial supersession of yard limit rules, by the adoption and use of certain orders inconsistent therewith, does not wholly dispense with them. They still apply in a modified form.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.*]

7. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—OPERATION OF TERMINAL RAILROAD.

If a company, operating its road under yard or yard limit rules, forbids the running of trains over a certain portion of the road without orders, limiting them in respect to the time of starting, and requiring them to run extra, and such orders are issued, the trains receiving them are not thereby scheduled in respect to speed or time, nor their crews relieved from the duty of vigilance and self-protection; nor is it negligence to start two such trains in the same direction on a single track, in close proximity to one another, without advising the crew of each of the location of, and orders given to, the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 752; Dec. Dig. § 240.*]

8. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

If two trains, running under such orders, are passing through a tunnel, and the crew of the one following find the tunnel filled with smoke, so dense as to prevent them from ascertaining, by sight, whether there is a train ahead of them, and so close as to render it dangerous for them to proceed, the presence of the smoke is sufficient to put them upon inquiry, and it is their duty to stop, if necessary, and not to proceed until the track is clear; and, if they fail to do so, and injury to one of them results, no recovery therefor can be had, since the cause thereof is the negligence of the person injured and his co-servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 752; Dec. Dig. § 240.*]

9. MASTER AND SERVANT (§ 198*)—FELLOW SERVANTS—WHO ARE.

If trains of one railroad company are run over the track of another, under the complete control of a servant of the latter, known as a "pilot," the crews of such trains are fellow servants of the crews operating the trains of the owner of such track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 493; Dec. Dig. § 198.*]

10. EXCEPTIONS, BILL OF (§ 13*)—SUFFICIENCY—INCORPORATING EVIDENCE.

A bill of exceptions is not open to the charge that it does not contain all the evidence adduced, if it purports to embody "the evidence" in the case, and the order of the court making it part of the record describes it as containing "all the evidence" introduced; such description being consistent with the terms of the bill, and presumed to rest upon knowledge, on the part of the court, derived from sources other than the bill of exceptions itself.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 13; Dec. Dig. § 13.*]

(Syllabus by the Court.)

Error to Circuit Court, Ohio County.

Action by Charles G. Jackson against the Wheeling Terminal Railway Company and another. There was a verdict for plaintiff, which was set aside on motion, and he brings error. Affirmed.

Dovener & Fickelson and J. J. Coniff, for plaintiff in error. J. B. Sommerville and H. M. Russell, for defendants in error.

POFFENBARGER, J. In an action for damages resulting from personal injury Charles G. Jackson obtained a verdict for the sum of \$10,000 against the Wheeling Terminal Railway Company and the Baltimore & Ohio Railroad Company, in the circuit court of Ohio county, which was set aside on motion, and he obtained a writ of error to the judgment.

Objection to consideration of the case on its merits is based upon the contention that the evidence has not been made part of the record; it being urged that the bill of exceptions does not show that the evidence therein embraced is all that was adduced at the trial. The bill of exceptions does not use the word "all." In one place it says the plaintiff "asked the court to sign and seal his bill of exceptions, certifying all of the

instructions and the evidence given during the trial of said cause, which is here accordingly done." Following this, there is a caption inserted reading as follows: "Transcript of Evidence in Case of Charles G. Jackson v. Wheeling Terminal Co. and B. & O. R. R. Co." Below this appears the style of the case, and a memorandum showing the names of the attorneys representing the parties. After this appears the following: "Be it remembered that on the trial of this cause, after the jury had been selected and sworn, as in the record is set forth, the following evidence was introduced by the plaintiff and the defendant, respectively." But the court, in the order which makes the bill of exceptions part of the record, says the plaintiff "presented to the court his bill of exceptions containing the instructions given in said cause, and all the evidence introduced in the trial in said cause." This recital, though in terms descriptive and susceptible of a construction, denying it the function of affirmation, is, it must be remembered, part of a solemn court order, possessing higher character than a pleading, and deemed to be true. We may summon to its aid the presumption that the court verified it by personal recollection, the notes taken during the trial, and the assent of the parties. It, in no sense, contradicts the bill itself. On the contrary, it accords with the terms thereof, saying it incorporates "the evidence" introduced, and literally importing completeness. *Hall v. Hall*, 12 W. Va. 1, invoked to sustain the position taken in the brief, is inapplicable, since it relates to a wholly different subject, namely, how far separate bills of exception can be read together, or used to sustain, or complete, one another.

The evidence proves, and tends to prove, the following material facts: The Wheeling Terminal Railway Company owns and operates a short terminal railroad, by means of which transfers of cars are made from railroad to railroad, and between the railroads and shippers in and around the city of Wheeling. Its road passes through a tunnel, under what is known as "Chapline Hill," 2,473 feet in length. It has its own engines, cars, crews, and officers, including a superintendent and train dispatcher, and operates its road under the standard railway rules and regulations, so far as they are applicable; but, in view of the character of the road and the nature of the company's business, some of the rules are deemed inapplicable. Some time before the injury complained of occurred, an arrangement was made between the Wheeling Terminal Company and the Baltimore & Ohio Railroad Company, by which the latter was permitted to run its coal trains over the tracks of the former. Whether other railroads were allowed to do likewise as to any of their

trains is not disclosed. After this arrangement had been made, certain railway rules, not previously observed, were put in force. Until that time it seems the terminal company's trains could enter the tunnel without a special order from the train dispatcher, but afterwards no train was permitted to do so. Before this change was made, only the rules applicable to yards and yard limits were observed. There was one exception under the new order of things. The La Belle Iron Works used exclusively one of the two tracks in the tunnel for storage of cars, and ran on it a small engine, popularly known as the "La Belle Buck," for putting in, taking out, and shifting them. This engine came and went at its will. On every Baltimore & Ohio train there was stationed a terminal company employé, known as "pilot," while it was passing over the terminal tracks. The orders for such a train were given to the pilot, and the train crew obeyed his orders, he observing the orders issued by the dispatcher. No train, while on the terminal tracks, was scheduled as to them. All ran extra, the time of starting alone being fixed in the orders, and each train being expected to pass over the track with such speed as was practicable and consistent with the observance of the rules prescribing the duties of crews in charge of extra trains. When trains were sent in the same direction over the road, no notice was given to the crew of one, concerning the relative situation of, or the orders given to, the other, and they passed through the tunnel in the order in which they reached it. To such trains orders could be given, complete at the same time and place, the object being to forbid their starting before the time designated in the order, not to require them to start at that time. According to the testimony of several witnesses, qualified by occupation and experience to testify on the subject, this method of running trains over the same track in the same direction conformed to the rules and practice of railroad operation throughout the United States, Canada, and Mexico. Of course such orders are not given to trains going in opposite directions on the same track without provision for passing at some point.

On the morning of August 23, 1902, at the station of the terminal company, two orders were given practically at the same time. One was written and delivered right after the other. The first was handed to the conductor of the company's own train, propelled by engine No. 3, ordering it to proceed from north to south through the tunnel to what is known as the "Pan Handle Transfer," distant something less than a mile, and there pick up and bring back a stock car. The other was given to the pilot who was to pass through the tunnel on the train drawn by engine No. 3, and, at the far end thereof, take charge of the Baltimore & Ohio coal

train, propelled by engines Nos. 216 and 218, and having in it 33 cars, and bring that train through the tunnel and conduct it off of the terminal tracks. At the south end of the tunnel a branch of the terminal road ran southwest a distance of 2,475 feet to the Pan Handle transfer, while another branch ran south about 1,945 feet to the Baltimore & Ohio Railroad, where the train in question came onto the terminal company's track. The pilot Burke went through the tunnel on the terminal company's engine in company with the plaintiff, a brakeman, and, on reaching La Belle Junction, situated at the south end of the tunnel, and at the point at which the road branches in two directions, as above stated, he got off. The Baltimore & Ohio train was then in sight, and moving in the direction of the tunnel. He signaled it to come on, and, when it reached the junction, boarded the front engine, leaving orders at the switch for the rear brakeman. The terminal company's train proceeded to the Pan Handle Junction, picked up the stock car, and started back with it, intending to follow the other train through the tunnel on the same track. The Baltimore & Ohio train was pulled by one engine and pushed by another. As the terminal engine came up, it was running backward and pushing the stock car ahead of it. Plaintiff and another brakeman were standing on the sill of the front end of the car. When the terminal train got well into the tunnel, its crew found it filled with a dense smoke, which rendered it impossible for them to see anything. Proceeding, nevertheless, they passed the center of the tunnel, the highest point in it, and, shutting off the power, drifted some distance, when a rear end collision occurred, the stock car being driven against the rear engine of the coal train. The plaintiff was so badly crushed that one leg and some of the toes of the foot of the other had to be amputated. All the crew of the terminal train admit the density of the smoke and their ignorance of the cause of it. Knowing the practice of the La Belle shifter, they say they thought the smoke might have come from it, and also that it might have been the smoke from their own engine, made in previously passing through. The order given to the terminal train became complete at 5 o'clock a. m.; that is, it could be acted upon after 5 o'clock, but not before. The train started, according to the testimony, about 5:05. The order for the Baltimore & Ohio train became complete at 5:16, and reached La Belle Junction in the hands of the pilot, at the south end of the tunnel, at 5:15. The witnesses who were on the Baltimore & Ohio train say it was running at from five to seven miles an hour at the time of the collision, and at that rate the time consumed in passing through the tunnel would have been from 4 to 5½ minutes. Burke, the

pilot, testifies that, as he went over on the terminal engine, the plaintiff, Jackson, opened and closed a switch just north of the tunnel, and was told by witness not to lock it as he (Burke) wanted to use it when he "came right through." He also says that, when he alighted from the terminal train, at the south end of the tunnel, Jackson said to him, "There they are up there waiting on you," and it appears that the Baltimore & Ohio train was then in sight.

The duty of an employer to formulate and enforce rules, to be observed by his servants as a means of protecting them from injury by the acts of one another, as well as that of common carriers of passengers to do so for that purpose, and also the purpose of safety and protection to the persons carried by them, is asserted by all courts; and there is like unanimity in the decisions to the effect that the necessity for such rules, as well as their nature, depends upon the character and scope of the business. But there are functions to be performed, and conditions to be dealt with, even in an extensive and complex railroad system, not susceptible of control or government by general rules respecting all matters of detail. These must be intrusted to the caution and diligence of the employes using the means provided for such occasions and exigencies, rather than responding to specific directions, given in view of the peculiar conditions. Thus, in *Railroad Co. v. Carruthers*, 56 Kan. 309, 43 Pac. 230, there is a strong intimation that no system of rules for the control of operations within a railroad yard, descending into all the details of switching, shifting and coupling cars, could be devised and operated with success. In that case the court declared it incompetent for a jury to charge a railroad company with negligence in failing to prescribe a code of rules or system of signals for the giving of notice or warning of the approach of detached cars in a railroad yard, in the absence of evidence showing that such system would be feasible or useful. In the testimony of witnesses taken in this case, practical railroad men, having had years of experience in railroad operation, repeatedly declare that, in yards and within yard limits, trains run without regard to schedules of time and speed limits, and that the matter of safety to passengers and employes is intrusted to the watchfulness and care of the train crews, a general rule requiring every engine, when in the yards or yard limits, to be brought and kept within the control of the engineer, so that it can be stopped at any time, and the train crews being able to know, by means of observation and communication, through the signals prescribed by general rules such as blasts of the whistle, sounds of the bell, and motions of employes, where every train and engine is, and cause it to be handled so as to avoid collision and injuries. Of course there is not an entire absence of rules. General rules require the

engines to be kept under control within the limits, as well as provide signals to be observed, and impose upon the brakemen, flagmen, and others the duty to be watchful, diligent, and prudent as each exigency arises. At the same time, it is to be observed that within these limits trains do not, as a general rule, run on any schedule, nor have any exclusive right to the track or right of way. There may be exceptions to this in cases of through trains not stopping at certain stations, but having occasion to pass through yards. A general notice of their time, afforded by their schedules, and an order requiring the track to be kept clear through the yard when they are expected to pass, may except them from the general rule, and so supersede what are known as "yard limits." It is easy to perceive, too, that even on the main line the safety of trains may be intrusted, to some extent, to duties imposed upon the train crews, rather than to instructions from the train dispatcher, without any violation of duty on the part of the company. There are many miles of space between stations on the lines of some railroads so that, in case of delay between them, caused by accident, it could not be known at the managing office until the time for arrival had passed; there being no means of communication with the stations from any point between them. If two or more trains, following one another, were not permitted to enter upon such a space, it would result in hours of delay, loss in operating, expenses and inconvenience to the general public. As the ingenuity of railroad men has devised means of enabling them to do so with perfect, or at least reasonable, safety, this loss of time and inconvenience becomes unnecessary, and therefore the law does not inflict it.

Experience has demonstrated that ordinarily trains are not delayed. Accidents constitute the exception, not the rule; and generally two or a dozen trains may follow one another over such a space without collision, interference, or the slightest danger to one another, if the crews perform their duties. For the exceptional cases provision is made by certain duties imposed upon these servants. In case one train stops for any reason, it is the duty of the rear flagman to go back a sufficient distance to enable him to cause the following train to stop and thus avoid collision. If a train is delayed, and a following train does not overtake it at the point of stoppage, means are provided for giving notice of the delay. One or more torpedoes are fastened to the track, and, exploding, indicate to the following train the rate of speed at which it should run, or a fusee is dropped from a moving train, which, burning for 10 minutes, will halt a following train until it burns out. In case of any indication of danger ahead, no matter what its nature may be, it is the duty of the crew to stop the train and send a flag-

man forward to investigate. What are known as extra or wild trains are frequently sent out after regular or scheduled trains. They are required to make the best time they can, observing the schedules of the regular trains, these being known to them, and it being their duty to observe them without any special instructions to do so. In such cases extra precautions are exacted of the crew. Prudence, caution, and safety do not require notice to be given to the crews of several trains, going in the same direction on a single track, of their relative positions. Experience has shown that it is thus practicable, without endangering employes or passengers, to devolve upon the train crews, under certain conditions, the management and control of the trains, and that it is necessary to do so to avoid a useless waste of time, and economize in the interest of the railroad company and the general public. Freeing the men, under such circumstances, from time and speed requirements, is in itself a rule or measure conducive to safety, and, at the same time, permissive of enlarged duty and responsibility on the part of the employes. If an employe were not required to do anything but take care of himself, no hardship would be inflicted upon him by the requirement. If his duties are such as to allow him no opportunity to take measures for his own protection, the employer must provide for his safety by keeping others out of his way. As limitations are imposed and freedom restrained, the means of self-protection are diminished. As limitations are removed, ability of the servant to protect himself is enlarged. Such rules as have just been indicated have been judicially approved. *Nolan's Adm'x v. N. Y., N. H. & H. R. R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305; *Enright v. Toledo, A. A. & N. M. Ry. Co.*, 93 Mich. 409, 53 N. W. 536; *Illinois C. R. R. Co. v. Neer*, 31 Ill. App. 128.

In *Nolan v. Railroad Co.* the court declared as follows: "The legal duty of a railroad company operating a single-track road to its employes is not violated by failure to provide in its rules for giving those in charge of trains moving in the same direction telegraphic information of the relative position of the trains. A railroad company operating a single-track road is not negligent in failing to give those in charge of trains moving in the same direction telegraphic information of the relative position of the trains." In the opinion the court said: "The conditions in general attending trains moving in the same direction under the rules, without telegraphic information of their relative position, include: All trains, regular or extra, made up in all ways, even to a single engine; trains off their regular time, way freights being commonly behind time; stopping places for trains which are used only occasionally, and not at regular intervals; trains moving at all times of day and night, and in all conditions of weather and at-

mosphere; trains moving at various rates of relative speed. The special facts found, from which, apparently, the inference of an exceptional case or emergency is drawn, are the following: Train 474 consisted of an engine pushing a snowplow. Train 1,411 was upward of an hour behind its schedule time. Train 1,411 stopped to attach three freight cars at Kent Furnace, which is merely a siding where freight trains stop occasionally and at regular intervals. The rear train, when in motion, moved at a faster rate of speed than the forward train. The day was very cold, and the snowplow threw snow considerably, rendering it difficult for the lookout stationed on the snowplow to see ahead. Just before the accident the plow was not throwing much snow, and the lookout could see. We think the conditions shown by these special facts, considered by themselves, or in connection with all the special facts found, are within the conditions in general attending trains moving in the same direction, do not constitute an exceptional case or emergency unprovided for by the general rules, and did not throw upon the defendant or its train dispatcher the special duty of keeping the conductors of those trains informed by telegraph of their relative position. No other inference can be legally drawn from the facts." To the same general effect, see *Kennelly v. Railroad Co.*, 166 Pa. 60, 30 Atl. 1014.

In view of these general principles it becomes necessary to determine what the duty of the Terminal Railway Company was. As has been stated, it used the standard code of rules, as far as they were deemed applicable, but how far they were applicable the evidence does not clearly disclose. It indicates that the trains were not scheduled, nor susceptible of government and control by schedules. Before the Baltimore & Ohio trains were allowed to go over its tracks, all trains were permitted to enter the tunnel without orders, and all trains ran extra, and without limitation. It is also said that the effect of the orders afterwards given was not to change the character of the trains from extra to regular, but only partially to supersede the yard limit rules. This implies that, in the absence of such orders, all trains and engines operated under yard rules, and this imports that all such trains were required to be run at a low rate of speed and kept under control, so that train crews would be able to protect themselves at all times, if they were diligent and careful in the performance of their duties. There is no evidence tending to show that any train on the road was scheduled, or that the two trains in collision were scheduled. No reason is perceived why a company, operating a short road, having many connections by switches, and used substantially for the purpose of switching and transferring cars from one railroad to another, and between railroads and points of consignment and delivery, may not, if it sees fit to do so,

dispense with schedules, and operate its engines and trains as they are operated within the yard limits of a large railroad system. If it operates no scheduled trains, the rules relating to such trains could have no application. If all its trains and engines are made subject to the rules governing operations within yard limits, it is clearly under no duty to prescribe or observe any rules other than those which experience has shown to be adequate and reasonable under such conditions. These rules require nothing of the train crews that render them unable to provide for their own safety. It is their duty to know when the track ahead of them is clear, and not to proceed without knowing it to be so. They are under no time limit requiring them to maintain any particular rate of speed, and they are required to keep the trains under control, so that they can be almost instantly stopped, when they are unable to see that control of them may be safely released. For instance, if within the yard limits the engineer perceives a clear track for some distance, and knows, by reason of the switch connections, that nothing can obtrude itself so as to make a high rate of speed dangerous, it is possible he may put on the steam, and for the time being let the engine get beyond control in the sense that it cannot be instantly stopped; but, if he does this without knowing it is safe to do so, he does it without necessity, and not in obedience to any rule, but in violation of the rule and of his duty. Transportation under such limitations must necessarily be comparatively slow; but, if the railroad company sees fit to operate its road in that manner, there is no limitation upon its power to do so, nor is it under any duty to provide or adopt any rules beyond such as are reasonably safe. It seems logically clear, also, that a railroad company so operating may modify the yard limit rules by adoption and use of some orders applicable to schedule trains on main line roads, without wholly dispensing with yard limit rules, or adopting all the rules applicable to scheduled trains; and, if it does so, the adoption of such additional rules does not impose a duty, respecting them or trains operating under them, higher than, or different from, that which rests upon companies operating scheduled trains or extra trains under the same rules. In other words, if a railroad company may send one extra train after another on a single track, outside of the yard limits, without notifying each crew of the relation of its train to the other, it seems clear that the same thing may be done within the yard limits, without relieving the crews of the duties imposed upon them by the yard limit rules.

The employes of the Terminal Railway Company were supplied with books of rules, and the testimony indicates that they were all familiar with them, not only those applicable to operations within the railroad yards, but the others as well. In the exercise

of their daily duties they observed such of them as were applicable. The conductor, engineer, and brakemen all knew what was required of them by these rules. The track on which they worked was similar to other railroad tracks. While they operated through a tunnel, that fact did not relieve them from the duties imposed upon them by the rules, nor impose upon the company the duty to formulate rules for operations within the tunnel different from those observed by other railroads running trains through tunnels; and it is not contended here that any special duty in respect to the tunnel was omitted. Something is said about a target, sometimes used in it for the purpose of giving notice of the passing of trains, not to the train dispatcher, but to some other officer, but the purpose of this is not made clear. It could not have been intended for the purpose of enabling the train dispatcher to control trains within the tunnel, for there was no means by which he could communicate with them while in it. The whole tendency of the testimony is to the effect that all the trains, whether in or out of the tunnel, were completely within the control of their crews, who were so far free from restrictions as to time and speed that they could protect themselves, and that the rules under which they were operating contemplated that they should do so. A thing peculiar to the tunnel was that, under certain atmospheric conditions, the smoke made by passing trains would remain in it for some time, while, under other conditions, it would clear out almost immediately, and, when the tunnel was free from smoke, the view through it was unobstructed, so that trains might follow one another through it with practically as much safety as they could follow one another elsewhere on the track. The light trains of the terminal company made comparatively little smoke, while the heavy ones of the Baltimore & Ohio Company made a great deal, enough to fill the tunnel full, so that nothing could be seen. This, we must assume, was well known to those who were daily passing through the tunnel and had constant opportunities to observe it.

In view of all the circumstances and conditions, we are of the opinion that there was no failure of duty on the part of the railway company in respect to the adoption and promulgation of rules, nor on the part of the train dispatcher in giving the orders under which the trains were running. These orders were taken from the forms prescribed by the rules, and given in accordance with the rules. Certain other orders could have been given which would have prevented the collision, and it is insisted that the train dispatcher failed in his duty by not giving them. It is to be observed, however, that the company was under no duty to do more than make a reasonable provision for the safety of its employes, and that it could devolve upon them the duty to preserve themselves from danger by relieving them of time and speed

requirements so as to enable them to do so. The reasons for this view have already been stated, and there is no occasion to repeat them.

Some authority is cited for the position that a train dispatcher is not a fellow servant of the trainmen on a railroad; but it is unnecessary to inquire whether, by the weight of authority, or any decisions of this court, the proposition is true, since there was no failure of duty on the part of the train dispatcher.

Our conclusion is that the injury was the result of negligence on the part of the men in charge of the trains, all of whom were fellow servants. Those in charge of the terminal company's train were unquestionably so, and the Baltimore & Ohio train was under the control of the pilot, a servant of the terminal company. Its crew took their orders from him, and the train, while under his control, was operated under the Terminal Railway Company's rules. For the purposes of this case, therefore, the Baltimore & Ohio Railroad Company's servants were the servants of the Terminal Railway Company, and fellow servants of the crew of the other train. The presence of dense smoke in the tunnel was sufficient to put the crew of the following train on inquiry, and deter them from proceeding without knowing the cause of it. By the exercise of diligence and care they could have ascertained the danger, and it was their duty to do so.

Perceiving no error in the judgment complained of, we affirm it.

Affirmed.

(132 Ga. 515)

VAN GIESEN v. QUEEN INS. CO.

(Supreme Court of Georgia. April 19, 1909.)

1. APPEAL AND ERROR (§ 977*)—REVIEW—FIRST GRANT OF NEW TRIAL.

This being the first grant of a new trial, and the verdict not having been demanded absolutely by the evidence, this court, without undertaking to make any adjudication with respect to the reason assigned by the trial judge as the basis of his action, will affirm the judgment. Civ. Code 1895, § 5585; *Cox v. Grady* (Ga.) 64 S. E. 262; *McCain v. College Park*, 112 Ga. 701, 37 S. E. 971; *Brantley Co. v. Bank of Waycross*, 112 Ga. 532, 37 S. E. 737; *Harvey v. Bowles*, 112 Ga. 363, 37 S. E. 363; *Weinkle v. Brunswick R. Co.*, 107 Ga. 367, 33 S. E. 471; *Macon Street R. Co. v. Jones*, 116 Ga. 351, 42 S. E. 468; *Allen v. Lumpkin*, 116 Ga. 777, 43 S. E. 54.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 977.*]

2. APPEAL AND ERROR (§ 977*) — REVIEW — FIRST GRANT OF NEW TRIAL.

This rule applies, although the judge who presided at the trial may have ceased to hold office before the hearing of the motion for new trial, and it was passed on by his successor.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 977.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by F. S. Van Giesen against the Queen Insurance Company. Verdict for plaintiff. From an order granting a new trial, he brings error. Affirmed.

Osborne & Lawrence and E. H. Abrahams, for plaintiff in error. Lawton & Cunningham, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 413)

PHILLIPS et al. v. BOND.

(Supreme Court of Georgia. April 15, 1909.)

1. CORPORATIONS (§ 507*)—ACTION AGAINST CORPORATION — SERVICE OF PROCESS — RETURN.

Where suit was brought in the superior court against a corporation, process was issued directed to it, and the sheriff made a return stating that "I have this day served the defendant's agt. [naming him] with a copy of the within writ, by handing copy to said agt.," such an entry of service was not void, and the record of the suit, with the judgment thereon, was not inadmissible as evidence on that ground.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1906; Dec. Dig. § 507.*]

2. SERVICE OF PROCESS.

The decision in *Burnett & Goodman v. Central of Georgia Ry. Co.*, 117 Ga. 521, 43 S. E. 854, 97 Am. St. Rep. 175, distinguished.

3. MORTGAGES (§§ 1, 188*) — CONSTRUCTION — LIEN.

A mortgage in this state is only a lien, and conveys no title. Possession by virtue of it, therefore, furnishes no defense against an action of ejectment by the holder of the title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1, 469; Dec. Dig. §§ 1, 188.*]

(Syllabus by the Court.)

Error from Superior Court, Twiggs County; J. H. Martin, Judge.

Action by Monroe Phillips and others against J. T. Bond. Judgment for defendant, and plaintiffs bring error. Reversed.

Jno. R. L. Smith, for plaintiffs in error. Olin J. Wimberly and Akerman & Akerman, for defendant in error.

LUMPKIN, J. An action of ejectment in the common-law form was brought on the several demises of Monroe Phillips, as executor of the will of Hayward H. Phillips, Monroe Phillips individually, Robert H. Cowart, by his guardian, Monroe Phillips, John Phillips, Mary J. Reed, Roxie A. Stapleton, Lorena R. Johnston, and Ophelia R. Phillips, against J. T. Bond. The defendant testified that he purchased the land from Mrs. Johnston and Mrs. Stapleton and went into possession; that he then sold the land to one Rogers, receiving \$500 in cash and a mortgage for \$2,500; that Rogers sold the property to the Reco Mining Company and put

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

them in possession; and that he purchased at a sale made by the United States marshal under an execution against the mining company and took possession. In answer to the question, "The only title that you claim is this marshal's deed, is not that correct, outside of your mortgage?" He answered, "Yes, sir; I suppose so; that is all I could claim." There was introduced in evidence a warranty deed from Lorena H. Johnston and Roxie A. Stapleton to J. T. Bond, dated May 11, 1901, and recorded June 1, 1901, conveying the premises in dispute, and also a warranty deed from J. T. Bond to R. M. Rogers, dated June 4, 1901, and recorded June 22, 1901, and a warranty deed from R. M. Rogers to Reco Mining Company, dated June 24, 1901, and recorded December 2, 1901. The writ of execution from the United States court and the marshal's deed made in pursuance of the sale thereunder were introduced in evidence, the deed being dated November 5, 1906, and reciting that the sale was made on August 7, 1906, preceding. The execution stated that the judgment was recovered on March 25, 1902. The defendant offered in evidence a record from the superior court of the same county, in an action of complaint to recover the land now in controversy, brought by Monroe Phillips, executor, one of the lessors in the present case, against the Reco Mining Company, alleged to be a corporation of New Jersey. The suit was brought to the April term, 1902, of the superior court. The entry of service was in the following words: "Georgia, Twiggs County. I have this day served the defendant's agt., J. T. Dean, with a copy of the within writ, by handing copy to said agt."—signed by the sheriff and dated March 22, 1902. On April 7, 1903, the record shows that a jury found a verdict in that case in favor of the plaintiff for the premises in dispute, and a judgment was entered thereon. This record was rejected from evidence, on objection, on the ground that the return of service was not sufficient to show a legal service upon the defendant, and that therefore the proceeding and the verdict and judgment therein were not binding upon the defendant in the present case. The plaintiffs having rested their case, on motion of the defendant a nonsuit was granted, and the plaintiffs excepted.

1, 2. The controlling question in this case is whether the entry of service in the former suit was sufficient to show service on the defendant corporation. The sheriff's entry of service stated that "I have this day served the defendant's agt., J. T. Dean, with a copy of the within writ, by handing copy to said agt." The objection was that it did not recite that the sheriff had served the defendant corporation, but only that he had served its agent. Section 1899 of the Civil Code of 1895 is as follows: "Service of all subpoenas, writs, attachments and other process necessary to the commencement of any suit against any corporation in any court, except as here-

inafter provided, may be perfected by serving any officer or agent of such corporation, or by leaving the same at the place of transacting the usual and ordinary public business of such corporation, if any such place of business then shall be within the jurisdiction of the court in which said suit may be commenced. The officer shall specify the mode of service in his return." It would doubtless have been more accurate if the sheriff had returned that he served the corporation by serving its agent personally with the copy of the petition and process directed to it. The statute itself does not, however, prescribe the exact form of the return to be made. It says that service of all writs against any corporation, except as otherwise later provided in the Code, "may be perfected by serving any officer or agent of such corporation," etc. It does not itself in express terms say that the service may be perfected on the corporation by serving any officer or agent thereof, but, of course, it means this. It declares in substance that, where not otherwise provided, the legal effect of serving a process necessary to the commencement of a suit against a corporation (which must be directed to the corporation to make it a party) by serving any officer or agent of such corporation with such process shall be to perfect service on the corporation itself. This contemplates personal service on the agent. The other mode of serving the corporation by leaving a copy at the place of transacting its usual and ordinary business is not here involved. An examination of other statutes in regard to serving various corporations will show that great verbal nicety is not used in some of them. Thus in Civ. Code 1895, § 1984, it is declared that "service of the process upon the agent of any such banks shall be as legal and effectual as if served on the president, cashier, or bank at its usual place of business." This had reference to service of process in a suit brought against a bank. Of course, it did not mean to say that service of process upon the agent was not service upon the bank, though such a technical, verbal criticism might be made from the language employed. It evidently meant that serving the agent with process directed to the bank should be effectual as a service on the bank. The section immediately following (1985) declares that, "when such process is served upon such agent, the proceedings thereafter shall be conformable to the provisions of existing laws in suits against banks; and the judgment, when obtained, shall be as binding and effectual as judgments against banks now are by law."

These laws as to service must be construed in connection with other laws which provide what must be served. It is required, in cases of suits begun in courts of record by petition, that the clerk shall annex a process calling on the defendant to appear at the term fixed by law for that purpose, and that a copy of

the petition and process shall be served on the defendant. As corporations are artificial persons having no visible personality on which service can be made by the sheriff or serving officer, the Legislature has provided certain means by which service of process may be perfected upon them. One of these is by serving "any officer or agent of such corporation," except where otherwise provided. Suppose that the sheriff, in addition to the entry of service which he made in the present case, had added a statement that, under section 1899 of the Civil Code of 1895, the service which he had made upon the agent, as shown by the preceding portion of his entry, operated to perfect service upon the corporation, and that he declared it to have that legal effect, how much force would such declaration on the part of the sheriff have added to the effect which the law gave to the service on the agent? Here was a petition against a corporation, with a process annexed thereto, summoning the corporation to appear at the proper term of court; and the sheriff's entry showed that he had served the defendant's agent with "the within writ" by handing a copy to such agent. The corporation was sued, summoned, and a copy of the writ (presumably including the copy of the petition, as that was required to have the process annexed to it and be thus served) was delivered to the person to whom the law required that it should be delivered in order that service might be "perfected." Why does this not perfect the service? In *Jones v. Tarver*, 19 Ga. 279, a suit was brought against an individual, one mode of service permissible being by leaving a copy at the defendant's residence. The sheriff's return there involved showed that he had left copies "at the house of the defendant." This was held sufficient. In *Morris v. Bradford*, 19 Ga. 528, the entry of service considered was in the following terms: "Left a copy of the within bill of injunction at the residence of George W. Crawford, one of the defendants, this day, December 11, 1841." There was no answer of Crawford filed to the bill, and a decree was taken. It was held that this service was sufficient to give force and effect to a decree against him. In *National Bank of Augusta v. Southern Porcelain Mfg. Co.*, 55 Ga. 36, it was held that "service upon the president of the company in the county of Richmond, where he resided at the commencement of the action, and where the books of the company were, and where the stockholders were under notice to meet, is sufficient service upon the company." From the original record of file in the office of the clerk of this court it appears that the entry there made was as follows: "I have this day served the defendant, James S. Hope, president, personally with a copy of the within petition and process." In *Central Railroad v. Smith*, 69 Ga. 268, the plaintiff brought suit against the defendant for a personal injury alleged to have occurred while the defendant was operating and run-

ning the trains of the Southwestern Railroad, which it had leased. The following entry of service was made by the sheriff: "I have this day executed the within writ by serving a copy thereof on R. T. Gilbert, agent Central Railroad & Banking Company at Georgetown." It was held that, "where one railroad in this state has leased and is operating another, in a suit against the lessee, an entry of service by the sheriff by serving personally its depot agent was sufficient." In *Mitchell v. Southwestern Railroad*, 75 Ga. 398, the return of service by the sheriff was as follows: "I have this day served Lott Warren, agent, at the depot, at Americus, Sumter county, Georgia, personally with a copy of the within, this March 20, 1883." A second original issued, with process directed to the sheriff of Bibb county, and was served on the president of the defendant in that county. The defendant traversed the entry of service and pleaded to the jurisdiction, alleging that it had no office and no agent in Sumter county, and that all of its property was held by the Central Railroad Company under a lease. It also made a motion to dismiss the case, on the ground that there was no legal service. It was held that the service was sufficient.

It was argued on behalf of the defendant in error that in none of the cases cited was the exact point discussed which is now made, namely, that the entry of the sheriff should state that the service was made on the defendant by delivering a copy to its agent, and not merely that he served the writ upon the agent of the corporation by handing it to him. It is true that the precise contention now made has not been discussed; but entries of service quite similar to, certainly no more formal than, that which was made in the present case have been treated as sufficient, especially after judgment has been rendered thereon without objection. In *Keener v. Eagle Lake Land Co.*, 110 Cal. 667, 43 Pac. 14, service was made by a private individual (which apparently was permissible under the laws of California), and he made an affidavit showing such service on the defendant corporation. Judgment by default was rendered, and the defendant appealed. The appellant urged that the judgment was void because there was no proof of service of summons upon the defendant. It was held that, "in an action against a corporation, an affidavit of service of summons, stating that it was personally served upon a designated person, described as the managing agent of the corporation, by delivering to such managing agent personally a copy of the summons attached to a copy of the complaint, sufficiently shows that the service was made upon the corporation, and is prima facie proof that the person served was its managing agent upon whom the summons was authorized to be served for the corporation." In the opinion *Harrison, J.*, said: "It is objected that this affidavit merely shows that the service was

made upon Elledge, and does not show that it was made upon the corporation. * * * It sufficiently appears from the complaint that the defendant is a corporation, and the corporation is the only defendant in the action." So in the case before us the record of the former proceeding which was tendered in evidence showed that the only defendant was the Reco Mining Company, that process was issued against it alone, and that the sheriff returned that he had served "the defendant's agt.," naming him, with a copy of the writ by handing it to "said agt." It is clear that the corporation was the defendant against whom the plaintiff brought the action, that the sheriff, in making his entry of service, recognized the corporation as the defendant on whom he was attempting to perfect such service, and that he did this in the way pointed out by the statute, namely, by personally serving the defendant's agent. We agree with the Supreme Court of California in saying that "it would be sacrificing substance to form to hold that this service was not made upon the defendant." In *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006, it was held that a return of service of process upon "Charles C. Comstock, as president of the Grand Rapids Chair Company, who is the owner of said goods and chattels described in within writ," sufficiently showed a service on the corporation named. In the opinion *Morse, J.*, said: "It is not best to void the sheriff's return, and thereby nullify the whole proceedings in 19 suits, by hairsplitting."

Service, or waiver of service, is necessary to give a court jurisdiction to render judgment against the defendant. If there is an entire absence of a return of service, or if the return made is void because showing service upon the wrong person, or at a time, place, or in a manner not provided by law, the court should not proceed. The return of the officer is evidence of the service. "If, however, the fact of service appears, and the officer's return is irregular and incomplete, it should not be treated as no evidence, but rather as furnishing defective proof of the fact of service." *Jones v. Bibb Brick Co.*, 120 Ga. 324, 48 S. E. 25. If the fact of service appears, but the return is irregular, it may be amended. As stated by Mr. Justice Lamar in his opinion in the case last cited, the decisions construing sections 1901 and 4710 of the Civil Code of 1895 may be reconciled by noting whether in the particular case the process was valid or void, whether the return was void or only defective, whether the issue was raised before or after judgment, and whether on the hearing the evidence or pleadings showed that the service was good or bad. In the case against the Reco Mining Company it does not appear that any point was raised upon the service before the judgment was rendered. If it should be conceded that the entry was not entirely regular in form, but

would have been more perfect and exact if it had stated that the service was made on the defendant in the manner provided by the statute, it was not a void entry. There is a general presumption in favor of the judgments of courts of competent jurisdiction; and the record of the suit and judgment against the defendant should not have been rejected as a void proceeding, because of the form of the entry of service.

It was argued that, when the record was tendered in evidence and objection was made thereto, it was incumbent on the plaintiff to have the entry of service amended. If it might have been made more technically exact, it was not void, nor so imperfect as to authorize the rejection of the record from evidence because of it. If, in spite of the return, there was in fact no service, or if the agent was not one of such a character that service could be perfected upon him, after judgment this was matter which should have been set up in some direct attack upon the judgment, rather than by mere objection to the admission of the record in evidence. In *Pennsylvania Casualty Co. v. Thompson*, 123 Ga. 240, 51 S. E. 314, the entry of service was in these words: "I have this day served E. T. Moore, agent, personally with a copy of the within bill and proceeds." There was an entry of default made on the docket at the appearance term. At the trial term, and before the final judgment was rendered, the defendant appeared and moved to dismiss the case for want of service, which motion was overruled. On motion of the plaintiff the sheriff was then allowed to amend his entry of service as follows: "By permission of the court I hereby amend my entry of service, by saying that I served the defendant company, the Pennsylvania Casualty Company, of Scranton, Pa., by personally serving E. T. Moore, their agent, with a copy of the within writ and process, this April 1, 1904." The defendant then moved to open the default, offering to pay the court costs, and asking leave to demur and answer instant. This motion was refused. Exceptions pendente lite were taken to these rulings. The trial resulted in a verdict for the plaintiff. The defendant moved for a new trial, which was overruled, and it excepted. The opinion of Presiding Justice Fish concludes thus: "As the court erred in refusing to allow the defendant to demur and plead, it is unnecessary to pass upon the assignments of error made in the motion for a new trial." The entry of service there involved was more imperfect than that now under consideration by us. In that case it was not stated for whom Moore was the agent, nor was there anything in the entry to connect him with the defendant. The point was also made before final judgment.

It was argued that the rulings in cases of garnishments were practically controlling in regard to the entry of service here in-

volved. But the two classes of cases are quite different. Section 4710 of the Civil Code of 1895 provides that "service of a summons of garnishment upon the agent in charge of the office or business of a corporation in the county or district at the time of service shall be sufficient." In this state the original summons of garnishment is served, not a copy of an original, which remains on file; nor is there any provision of law for keeping on file a copy of the summons thus served. *West v. Harvey*, 81 Ga. 711, 8 S. E. 449. The only evidence of record, showing to whom the summons is directed, is the entry of the officer. If his entry does not indicate service of a summons of garnishment directed to the corporation claimed to be garnished, there is nothing of record to show it. In *Burnett & Goodwin v. Central of Ga. Ry. Co.*, 117 Ga. 521, 43 S. E. 864, 97 Am. St. Rep. 175, it was held that "an entry of service of a summons of garnishment, stating that the same was served 'personally on S. C. Hoge, agent in charge of the office of the Central of Ga. Ry. Company,' does not show a service upon the corporation, but only upon the person named as an individual; the words 'agent in charge of,' etc., serving merely to describe and identify the individual." As there was nothing to show to whom the summons of garnishment was directed, save the entry of service, it might be presumed that the summons followed the entry, and that it was directed, not to the company, but to the agent personally. An execution or process against a named person, with the added words "agent for" another, is a process against the person named, and not against the principal. If a summons of garnishment was issued against Hoge, although described as the agent in charge of the office of the Central of Georgia Railway Company, and was served upon him, although the entry of service may have contained a similar description, he, and not his principal, was the garnishee. In the opinion Mr. Justice Cobb said: "This rule should, if anything, be more strictly applied in cases of garnishments than in ordinary suits." This is true for the reasons above mentioned. But, while some of the expressions used in the opinion in that case might appear to have a broader application, they must be taken in connection with the case which was before the court. The ruling made in regard to garnishment proceedings of the character above indicated is not controlling in a case where there was a regular suit by petition, a single corporate defendant, a process directed to the sheriff and attached to the petition, requiring the defendant named to appear at the next term of the court, and an entry by the sheriff (whose duty it was to serve that writ on the defendant named in it) showing an ef-

fort to make service of it, and that he had served the defendant's agent personally with a copy of such writ.

3. In the brief of counsel for defendant in error it was suggested that the defendant Bond had sold the land to one Rogers, and had taken a mortgage for the balance of the purchase money, that Rogers had sold to the Reco Mining Company, and that Bond had acquired lawful possession. But the present action was a suit in ejectment in the common-law form. If Bond has a valid mortgage upon the property (as to which we express no opinion), it is only a lien, not a title. Civ. Code 1895, § 2723. A mortgagee in this state is not entitled to the possession of the mortgaged land by virtue of the mortgage.

Judgment reversed. All the Justices concur.

(132 Ga. 430)

CLEMENTS v. LEDDEN.

(Supreme Court of Georgia. April 16, 1909.)

1. NEW TRIAL (§ 154*)—DISMISSAL OF MOTION—CLERICAL ERROR.

Where, during the term when a case was tried and a verdict therein rendered, a motion for new trial was made and a rule nisi granted, including an order allowing time for the preparation and presentation for approval of the brief of evidence, and where, in the light of the order itself, as well as of the other acts of the court and the surrounding facts, it was evident that by inadvertence the order stated that the "plaintiff" was allowed the time, instead of the "movant," who was the defendant in the case, this did not furnish sufficient ground to dismiss the motion for a new trial, the movant having in fact prepared a brief of evidence, which was agreed upon by counsel and approved by the court.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 313; Dec. Dig. § 154.*]

2. NEW TRIAL (§ 154*)—MOTION—DISMISSAL.

If a motion for a new trial was duly made in term time, and a rule nisi was issued calling upon the respondent to show cause why the motion should not be granted, it would not furnish ground for dismissing the motion if the order set it to be heard in vacation at an impossible date, naming a date which was already past; but the motion would stand for a hearing at the next term.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 313; Dec. Dig. § 154.*]

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Action by E. Z. Ludden against J. W. Clements. Judgment for plaintiff. Defendant brings error. Reversed.

At the December term, 1907, of the superior court of Calhoun county, the judge directed a verdict in favor of the plaintiff in the case of Mrs. E. Z. Ludden against J. W. Clements. On the 4th day of December, 1907, during the term at which the verdict was directed, the defendant filed his motion for a

new trial. At the time the motion was presented to the judge, and before it was filed, the following order was entered thereon by him: "Read and considered. Let the plaintiff show cause before me at Bainbridge, Ga., in vacation, on the 1st Monday in February, 1907, why the motion should not be granted. The plaintiff is allowed until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, this December 3, 1907." Counsel for respondent in motion for new trial also entered an acknowledgment of service in these words: "Due and legal service of the foregoing motion acknowledged. Copy and all other and further service waived, this December 4, 1907." On the first Monday in February, 1908, the motion was not heard; but the judge on that day, in vacation, passed another order as follows: "Motion for new trial filed by J. W. Clements in above-stated case having been set for a hearing at Bainbridge, Ga., before me on the first Monday in February, 1908; and, it appearing that the official stenographer has been unable to write out a report of the evidence, it is ordered that said motion be continued to be heard before me at Bainbridge, Ga., on the 10th day of February, 1908, in vacation; ordered, further, that the movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and to amend the motion for a new trial. This February 3, 1908." At the time and place stated in the order last recited the motion for new trial came on to be heard, at which time counsel for respondent filed a motion to dismiss, as follows: "(1) Because the defendant failed to prepare and present to the court for approval a brief of the evidence within the time allowed by the rule nisi, nor has the court granted or signed any order allowing the defendant further time for same. (2) Because there does not appear in the rule nisi any authority or right to the defendant to prepare and present for approval a brief of the evidence, but same, which was drawn by defendant, makes it the duty of the plaintiff to prepare and present for approval a brief of the evidence, which is contrary to law; the plaintiff not being the movant. (3) Because movant's motion for new trial requires the plaintiff to show cause why a new trial should not be granted, setting the first Monday in February, 1907, which plaintiff could not do, as it was a matter of impossibility." Upon the motion to dismiss the judge passed the following order: "The within motion to dismiss read and considered. It appearing to the court that the facts set forth in the foregoing motion to dismiss are true and correct, it is therefore ordered that the motion to dismiss the motion for new trial be sustained, and the same is hereby ordered dismissed, this February 10, 1908." To this order the movant excepted. At the close of the assign-

ments of error the bill of exceptions contains the following recital: "Said erroneous order and judgment was prejudicial to the said J. W. Clements, for that on the 10th day of February, 1908, he did appear in accordance with the terms of the order of February 3d, and then and there presented to the judge for approval a true and correct brief of the evidence, to which counsel had previously in writing agreed, and the judge did approve said brief and order the same filed as a part of the record; and the said Clements did also present to the judge an amendment to the motion for new trial, which amendment the judge allowed and approved, and ordered the same filed."

Pottle & Glessner, for plaintiff in error.
Smith & Miller, for defendant in error.

ATKINSON, J. A motion for a new trial, together with a brief of the evidence, must be filed during the term of the court when the verdict was found, unless further time for filing the brief should be allowed by order. But this may be done. The order granted on December 3, 1907, may be construed as composed of two parts: First, a rule nisi to show cause why the new trial should not be granted; and, second, an order allowing time to prepare and present for approval a brief of the evidence. As to the latter feature it was provided that the plaintiff was allowed until the hearing, whenever it might be, to prepare and present for approval a brief of the evidence in said case. One ground of the motion to dismiss the motion for new trial was based on the use of the word "plaintiff" in this part of the order, instead of the word "movant," and it was urged that there did not appear in the order any authority or right given to the defendant to prepare and present for approval a brief of the evidence, which was contrary to law. On the face of the order it is apparent that the presiding judge intended to set the case for a hearing and to allow time for the preparation of the brief of evidence. It may reasonably be inferred that he intended to allow such time to the party who would need it, and upon whom rested the duty of preparing the brief, and that the word "plaintiff," as there used, was inadvertently used instead of the word "movant." It is hardly probable that he intended to grant time to a party on whom there was no obligation to file a brief of evidence.

It is true that it is stated that the defendant prepared the order, but the judge adopted it and signed it; and it would be an unreasonable construction to hold that the inadvertent use of the word "plaintiff" for "movant" should destroy the right and privilege which was evidently intended to be conferred. This construction is rendered more certain by reference to the order which was passed on February 3, 1908. It recited that the official stenographer had been unable to

write out a report of the evidence, and that the motion was continued to be heard on February 10, 1908, in vacation. It then proceeded: "Ordered, further, that the movant may have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and to amend the motion for a new trial." In this action the judge recognized the fact that the preparation and presentation of a brief of the evidence was the duty of the movant, and that it was such movant to whom he intended to grant an extension of time for that purpose. If it should be held that in the original order he allowed time for the preparation and presentation of the brief of evidence, but erroneously placed the burden of doing so upon the wrong party, it may well be doubted whether even this would make the order void, or would simply make it erroneous. Considered, therefore, from any standpoint, the mere misuse of the word "plaintiff," instead of "movant," was not such a fatal defect as to authorize or require the dismissal of the motion for new trial. Such an order is to be reasonably construed. *Gould v. Johnston*, 123 Ga. 765, 769, 51 S. E. 608, and cases cited.

Taking up, then, that part of the order granted by the judge which constituted the rule nisi proper, or order to show cause why a new trial should not be granted, was the effect of it to authorize a dismissal of the motion on February 10, 1908? It was contended that this order, which was granted on December 3, 1907, required the plaintiff in the action (respondent in the motion) to show cause why a new trial should not be granted, setting the hearing for the first Monday in February, 1907, which was an impossible date, being already long past, and that therefore the motion should be dismissed. There are two ways in which this rule nisi can be viewed—one that the date set for the hearing, the "first Monday in February, 1907," was a mere inadvertence, when 1908 was intended. This was no doubt the fact. The order was granted on December 3, 1907. It is a matter of common knowledge how difficult it is at the close of one year and the beginning of the next to at once change the figure of the calendar, so as to write the new year instead of the old one. This order was granted during the term of court, and set the hearing "in vacation." The judge unquestionably did not intend to set it for hearing in a vacation which had been past for a year. Plainly it was meant to be during the vacation which would follow the then present term of the court, and would include the first Monday in February, 1908. If the rule nisi be construed as in fact returnable on such mentioned date, there would be no further difficulty in the case, because on

that date further appropriate action was taken. But if we are constrained to treat the rule nisi as returnable on the first Monday in February, 1907, as the written order stands unchanged, then the effect would be that the presiding judge had granted a rule nisi, but had fixed an impossible date in vacation for the hearing. To authorize a hearing in vacation, but to set an impossible date therefor, would be equivalent to setting no date. In *Eady v. Atlantic Coast Line R. Co.*, 129 Ga. 363, 58 S. E. 895, where a motion for a new trial was duly filed during the term at which the verdict was rendered, and at that term the judge passed an order continuing the motion to an indefinite and unnamed day in vacation, but providing that if the motion was not previously heard in vacation it should stand on the docket to be heard during the next term of court, and no brief of evidence was filed with the motion, but in the order above referred to it was provided "that the movant have until the hearing, whenever it may be, to prepare and present the brief of evidence," and the brief of evidence was not filed until the next term after the order was passed, it was held that the court had jurisdiction at that term to approve the brief of evidence and to decide the motion on its merits. The result of fixing an impossible day in vacation for the hearing of a motion for a new trial would not be to cause its dismissal, but to cause it to stand until the next term of court, when it could be heard. If the order was not sufficient to authorize the judge to pass upon the motion, we do not see how it was any more sufficient to give him authority to dismiss it in vacation. If the error in fixing the date deprived him of jurisdiction to deal with the motion during the vacation, it equally deprived him of jurisdiction to dismiss it. See *Miller v. Thigpen*, 121 Ga. 475, 49 S. E. 286. At most, the rule nisi was irregular, not void; and irregularities in the form of such a rule have been held waivable. In fact, it has been held that, while a rule nisi ought to be granted, its absence may be waived, and will not wholly annul the proceedings had on the motion where such waiver has taken place. *McIntire v. Tyson*, 56 Ga. 468; *Ga. R. Co. v. Usry*, 82 Ga. 54, 8 S. E. 186, 14 Am. St. Rep. 140. If the presiding judge construed the order which was granted on December 3, 1907, as conferring no power upon him to act in vacation, he should not have proceeded further, but should have allowed the motion to stand until it could be dealt with at the next term of court. If he construed it as conferring authority upon him to act, he should not have dismissed it. See *Arrington v. Cronin*, 123 Ga. 870, 51 S. E. 708.

Judgment reversed. All the Justices concur.

(132 Ga. 376)

BATTLE v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of Georgia. April 14, 1909.)

1. ACTION (§ 50*)—MISJOINDER—PARTIES AND INTERESTS INVOLVED.

Where suit was brought against two railroad companies by an employé who had been discharged by one of them, in whose service he was at the time, and the petition showed no contract of employment with him binding both of them, and no such common action on their part as rendered both liable to him in relation to the subject-matter of the suit, and the matters charged against each were separate and independent, the petition was demurrable for misjoinder of parties and causes of action.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 50.*]

2. MASTER AND SERVANT (§ 39*)—ACTION BY EMPLOYÉ—CONTRACT OF EMPLOYMENT—PETITION.

The petition alleged that in the railroad service promotion is a matter of merit, and an employé's rank, in point of seniority and dignity, determines the kind and lucrativeness of the employment and the beneficial preferences to which he may be entitled while in the service; that the plaintiff had been in the service of one railroad company for a considerable length of time, and had been promoted to the position of a passenger conductor; that he and other employées were transferred by that company to another railroad company, with an agreement between the two companies that such employées were to receive and maintain the identical rank with the second company, with the same rights, privileges, and benefits to which they were entitled in the former employment; that on the faith of this he acquiesced in the transfer; and that the second company, after retaining the plaintiff in its employment for a considerable length of time, discontinued him "in the position and service to which he had been accustomed, and to which he had been entitled as aforesaid." *Held*, that the petition set forth no such contract of employment between the plaintiff and either company, and no such breach of contract, as would authorize a recovery; and it was demurrable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 39.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by C. L. Battle against the Atlantic Coast Line Railroad Company and the Southern Railway Company. Judgment for defendants, and plaintiff brings error. Affirmed.

C. L. Battle brought suit against the Atlantic Coast Line Railroad Company and the Southern Railway Company, alleging as follows: In the fall of 1899 the plaintiff entered the employment of the Savannah, Florida & Western Railway Company in the capacity of flagman and brakeman, running between Savannah and Jacksonville and Waycross and Gainesville. He continued in the employment of that company, and was promoted from time to time from the position of flagman and brakeman to that of extra freight conductor, freight conductor, and extra passenger conductor, and he continued in the employ-

ment of the company until it was purchased absorbed by, and consolidated with the Atlantic Coast Line Railroad Company, and thereafter remained in the employment of the latter company up to July 2, 1902, "and retained, while in the employment of said Coast Line Company, all the rights, privileges, and relative rank which he enjoyed while an employé of said Savannah, Florida & Western Railway Company." Promotion is a matter of merit, and an employé's rank in the service, in point of seniority and dignity, determines the kind and lucrativeness of employment and the beneficial preferences to which he may be entitled while in the service, and "in order to continue the beneficiary of the privileges and benefits inuring to an employé, by reason of his rank, that rank must be maintained at all times." On July 2, 1902, his rank with the Atlantic Coast Line Railroad Company was that of a passenger conductor, in which capacity he was entitled to a run on a passenger train south of Savannah, and to enjoy with that company due consideration for his employment with the Savannah, Florida & Western Railway Company. On the day mentioned he was transferred by the Atlantic Coast Line Railroad Company from its employment to the employment of the Southern Railway Company. This was done under an agreement and contract entered into between the Southern Railway Company and the Atlantic Coast Line Railroad Company and the plaintiff and other employées of the Atlantic Coast Line Railroad Company, which contract is evidenced by letters attached to the petition. Under the terms of that contract the Atlantic Coast Line Railroad Company was to transfer to the Southern Railway Company, and the latter was to receive, certain employées of the Atlantic Coast Line Railroad Company, among whom was plaintiff, which employées, when so transferred, were to have, receive, and maintain the identical rank, with the same rights, privileges, and benefits, to which they were entitled in their employment with the Atlantic Coast Line Railroad Company, and were to be employed by the Southern Railway Company in similar capacities to those occupied by them under the other company, and were in all respects to rank with the same degree of dignity and priority as though they had been employées of the Southern Railway Company for the same length of time and in the same capacity as regular employées of that company, "and were to receive the same consideration at the hands of the Southern Railway Company as their own employées." In the contract described the plaintiff was one of the parties, he was a party to the consideration, and the contract was entered into for his benefit and for the benefit of the defendant railway companies; and plaintiff had a legal and equitable interest in its performance, and it was

in reliance upon such an agreement that he consented to be transferred from the employment of the Atlantic Coast Line Railroad Company to the employment of the Southern Railway Company, in the capacity of a passenger conductor. He was employed by the Southern Railway Company on July 2, 1902, and was given "the rights to which his rank and priority entitled him" until June 27, 1903, when, for no cause whatever, he was relieved from duty by the Southern Railway Company as a passenger conductor, and his run was given to employees of that company whose service with it was of longer duration than his had been, "but whose rights in the line of promotion, as determined by the agreement made with your petitioner at the time he entered the service of the Southern Railway, were of lower rank than petitioner's." After he was relieved from duty, he protested both to the Southern Railway Company and to the Atlantic Coast Line Railroad Company against the violation of said contract; and thereafter, on March 23, 1904, the Southern Railway Company reinstated him in his former capacity and in his regular run. After he was relieved from service, and before he was reinstated, he presented himself to the Atlantic Coast Line Railroad Company for reinstatement in their service, at the same rank and with the same degree of priority to which he would have been entitled, had he steadily remained in the employment of that company and had not permitted himself to be transferred to the Southern Railway Company, under the contract, agreement, and guaranty of the Atlantic Coast Line Railroad Company with plaintiff that his rights, in all respects, would be protected by the Southern Railway Company, the same as though he had continued in the employment of the other company; and the Atlantic Coast Line Railroad Company failed and refused to receive him back upon such terms. From March 23, 1904, the date of his reinstatement by the Southern Railway Company, to April 9, 1907, "he was given all his rights and privileges, in accordance with his rank and right of seniority, and his rights, during that period of time, were at all times recognized in accordance with the contract made on July 2, 1902"; but on April 9, 1907, the Southern Railway Company broke its contract and discontinued plaintiff "in the position and service to which he had been accustomed, and to which he was entitled as aforesaid." His services to the Southern Railway Company were at all times satisfactory, he discharged his duties faithfully and well, and no cause whatever exists, as far as efficiency and service are concerned, to authorize or warrant his discontinuance in the passenger service and in his regular run. Subsequently to April 9, 1907, he called upon the Atlantic Coast Line Railroad Company to carry out in good faith with him the contract and agreement under which he was transferred to the employment

of the Southern Railway Company, and, to that end, to institute, in his behalf, a suit against the Southern Railway Company, calling upon it "to live up to this contract and agreement with the Atlantic Coast Line Railroad Company and your petitioner." This request was declined. Plaintiff's seniority and rank as a passenger conductor is a valuable asset to him, and is a means whereby he is enabled to earn a livelihood and the salary paid to passenger conductors on the run south of Savannah. The damage he has sustained consists in the loss of time from June 28, 1903, to March 23, 1904, at a salary of \$100 per month, and lost time from April 9, 1907, to the commencement of the suit, at a salary of \$100 per month, "and for such further lost time as he may incur in the future," and, "further, in the loss of his rank of seniority in the railway service, which said rank is a valuable asset to a railroad man, as upon it depends his salary, the nature of his work, and the desirability of the work assigned to him," and, still further, because his advanced years makes it difficult for him to start life anew in the railway service, as the opportunities are not open to a man of his years as to a younger man, and the salary which it would be possible for him to earn, starting anew, would be considerably less than that which he is now entitled to earn, by reason of his rank and seniority, and the work in starting anew would also be more arduous and hazardous, "all of which said items of damage were in the contemplation of the parties at the time said contract was made."

Plaintiff laid his damages at \$1,000. Attached to the petition were copies of the three letters referred to in it as evidencing the contract. They are as follows:

"Savannah, Ga., July 20, 1903.

"Mr. C. L. Battle, Bartow, Ga. Classification of Employees—Plant System Employees Transferred to Southern Railway. Dear Sir: Replying to your letter of the 18th, beg to state that upon receipt of your first letter I wrote General Manager Ackert of the Southern Railway, explaining to him fully the conditions under which you and other Plant System employees were transferred to the Southern Railway; that is, that it was understood their rights would be protected. I have not yet heard from Mr. Ackert, but as soon as I do I will advise you. Very truly yours, [Signed] W. B. Denham, General Superintendent."

"Savannah, Ga., July 31, 1903.

"Mr. C. H. Ackert, General Manager Southern Railway, Washington, D. C. Classification of Employees—Plant System Employees Transferred to Southern Railway. Dear Sir: I have your favor of the 27th, in reply to mine of the 13th. I beg to hand you herewith copy of letter from your superintendent, Mr. Wells, regarding the rights of the men we turned over to your company on July 1, 1902. It was on my guaranty that

they would always have their rights south of Savannah that they agreed to go to the Southern Railway, and you promised me yourself, in your car, in the presence of Mr. Dugan, that if you took these men in your service you would always see that their rights were maintained. Of course, the men feel that they have not been treated right, and I cannot help but agree with them. Yours very truly, [Signed] W. B. Denham, General Superintendent."

"Savannah, Ga., September 21, 1903.

"Mr. C. L. Battle, Bartow, Ga. Classification of Employes—Employes Transferred to Southern Railway. Dear Sir: Your letter of the 18th inst. received, and it certainly would afford me pleasure to do anything I could with Mr. Ackert, or the Southern Railway people, to have them carry out their agreement with me regarding the transfer of you men to the Southern; but you can readily understand that I have no authority to force Mr. Ackert to do this. He made the agreement with me in good faith, and I transferred you men to him with that understanding; but, if he fails to carry out the agreement, there is no way in the world that I can force him to do it. Now, as to allowing you to take your rights with the Atlantic Coast Line that you had previous to going with the Southern, this is a matter that will have to be decided by the men. Put yourself in the position of one of the Atlantic Coast Line conductors, and suppose that I was to place you back on the Atlantic Coast Line, where you were previous to going with the Southern; what would you think about it? You would say right away that I had no right to do it; that these men left the Atlantic Coast Line, and if they want to come back they should come back as new men. Now, I will say to you that if all of the men are willing that you should be transferred back to the Atlantic Coast Line, with the same rights that you had previous to going to the Southern Railway, I am perfectly willing for you to come back; but I do not think I have the authority to put you ahead of these men, and I have no doubt but that you will agree with us. Yours very truly, [Signed] W. B. Denham, General Superintendent."

Each of the defendants demurred to the petition generally and specially. Among the grounds of the demurrer of the Atlantic Coast Line Railroad Company were the following: (1) The petition does not show with sufficient fullness or certainty the terms of the contract alleged to have been made between the defendant railroad companies. (2) It does not sufficiently describe the employes who were the subjects of the contract, nor show what class of employes was the subject thereof. (3) It does not show the contract of employment between the plaintiff and the Atlantic Coast Line Railroad Company, in existence at the time of the transfer to the Southern Railway Company. (4) There is a

misjoinder of parties and causes of action. The petition shows no community of interest between the defendants. It shows no joint contract between defendants and plaintiff. It shows no right to recover against the defendants jointly. The rights claimed by plaintiff are against the defendants individually and severally, and not jointly. Plaintiff seeks damages because of a failure of the Southern Railway Company to continue him in its employment, in which breach of duty, if any, the other defendant took no part and is not concerned. He seeks damages for the time he has been unemployed by the defendant, which damages, if any, were not caused by the Southern Railway Company. He seeks future damages because of the failure of the Atlantic Coast Line Railroad Company to employ him; and such damages, if any, the Southern Railway Company did not cause. The demurrer of the Southern Railway Company was substantially the same, except that the fourth ground stated that the plaintiff sought to recover damages for the time he had been unemployed by the Southern Railway Company, which were not caused by the Atlantic Coast Line Railroad Company, and for future damages because of the failure of the Southern Railway Company to employ him, which the Atlantic Coast Line Railroad Company did not cause.

The court sustained the demurrer and dismissed the action. The plaintiff excepted.

Oliver & Oliver, for plaintiff in error. Osborne & Lawrence, Garrard & Meldrim, and Shelby Myrick, for defendants in error.

LUMPKIN, J. (after stating the facts as above). The petition of the plaintiff was properly dismissed on demurrer, for two reasons: First. Because it sought to join separate and independent parties and causes of action, as to both of which there was a misjoinder. No breach of a common contract with or duty toward the plaintiff on the part of both defendants was shown. It was claimed that the Atlantic Coast Line Railroad Company had damaged the plaintiff in one way, and that the Southern Railway Company had damaged him in another, but not that there was any common violation of contract or duty by both of them jointly, causing damage to him. Second. No cause of action was set out against either defendant. While the petition made frequent references to the plaintiff's "rights" of priority in the line of promotion in his work, it failed to show that there was any such legal right, or exactly what it was, or how it arose. It showed no contract on the part of any of the companies mentioned, made with him, to employ him for any definite length of time, or not to discharge him except under certain specified circumstances, or that it would promote him in any particular manner. He was first in the employment of the Savannah, Florida & West-

ern Railway Company, and it was alleged that, when that road was purchased by and absorbed and consolidated with the Atlantic Coast Line Railroad Company, he remained in the employment of the latter company, and retained "all the rights, privileges, and relative rank which he enjoyed while an employé of the said Savannah, Florida & Western Railway Company." But it was not shown that he had any contract with the first company which gave him any definite rights, privileges, or rank, or that he had any contract with the second company on that subject. So, also, it was alleged that, when he was transferred to the employment of the Southern Railway Company, he retained the same rights, privileges, and benefits to which he was entitled in his employment with the Atlantic Coast Line Railroad Company; but it was not alleged that there was any contract between either of the companies and him, by which he was employed for any definite time, or so as not to be subject to discharge or change in position. There were some general statements that in the railroad service promotion is a matter of merit, and that "an employé's rank in the service, in point of seniority and dignity, determines the kind and lucrativeness of employment and the beneficial preferences to which he may be entitled while in the service." But such general allegations can furnish no ground for a recovery of damages because of the discharge of the plaintiff. This is not a question of expediency, or even of ethical propriety, but of law; and the plaintiff's petition showed no infraction of any legal duty which authorized a recovery by him.

Judgment affirmed. All the Justices concur.

(132 Ga. 501)

LOUISVILLE & N. R. CO. et al. v. VENABLE.

(Supreme Court of Georgia. April 19, 1909.)

1. CARRIERS (§ 158*)—INJURY TO FREIGHT—DAMAGES—LIMITING LIABILITY—NEGLIGENCE.

Under the evidence in this case it could not be held as matter of law that the shippers of the stone which was damaged were limited in their recovery to an amount stated in the bills of lading, if such damage resulted from negligence on the part of the carrier; and it being admitted on the trial that there was no issue in the case, as presented by the evidence, except the construction of the bills of lading introduced, there was no error in directing a verdict for the plaintiff for the amount admitted by the defendant to be due, if the court's construction of the bill of lading was correct. On the general subject, see *Georgia So. & Fla. Ry. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807; *Central of Ga. Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170 (4), and cases cited.

(a) There was no exception or contention that the court should have submitted to the jury as a question of fact whether there was a bona

fide effort to value the stone shipped and express such value in the bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 664; Dec. Dig. § 158.*]

2. CARRIERS (§ 158*)—SHIPMENT OF FREIGHT—AMOUNT OF DAMAGES.

The more especially did the court not err "in not holding that the plaintiffs were limited in recovery of damages to the value of the stone as set out in the bills of lading received by the plaintiffs from the defendants," when the evidence showed that some of the bills of lading expressed a value of 20 cents per cubic foot, and others 40 cents per cubic foot, which the parol testimony stated was an erroneous entry, and should have been 20 cents, and some of them expressed no valuation at all.

[Ed. Note.—For other cases, see *Carriers*, Dec.-Dig. § 158.*]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by S. H. Venable against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Jos. B. & Bryan Cumming and M. A. Candler, for plaintiffs in error. James L. Key, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 535)

SPENCER v. SCHUMAN.

(Supreme Court of Georgia. April 19, 1909.)

1. MORTGAGES (§ 37*)—EQUITABLE MORTGAGE—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

A deed absolute on its face may be shown by parol evidence to have been intended to convey title only for the purpose of securing a debt, where the grantee has not taken possession of the property. *Aakew v. Thompson*, 129 Ga. 325, 58 S. E. 854.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 98; Dec. Dig. § 37.*]

2. MORTGAGES (§ 37*)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

Where one brought a statutory complaint for land, and relied for a recovery upon title conveyed to him by the defendant by a deed claimed by the plaintiff to be absolute, and the defendant filed a defense, and offered testimony in support thereof, that the deed was given to secure a debt which had been fully paid before the action was brought, it was not error upon the trial to admit in evidence, over the plaintiff's objections, the following testimony of a witness for the defendant: "I asked Spencer [plaintiff] if he was not to make a deed back to Schuman's [defendant's] wife when the money was paid back. At first he laughed, and did not answer, and then said 'Yes.'" Such evidence was admissible as an admission by the plaintiff to illustrate the issue to be tried, and was not subject to the objection made thereto that it was irrelevant and incompetent, and there were no pleadings to authorize its admission.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 101; Dec. Dig. § 37.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO CASE.

The record not disclosing that any of the pleadings in the case were verified, or otherwise

sworn to, it does not appear that the court committed any error in refusing to give to the jury the following requested instructions: "I charge you that you have a right to consider the statements made in sworn pleadings in the case, in weighing the evidence of the party who swore to such pleadings."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.*]

4. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and the court did not abuse his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Liberty County; Paul E. Seabrook, Judge.

Action by C. S. Spencer against W. E. Schuman. Judgment for defendant, and plaintiff brings error. Affirmed.

Stubbs & Chapman, for plaintiff in error.
A. S. Way, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 484)

WOOD v. WOOD.

(Supreme Court of Georgia. April 19, 1909.)

1. NEW TRIAL (§ 154*)—MOTION—RULE NISI—SERVICE—TIME FOR.

Where, under the provisions of Civ. Code 1895, § 5484, an application for a new trial is duly made, and a rule nisi issued thereon, and no time is fixed for the service thereof, and service on the respondent is perfected in ample time to enable his counsel to prepare for the hearing of the motion on the day fixed by the rule nisi, the motion is not subject to dismissal because such service was not made within 30 days from the date of the rendition of the verdict, notwithstanding the term of the court at which the verdict was rendered continued longer than 30 days. Gould v. Johnston, 123 Ga. 765, 51 S. E. 608.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 318; Dec. Dig. § 154.*]

2. NEW TRIAL (§ 182*)—MOTION—BRIEF OF EVIDENCE—TIME FOR FILING.

Where, upon an application for a new trial duly made, an order was passed providing that the hearing of such motion be had on a specific day, "or so soon as it may be reached in its order on the motion docket, and that movant's counsel have until and during the hearing of its case to make out and prepare a brief of the evidence," the court had authority, on or before the day of the hearing, to approve and allow filed a brief of the evidence; and where such brief was approved and filed after the expiration of 80 days from the rendition of the verdict, but before such hearing, the court properly overruled a motion to dismiss the motion for new trial on the ground that the brief of evidence was not filed within 30 days from the date of the verdict, although the term of the court at which the verdict was rendered continued longer than 30 days. Cross v. Coffin-Fletcher Packing Co., 123 Ga. 817, 51 S. E. 704; Gould v. Johnston, supra.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 275; Dec. Dig. § 182.*]

3. NEW TRIAL PROPERLY GRANTED.

This was the first grant of a new trial, and under the facts appearing in the record there

was no abuse of discretion in granting a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. J. Wood and Capitola L. Wood. From the judgment, W. J. Wood brings error. Affirmed.

Rosser & Brandon, for plaintiff in error.
J. S. James and C. P. Goree, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 455)

ADAMS v. PHILLIPS.

(Supreme Court of Georgia. April 17, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 129*)—RECOVERY OF LAND—ACTION BY ADMINISTRATOR.

Where suit was brought by an administrator to recover certain land, and it appeared from the evidence introduced by the plaintiff that his intestate died in possession, and that afterwards a son of the decedent took possession with his family, and died while residing there, and that the widow of such son, who remained in possession after his death, was the defendant in the action, but there was no evidence that the administrator had ever been in possession, or that any order for sale of the land had been granted, or that there was any necessity for him to recover it in order to pay debts or distribute the estate of his intestate, a nonsuit was properly granted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 533; Dec. Dig. § 129.*]

(Syllabus by the Court.)

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action by J. L. Adams, administrator, against Nancy Phillips. Judgment for defendant, and plaintiff brings error. Affirmed.

J. B. Gelger, for plaintiff in error. Graham & Graham and W. M. Lewis, for defendant in error.

ATKINSON, J. In an action of complaint for land the plaintiff, as administrator, was nonsuited. On the trial his evidence showed that the intestate died in possession of the land, and that the defendant was a widow of a deceased son of plaintiff's intestate, who survived the intestate. The evidence did not show whether the son died testate or intestate. At the time of the death of the son (defendant's husband), she was living with him on the property in dispute. It was not shown that the plaintiff, as administrator, had obtained an order to sell; nor was it otherwise shown that it was necessary for the administrator to have possession of the land in order to pay debts or make distribution among the heirs, nor was

It shown that the administrator had ever been in possession and had lost it.

The wife was an heir at law of her deceased husband. Civ. Code 1895, § 3355. There being no evidence that the husband left a will, it is presumed that he died intestate. *Miller v. Speight*, 61 Ga. 460; 14 Cyc. 20. As the defendant was heir to a son of plaintiff's intestate, she had an interest in the land, acquired under the laws of inheritance. That interest was not antagonistic to the title of the plaintiff's intestate, but was derived through it. In order to have recovered from the defendant's husband, it would have been incumbent on the plaintiff to show that he had an order to sell, properly granted, or that it was necessary for him to have possession for the purpose of distribution among the heirs, or for the purpose of paying debts, or that the land had been in his possession and without his consent was at the time of the trial held by the defendant. *Dixon v. Rogers*, 110 Ga. 509, 35 S. E. 781; *Holt v. Anderson*, 98 Ga. 220, 25 S. E. 496.

Civ. Code 1895, § 3358, provides: "The administrator may recover possession of any part of the estate from the heirs at law, or purchasers from them; but in order to recover lands, it is necessary for him to show upon the trial, either that the property sued for has been in his possession, and without his consent is now held by the defendant, or that it is necessary for him to have possession for the purpose of paying the debts or making a proper distribution. An order for sale or distribution, granted by the ordinary after notice to the defendant, shall be conclusive evidence of either fact." While this section in terms refers to the right of an administrator to recover possession of any part of the estate "from the heirs at law or purchasers from them," there is no reason why an heir of an heir should in this respect stand upon a different footing from an original heir or a purchaser from him. In either event the title is held derivatively from the estate which the administrator is seeking to administer, and the right of the administrator is only in a representative capacity. For the reasons indicated there was no error in granting a nonsuit.

Judgment affirmed. All the Justices concur.

(132 Ga. 426)

ROWE v. SPENCER.

(Supreme Court of Georgia. April 15, 1909.)

1. SALES (§ 145*)—BILL OF SALE—PLACE OF EXECUTION—PRESUMPTION.

In the absence of a recital in a bill of sale that it was executed elsewhere, the presumption is that the situs of its execution was the place named in the caption of the instrument.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 145.*]

2. EVIDENCE (§ 83*)—PRESUMPTIONS—OFFICIAL ACTS.

Unless it appears from the face of the paper that the officer before whom it was officially attested was without the territorial limits of his official jurisdiction in attesting the same, it will be presumed that he was acting within such jurisdiction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. SALES (§ 145*)—BILL OF SALE—PLACE OF EXECUTION.

Where a bill of sale is attested by a justice of the peace and notary public whose official signature does not disclose the county of his appointment, and the record of the bill of sale is attacked by evidence showing that the attesting official was not an officer of the county named in the caption of the bill of sale, it is competent to prove, in aid of the record, that the paper was actually executed in the county where the attesting officer held his commission.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 145.*]

4. SALES (§ 473*)—CONDITIONAL SALES—RIGHTS OF THIRD PERSONS—NOTICE.

The title of one who buys and pays for personal property held by his vendor under a conditional contract of sale, but which has never been recorded, and of which he has no notice, is unaffected by such conditional contract of sale; and this is true, although subsequently thereto he may have notice of the contract of conditional sale within the time the law gives for its record, where the bill of sale is not properly recorded within such time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377-1390; Dec. Dig. § 473.*]

5. TRIAL (§ 296*)—HARMLESS ERROR—INSTRUCTIONS.

Where an erroneous principle of law is charged as to a material issue, the error is not rendered harmless by a subsequent statement of the correct principle, unless the judge expressly calls the attention of the jury to the incorrect statement and retracts it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; Charles H. Brand, Judge.

Trover by E. A. Spencer against W. H. Rowe. Judgment for plaintiff, and defendant brings error. Reversed.

F. F. Juhan, J. V. Pool, and J. A. Perry, for plaintiff in error. E. O. Dobbs and I. L. Oakes, for defendant in error.

EVANS, P. J. E. A. Spencer sold a pair of mules to C. W. Humphrey, reserving title in the purchase-money notes given therefor. These notes, with retention of title, were recorded in Gwinnett county within 30 days of their execution. The defendant, W. H. Rowe, purchased the mules from Humphrey before the record of the conditional sale. The original vendor brought an action of trover against Rowe to recover the mules or their value, which resulted in a verdict for the plaintiff. The court refused to set aside the verdict on motion for a new trial, and the defendant excepted.

1-3. The notes, with retention of title, were headed, "Flowery Branch, Ga., June 17, 1906," and purported to have been signed before "J. P. Neese, N. P. & J. P." The court allowed the attesting magistrate to testify that the paper was executed at Buford, in Gwinnett county, over objection that this evidence was incompetent, as contradicting the paper as to the place of its execution. Flowery Branch appearing by the recitals in the instrument to be in Georgia, the courts will take judicial cognizance of the fact that it is an incorporated town in Hall county. It appeared allunde that the attesting magistrate was a duly commissioned officer of Gwinnett county. In the absence of a recital in the bill of sale that it was executed elsewhere, the presumption is that the situs of its execution was the place named in the caption of the instrument. *Doe ex dem. Truluck v. Peebles*, 1 Ga. 3. The law will not impute malpractice in the officer by presuming that he would attest a paper beyond his territorial jurisdiction; and where there is nothing in the paper to indicate that the attesting magistrate is an officer of a county different from that stated in the caption, the clerk of the superior court would have the right to act upon the presumption as to the proper execution of the paper, and record the same. The rule is different where the attesting magistrate discloses in his official signature that he is acting beyond the scope of his jurisdiction.

In the case of *Allgood v. State*, 87 Ga. 668, 13 S. E. 569, the defendant was convicted of the crime of forgery. The instrument alleged to have been forged was a deed. It was headed, "Georgia, Carroll County," and purported to have been attested by A. J. Hansell and by J. H. Jones, a notary public of Fulton county, Ga. It was recorded in Carroll county. A certified copy of the record was offered in evidence, and this court ruled that it was incompetent, for the reason that the clerk of the superior court of Carroll county had no authority to record the deed in that county. The deed in that case appeared upon its face to have been attested by a notary public of Fulton county, who had no authority to witness a deed executed in Carroll county, where the deed was presumptively executed. The bill of sale in the present case was apparently properly executed; that is to say, it was prima facie executed at Flowery Branch, Ga., in Hall county, in the presence of a magistrate who, until the contrary was made to appear, is presumed to hold his appointment in Hall county. On the trial it appeared that the magistrate was actually an officer of Gwinnett, and that the paper was actually executed at Buford, in Gwinnett county. It was perfectly competent to prove these facts; for the presumption of the situs of the execution of the paper, and of the authority of the officer to witness it, are mere-

ly prima facie. But when a paper is prima facie entitled to record, and is recorded, and it is undertaken to overcome the presumption which the law indulges to establish its prima facie right to registration, it is competent, in aid of the record, to show that it was executed in the presence of an officer who had authority to attest the paper at the place of its actual execution, notwithstanding the situs of its execution may be at a place other than that stated in the caption of the instrument.

4. There was a sharp conflict in the evidence as to the domicile of Humphrey at the time of the execution, and also at the time of the record, of the conditional bill of sale. The defendant offered proof tending to show that he was a resident of Fulton county during this period, and the plaintiff submitted proof tending to show that he was a resident of Gwinnett county. It appeared from the evidence that after the purchase of the mules, but before the record of the conditional bill of sale, Humphrey's vendee had actual knowledge of the conditional bill of sale; but he did not have such knowledge at the time of the purchase. Exception is taken to the following charge: "If you believe from the evidence in this case that the plaintiff owned the mules sued for and sold them to Charlie Humphrey, and at the time he sold them and delivered them to Charlie Humphrey he took this conditional bill of sale sued on, by which he reserved the title to said mules until the balance of the purchase money was paid, and if you believe from the evidence that subsequent to that time, but within 30 days, Charlie Humphrey sold or traded the mules to the defendant in this case, and that the defendant had actual notice that the title to said mules was in the plaintiff within 30 days from the time plaintiff sold to Humphrey, and the defendant had this actual notice while he was in possession of the mules, the plaintiff in this case would be entitled to recover, although you may not believe that Charlie Humphrey was not a resident of Gwinnett county at the time, and the conditional sale was never properly recorded, and although you may further believe that defendant had such actual notice after he bought or traded for the mules, provided it was within 30 days from the time plaintiff sold the mules to Charlie Humphrey."

This charge was erroneous. A conditional sale, in order to affect innocent third parties, must be in writing, and recorded within 30 days from its date in the county of the residence of the maker. If not so recorded, purchasers of the property from the vendee, without notice of the retention of title by the vendor, will get a good title. If properly recorded within 30 days, one who purchases from the vendee before actual record buys subject to the rights of the original vendor

of the property. It is only where such paper is properly recorded within 30 days from its execution that the constructive notice which arises from its record relates back to the time of its execution. The vice of the charge is the declaration that a bona fide purchaser of property incumbered by an unrecorded conditional bill of sale takes subject to the incumbrance if he subsequently has notice of it within the time allowed for record, although the incumbrance is not recorded within the statutory period for record. *Singer Mfg. Co. v. Bradfield*, 114 Ga. 303, 40 S. E. 271.

5. Counsel for defendant in error insists that this instruction, if erroneous, is cured by a subsequent charge that "if Rowe did not have actual notice when he bought, and Humphrey lived at the time in Fulton county, the plaintiff could not prevail." Where an erroneous rule is charged as to a material issue, the error is not rendered harmless by the subsequent statement, or even reiteration, of the correct rule, unless the judge expressly calls the attention of the jury to the incorrect statement and retracts it. *Brush Electric Co. v. Wells*, 103 Ga. 512, 30 S. E. 533; *Augusta Ry. Co. v. Smith*, 121 Ga. 32, 48 S. E. 681.

Judgment reversed. All the Justices concur.

(132 Ga. 437)

ODUM v. ODUM.

(Supreme Court of Georgia. April 16, 1909.)

1. DIVORCE (§ 202*)—APPLICATION FOR TEMPORARY ALIMONY.

Where a husband brought suit for divorce in a county which was not the county of the residence of his wife, and no service was made before the term of the court to which suit was brought, and after such term, and before the next term, the wife filed an answer, in which she pleaded to the merits, and on the back of the petition signed a writing wherein there was an acknowledgment of due and legal service of the petition and process and a waiver of copies thereof, *held*, while such application was pending, the wife had the right to file an application for temporary alimony and have a hearing thereon.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 593; Dec. Dig. § 202.*]

2. DIVORCE (§ 201*)—TEMPORARY ALIMONY.

The court did not abuse its discretion in deciding that the wife was entitled to temporary alimony, and in awarding to her the amount specified in its order.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 591, 592; Dec. Dig. § 201.*]

(Syllabus by the Court.)

Error from Superior Court, Wayne County; T. A. Parker, Judge.

Action by Walter Odum against Lula Odum for divorce. From an order granting a temporary alimony, plaintiff brings error. Affirmed.

J. R. Thomas, for plaintiff in error. L. L. Thomas and Hines & Jordan, for defendant in error.

HOLDEN, J. The plaintiff filed his petition against his wife for a divorce, in Wayne superior court on the 6th day of February, 1908; and process was issued, requiring the defendant to appear at the March term, 1908. No service by the sheriff of this petition and process was made; but on the 16th day of May, 1908, on the back of the petition, the defendant, by her attorney at law, signed an acknowledgment of due and legal service of the petition and process, a waiver of a copy thereof and of all other and further service, and also a waiver of the jurisdiction of the court, and agreed that the succeeding term of Wayne superior court be made the trial term of the case. On the 19th day of May, 1908, the wife filed an answer to the petition, wherein, among other allegations, she averred that the acts of adultery charged against her in the petition were untrue. On the 22d day of August, 1908, the wife filed her petition for temporary alimony and counsel fees, and asked an injunction against the defendant disposing of any of his property. Service of this petition for temporary alimony was acknowledged by the husband, and upon the hearing thereof the court overruled the motion of the husband to dismiss the application on the ground that the wife alleged she was a resident of Tatnall county, Ga., and not a resident of Wayne county, where his suit for divorce was filed, which he alleged was a nullity. He contended that the suit for divorce filed by him was void, and that the proceedings for temporary alimony could not be maintained. This motion the court overruled, and, upon the hearing of the petition for temporary alimony, awarded alimony and attorney's fees to the wife.

The answer and the affidavit of the wife appear to have been made in Tatnall county, and she stated that she waived jurisdiction of Wayne superior court. This latter fact indicates she did not reside in Wayne county, where the husband's suit for divorce was filed. Counsel for both parties in this case seem to proceed on the idea that it is an undeniable fact that the wife resided in Tatnall county at the time of the institution in Wayne county of the suit for a divorce by her husband. If she resided in Tatnall county at the time the suit for divorce was filed, could she, under the facts of this case, maintain an application for temporary alimony? In Civ. Code 1895, § 4981, it is provided: "Appearance and pleading shall be a waiver of all irregularities of the process, or of the absence of process, and the service thereof." After the March term, to which the suit was brought, and before the trial term, the wife acknowledged service on the suit and filed an answer thereto. It is true that no service

of the petition and process was made before the appearance term; but, when the defendant filed a plea to the merits, this was a waiver of service, and the case stood in the same position as if the defendant had been properly served. It is true that in a suit for divorce jurisdiction of the court cannot be waived, so as to permit a suit for divorce to be brought in a county other than that of the residence of the defendant. Code 1895, § 10; *Watts v. Watts*, 130 Ga. 683, 61 S. E. 593. It is also true that an application for temporary alimony will not lie unless there is a suit for divorce or for permanent alimony pending. Will the husband be permitted to say there was no suit for a divorce pending at the time of the application of the wife for temporary alimony?

While his application for divorce was on file, the wife had the right to file an answer thereto. If either party stated in their pleadings that the defendant was not a resident of the county in which suit was filed, the other party could controvert this allegation and thus make and have tried an issue on the question of jurisdiction. She could have appeared and filed a plea to the jurisdiction, and he could not say there was no suit pending against her until the court sustained the plea and dismissed the suit, or it was voluntarily dismissed by the husband. Pending an application by the husband for a divorce in a county wherein the wife did not reside when the application was filed, the court would have the right to award her counsel fees as a part of her temporary alimony for the purpose of contesting the issue on the question of jurisdiction, and have it properly tried and determined, and to award an amount for her support pending the final determination of such issue. The fact that the court had no jurisdiction might be the only ground on which a wife might desire to resist an application for divorce. She certainly would have the right to make the issue as to whether the court had jurisdiction as long as the husband kept his application for divorce on file; and she would have the right to apply for temporary alimony for her support and for counsel fees to pay her attorney for representing her in the litigation brought on by the application for divorce by her husband, even though the court had no jurisdiction to hear the application for divorce because brought in the county wherein the defendant did not reside. When the husband files an application for divorce in a county wherein the wife does not reside, as long as such application is pending she has the right to apply for temporary alimony and attorney's fees, whether any question of jurisdiction is or is not made by either party. If the husband files an application for divorce in a county having no jurisdiction to grant him a divorce, or on grounds on their face insufficient to authorize a divorce,

the fact that the wife does not plead the want of jurisdiction in the court, or the insufficiency of the grounds alleged, would not defeat her right to apply for temporary alimony and counsel fees as long as the application for divorce was on file in the court. The court committed no error in not dismissing the application for temporary alimony.

2. Under the evidence submitted at the hearing, the court did not abuse its discretion in holding that the wife was entitled to alimony and attorney's fees, nor in awarding to her the amount specified in its order.

Judgment affirmed. All the Justices concur.

(132 Ga. 422)

STEWART & CO. v. EXUM.

(Supreme Court of Georgia. April 15, 1909.)

1. MASTER AND SERVANT (§ 6*)—EVIDENCE OF EMPLOYMENT—SIMILAR CONTRACTS WITH OTHERS.

In an action for a breach of contract of employment, where one of the defendants had testified directly that the contract with the plaintiff was in writing, contained in a letter written and mailed to the plaintiff, but which the latter denied receiving, contending that the contract was in parol, it was immaterial whether the witness had made contracts with others for similar services by parol, or not; and there was no error in excluding a statement that he had never made a contract with any man to buy cotton for him, except in writing.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 6.*]

2. MASTER AND SERVANT (§ 6*)—WRONGFUL DISCHARGE—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where an employer consented for his employé to perform some small work for another during the continuance of the employment, it was not competent for him to testify that this consent was based on his idea of what were the terms of his contract with his employé; such idea or basis of consent not being communicated to the employé, or known to him.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 6.*]

3. MASTER AND SERVANT (§§ 21, 44*)—RIGHT TO TERMINATE CONTRACT—SATISFACTION OF EMPLOYEE—ACTIONS—INSTRUCTIONS.

If the contract of employment included a provision that the service should continue only so long as it was satisfactory to the employer, the latter might terminate the employment upon becoming dissatisfied.

(a) Where, in a suit by a discharged employé to recover for such discharge as being unlawful during a certain period fixed by the contract, the employer pleaded and introduced evidence to show that it was agreed that the continuance of the employment should be dependent upon the satisfaction of the employer, it was error to practically exclude such issue from the jury, and to instruct them, in effect, that the employer could not legally discharge the employé before the expiration of his term of employment, except for good and sufficient cause, "and the jury are the exclusive judges of what is a good and sufficient cause, basing their judgment upon the evidence in the case," and also that the employer would be justified in discharging the employé for "such incompetent and inefficient

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

services or misconduct of the plaintiff as would justify them in so doing."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 20, 21; Dec. Dig. §§ 21, 44.*]

4. MOTION FOR NEW TRIAL—GROUNDS.

In the light of the note appended by the judge to some of the grounds of the motion for a new trial, and of the writing off from the recovery of certain items thereof, the other grounds of the motion not herein specifically mentioned do not present any error requiring a reversal.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; George T. Cann, Judge.

Action by J. B. Exum against Stewart & Co. Judgment for plaintiff, and defendants bring error. Reversed.

E. S. Elliott, for plaintiffs in error. Alexander & Edwards, for defendant in error.

LUMPKIN, J. J. B. Exum brought suit against Stewart & Co., alleging that the defendants had employed him on or about August 25, 1905, to act as a cotton buyer for them, with his headquarters at the town of Lyons; that his employment was to continue for four months, and his compensation was to be a salary of \$50 per month and a commission of 15 cents per bale upon each bale purchased; that he faithfully performed his duties until on or about the 6th of October, when the defendants ceased to use his services and without legal justification abandoned their contract. The defendants admitted that they had employed the plaintiff, but denied the terms of the employment as stated by him. They alleged that they negotiated with him orally in regard to the employment, but that the contract was reduced to writing; that he was not to receive a salary, but 15 cents per bale as commission on each bale of cotton purchased by him; that the continuance of the employment was to be only as long as the services of the plaintiff were satisfactory to the defendants, and not for four months. They denied that he faithfully performed his duties but alleged that he was ignorant, inefficient, and incompetent; that his work was full of errors costly to them; that on October 11th, they discontinued the employment under the terms of the contract, because his services were not satisfactory, and also because he failed to reimburse them for the amount lost by them on account of his errors in the transaction of their business. They sought to recoup such alleged losses. The evidence was conflicting. The jury found for the plaintiff \$207.27. The defendants moved for a new trial, which was refused upon the writing off of certain items by the plaintiff, and the defendants excepted.

1. The court refused to allow one of the defendants to testify that "I have never made a contract with any man to buy cotton for

me, except in writing." This was complained of as error. The witness had testified positively that this particular contract was in writing, and other evidence had been introduced on that subject. It was immaterial for him to state what contracts he had made with others. Sometimes it is competent to show that a particular thing was done, by showing that the person claiming to have done it always so acted under certain circumstances; as, for instance, if one should testify that he wrote a letter, stamped it, and gave it to his clerk to mail, although the clerk might not remember the particular letter, he might testify that he mailed every letter which was given to him by his employer. Proof of custom or practice may sometimes be admissible to throw light on questions of detail or particular acts falling within the custom; but, under the testimony in this case, there was no error in rejecting the evidence offered, and doing so will not require a new trial.

2. During the time involved in the controversy the defendants consented for the plaintiffs to perform some other work, taking a small part of his time. One of them offered to testify that this consent was based on the construction placed on the contract by the defendants, namely, that the defendants had no objection to the plaintiff's going into other business if they were paying him 15 cents per bale for cotton as commission; but they would have objected if they were paying him \$50 per month and also 15 cents per bale. This was properly excluded. There was no evidence that such a construction of the contract was stated to the plaintiff as the basis of the consent given by the defendants. Their reasons, not communicated to the plaintiff or known by him, were inadmissible.

3. The judge charged the jury as follows: "An employer is not legally justified in discharging an employé before the expiration of his term of employment, except for good and sufficient cause, and the jury are the exclusive judges of what is a good and sufficient cause, basing their judgment upon the evidence in the case, and they are to judge of the value and weight of the evidence." He nowhere in his charge submitted to the jury the contention of the defendants that they had the right to terminate the contract of employment when the services of the plaintiff were not satisfactory to them. The defendants made this a distinct issue in their pleadings, and introduced evidence tending to sustain the allegation. If this right formed a part of the contract between the plaintiff and the defendants, they could terminate the employment of the plaintiff when his services become unsatisfactory to them; and they would not be liable for so doing. *MacKenzie v. Minis* (Ga.) 63 S. E. 900.

It is not held that the defendants could receive the plaintiff's services for a time,

terminate the further employment on the ground of a dissatisfaction, and refuse to pay anything for his services while they were accepted and received. That is not claimed in this case. Here, as in the case of *Mackenzie v. Minis*, supra, the question was as to the right of the employers to discharge the employé, or terminate the employment, when the services rendered were unsatisfactory to them. The defendants were entitled to have their contention on that subject submitted to the jury. The charge of the court practically excluded it, and left the jury to determine what was a good and sufficient cause for discharge, or, at most, to restrict the ground on which the contract could legally be terminated by the defendants, before the expiration of four months, to "such incompetent or inefficient services or misconduct of the plaintiff as would justify them in so doing."

4. There were other grounds of the motion for a new trial; but, when considered in connection with a note of the presiding judge to the motion for a new trial and the requirement that the plaintiff should write off certain items of the recovery, they do not require a reversal.

As the case will be remanded for another trial, we do not discuss the evidence.

Judgment reversed. All the Justices concur.

(132 Ga. 444)

WALDREP v. TOWN OF CANON et al.

(Supreme Court of Georgia. April 16, 1909.)
APPEAL AND ERROR (§ 854*)—WRONG REASON FOR CORRECT JUDGMENT.

The recital in an order granting an injunction pendente lite that the judge is influenced to grant the writ for specified reasons affords no ground to the prevailing party to except to the judgment because the court should have assigned other matters alleged in the petition as being sufficient to justify the interlocutory order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3410; Dec. Dig. § 854.*]

(Syllabus by the Court.)

Error from Superior Court, Franklin County; C. H. Brand, Judge.

Action by Kate Waldrep against the Town of Canon and others. From a judgment in her favor, plaintiff brings error. Affirmed.

James K. Skelton and A. S. Skelton, for plaintiff in error. Claude Bond and J. B. Jones, for defendants in error.

EVANS, P. J. The plaintiff in error filed her petition to enjoin the town of Canon and its officers from enforcing an execution issued by the mayor of the town against her by a levy upon her property. The validity of the execution was attacked on several grounds, and on the interlocutory hearing the court granted an injunction pendente

lite and in his order stated that in his opinion the injunction should issue so as to preserve the status until a final trial should settle the disputed issues of fact. The plaintiff excepts to the grant of the injunction, upon the ground that the court should have enjoined the defendants because the execution was invalid as matter of law.

The plaintiff prayed a pendente lite injunction. The court granted the writ. She is not concluded, by the judge's recital of his reasons for granting the interlocutory injunction, from insisting at the final trial upon all the attacks made in her petition respecting the invalidity of the execution. The judgment at the interlocutory hearing was a mere exercise of discretion, and not a final and conclusive adjudication of the whole law of the case. *Crovatt v. Baker*, 130 Ga. 507, 61 S. E. 127. The plaintiff, therefore, is not entitled to a reversal or modification of a judgment in her favor, whether or not the court might have rested his judgment upon the other grounds alleged in the petition as sufficient to justify the grant of an injunction until the final hearing.

Judgment affirmed. All the Justices concur.

(132 Ga. 463)

MORRIS v. ROUNSAVILLE BROS.

(Supreme Court of Georgia. April 17, 1909.)

TELEGRAPHS AND TELEPHONES (§ 15*) —
BREAKING OF POLE—LIABILITY TO PERSON CLIMBING.

Where one erects alongside a public road telephone poles on which telephone wires are placed, and a person climbs one of such poles by permission of the owner to remove the wire for the purpose of removing a building for another across such road, and the pole, because of its "rotten condition," breaks and injures such person, the owner of such poles is not liable in damages to the injured party because the poles were erected along the roadside "without authority or right, and contrary to law," and such pole was knowingly allowed to stand in a "rotten condition." The acts of alleged negligence were not acts of negligence relative to the party injured while climbing the pole for the purposes stated.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 15.*]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Mid Morris, by next friend, against Rounsaville Bros. Judgment for defendants, and plaintiff brings error. Affirmed.

Geo. A. H. Harris & Son, for plaintiff in error. J. Branham and Jno. W. & G. E. Maddox, for defendant in error.

HOLDEN, J. Mid Morris, by his next friend, brought complaint against Rounsaville Bros. to recover damages on account of

personal injuries received; his petition, as amended, making substantially the following allegations: The defendants are the owners of a private telephone line, the poles of which are placed alongside the public road. The plaintiff was engaged in moving a house for the Rome Tannery across this public road, and it was necessary to remove the telephone wire. The plaintiff placed a ladder against one of the telephone poles, and when he had climbed to the top round of the ladder, about 20 feet from the ground, the pole broke and fell with the plaintiff to the ground, causing him serious injury. The pole was rotten and in an unsafe condition under the ground, and up to about two inches above the ground. The plaintiff filed an amendment, which, properly construed, alleged that defendants gave him permission to climb the pole. The petition was dismissed upon demurrer, and the plaintiff excepted.

The amendment offered, stating that the defendants gave the plaintiff permission to climb the pole, simply had the effect of showing that the plaintiff was a licensee, if it can be said that he was acting within the privilege given him to climb the pole when he placed a ladder at an angle against the pole and climbed the ladder for the purpose of removing the wire. There is no allegation that the defendant made any statement to the plaintiff about the condition of the pole, or failed to warn him of its condition, or that it was unsafe to climb the pole, or place the ladder against it and climb the ladder, if there was any legal duty to thus warn him. Plaintiff does not allege that defendants are liable, or that a recovery is sought, because defendants failed to thus warn him. The only acts of negligence alleged against the defendants, on which a right of recovery was predicated, are as follows: "Petitioner shows to the court that the defendants had no right to erect the poles alongside the roadside, and to do so was an act of trespass, and an act of negligence per se; that it was negligent on the part of the defendants to allow said pole to stand alongside the roadside in the rotten condition that it was in. Petitioner shows to the court that the defendants knew of the rotten condition of said pole, and that it was negligence on their part to keep said pole in use. * * * Petitioner shows that the road alongside which said pole was erected is a public road, the property of Floyd county, and is worked, repaired, and maintained by said county for the benefit of its citizens, to be used as a highway of travel; and for said pole to be allowed to remain in use alongside of said road as alleged was a menace to the safety of its citizens, and was, therefore, an act of negligence upon the part of defendants to keep the same in use."

If it was an act of negligence on the part of the defendants to erect the poles along-

side the roadside without authority, or knowingly to allow the pole to stand along the roadside in a rotten condition with reference to persons using the road as a highway for purposes of travel, these were not acts of negligence with reference to one climbing the pole for the purpose of removing the wire solely for his own benefit. There was no duty on the defendants to keep their poles in safe condition for persons to climb in order to remove the wires thereon, so as to move a house across the highway. If the erection of poles along the highway was without authority, this fact would not give a right of action to one injured while climbing the pole for the purposes stated. In order for acts to constitute negligence towards any particular person, there must be a breach of duty owing to such person at the particular time and under the particular circumstances; and to give a right of action for injuries resulting from such breach of duty, such negligence must be the proximate cause of the injuries. As stated in *Georgia & Ala. Ry. Co. v. Cook*, 114 Ga. 760, 762, 40 S. E. 718, 719: "Negligence relatively to one to whom no duty is due with respect to the matter in question does not give him a right of action." The only acts of alleged negligence averred by the plaintiff on which he seeks a recovery being acts of negligence (if acts of negligence with respect to any one) with reference to persons using the highway for purposes for which it might lawfully be used, and the plaintiff not having been injured while using the highway for such purposes, but while using the pole for the purpose of removing the telephone wire in order to remove a building across the road, the court properly sustained a general demurrer and dismissed the petition.

Judgment affirmed. All the Justices concur.

(132 Ga. 461)

WESTERN & A. R. CO. v. COTTER.

(Supreme Court of Georgia. April 17, 1909.)

1. TRIAL (§ 251*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

The evidence authorizing a charge upon the subject of contributory negligence and apportionment of damages, it was not error for the court to charge thereon; and such charge is not subject to the complaint that "no charge should have been given on the subject of a diminished recovery, the plaintiff contending for full damages and claiming to have been free from fault." *Tucker v. Central Ry. Co.*, 122 Ga. 387, 50 S. E. 128 (6); *Southern Cotton Oil Co. v. Skipper*, 125 Ga. 368, 54 S. E. 110 (12).

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.*]

2. APPEAL AND ERROR (§ 1064*)—REMARKS OF COURT—HARMLESS ERROR.

The reference made by the court in his charge to one of the contentions of the defendant as the "real contention," while an inapt expression, was not, in the light of the whole charge and the facts of the case, of such harm-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ful effect to the defendant as to require a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

3. INSTRUCTIONS.

There was no error in the other charges complained of in the motion for a new trial. Such charges were not liable to mislead the jury, in view of the entire charge.

4. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict, and the court did not abuse its discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Flta, Judge.

Action by J. C. K. Cotter against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peeples, Bryan & Jordan and R. J. & J. McCamy, for plaintiff in error. W. E. Mann, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 433)

COMPTON et al. v. FENDER.

(Supreme Court of Georgia. April 19, 1909.)

1. EVIDENCE (§ 157*)—BEST AND SECONDARY—LACK OF ADMINISTRATION.

Under the decision in *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44, "the best method of proving that no administration was ever had upon a particular estate is to introduce the evidence of the ordinary, or of another who has examined the records in the court of ordinary where letters of administration should have been granted, that no such letters are shown by those records." *Cowan v. Corbett*, 68 Ga. 66, 70; *Wilson v. Wood*, 127 Ga. 316, 56 S. E. 457.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 461; Dec. Dig. § 157.*]

2. EVIDENCE (§ 157*)—BEST AND SECONDARY.

The best evidence which exists of the facts sought to be proved must be produced, unless its absence is satisfactorily accounted for. *Civ. Code* 1895, § 5162.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 460; Dec. Dig. § 157.*]

3. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE.

Where a witness had testified to the death of a person some 14 years before the time of the trial, it was not error to reject the evidence of such witness that there had never been any administration on the estate of the decedent, although he also testified that he was the son and one of three heirs at law of the decedent; he being neither the ordinary nor another person who had examined the records.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 80; Dec. Dig. § 37.*]

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by Hansell W. Compton and others against J. Floyd Fender. Judgment for defendant, and plaintiffs bring error. Affirmed.

Hansell W. Compton and others brought their action against J. Floyd Fender, praying an injunction to prevent the cutting of timber, and also to recover damages. The plaintiffs introduced a plat and grant from the state to Charles W. Compton, and then offered the answers of Hansell W. Compton to interrogatories. He testified that he lived in Atlanta, and was the son of Charles W. Compton, who died in 1884; that the mother of the witness and his sister survived their father; that his father died without leaving a will; and that he had charge of the interests of his mother and sister in the lot of land involved in the suit. He was asked if there had been any administration on the estate of his deceased father, and answered that there had been none. Objection was made to this latter question and answer, on the ground that it did not appear that the witness was the ordinary of the county in which Compton resided at the time of his death, or that he had examined the records in the office of the ordinary. The objection was sustained. There being no other evidence to establish the absence of administration, a nonsuit was granted, and the plaintiffs excepted.

Cranford & Wilcox, for plaintiffs in error. W. T. Dickerson and G. A. Whitier, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 445)

DYER et al. v. MARTIN et al.

(Supreme Court of Georgia. April 16, 1909.)

1. COUNTIES (§ 108*)—COMMISSIONERS—POWER TO SELL COUNTY PROPERTY.

The act creating the commissioners of roads and revenues of Hall county (*Acts* 1898, p. 265) confers upon them power to sell any public property of that county which has become unserviceable, according to the provisions of *Pol. Code* 1895, §§ 278, 348.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 171; Dec. Dig. § 108.*]

2. COUNTIES (§ 108*)—SALE OF PROPERTY—WHEN "UNSERVICEABLE."

Public property becomes "unserviceable," in the purview of *Pol. Code* 1895, § 278, so as to empower the proper authority to sell the same, where such property cannot be beneficially or advantageously used under all the circumstances.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 170, 171; Dec. Dig. § 108.*]

3. COUNTIES (§ 23*)—ACTION OF GOVERNING OFFICIALS—REVIEW BY COURTS.

A court of equity will not interfere with the discretionary action of the governing officials of a county within the sphere of their legally delegated powers, unless such action is arbitrary and amounts to an abuse of discretion.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 23.*]

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action by H. T. Martin and others against W. M. Dyer and others, Commissioners of Roads and Revenues of Hall County, to restrain the sale of a tract of land used for the care of the county's poor. An injunction pendente lite was granted, and the commissioners bring error. Reversed.

W. A. Charters, F. M. Johnson, J. G. Collins, W. B. Sloan, and H. H. Dean, for plaintiffs in error. H. H. Perry, for defendants in error.

EVANS, P. J. The county of Hall owns a tract of land which is devoted to the care of the county's poor, and the commissioners of roads and revenues of that county passed an order for the sale of this property at public outcry, after publication of the notice of sale in the newspapers of Gainesville. Pending the publication of the notice three citizens and taxpayers of the county filed their petition praying that the sale be enjoined. The court granted a pendente lite injunction, to which exception is taken.

1. One reason assigned by the petitioners to stop the sale of the pauper farm is that the commissioners of roads and revenues of Hall county have no authority to pass such an order. The act creating the commissioners of roads and revenues of Hall county (Acts 1886, p. 265) confers upon them exclusive jurisdiction in governing and controlling all county property as they may deem best according to law, of levying county taxes, and in managing other county affairs specifically designated in the act. The sections of the Political Code of 1895 relating to the sale of real property owned by the county are as follows:

"Sec. 278. Unserviceable Property Sold.—When any public property shall become unserviceable, it may be sold or otherwise disposed of, by order of the proper authority, and an entry of the same shall be made in said book, and the money received therefrom shall be paid into the treasury.

"Sec. 279. 'Proper Authority.'—The 'proper authority' referred to in this chapter is the Governor of the state, for all officers of the state, and the county commissioners, or other officers having charge of county matters, for all officers of the county."

"Sec. 348. County Property, How Controlled.—The ordinary has the control of all property belonging to the county, and may, by order to be entered on their minutes, direct the disposal of any real property which can lawfully be disposed of, and appoint a commission to make titles thereto, and the conveyance of such commission in accordance with such order vests the grantee or vendee with the title of the county."

The power conferred upon the ordinary by Pol. Code 1895, § 348, to control all property belonging to the county, and to direct

the disposal of any real property which can lawfully be disposed of, does not vest in that official exclusive power of sale of the county's property. The constitutional scheme of county government is that the powers in relation to roads, public buildings, taxes, and other county matters are to be exercised by the ordinary, except where the General Assembly confers such powers upon county commissioners of a particular county. Civ. Code 1895, §§ 5853, 5879, 5930. When the administration of county affairs in a particular county is lodged with commissioners, the power over county matters usually exercised by the ordinary devolves upon them, and they may discharge such functions with reference to county matters as are conferred on them by the act of their creation, which theretofore have been performed by the ordinary. *Town of Decatur v. DeKalb County*, 130 Ga. 483, 61 S. E. 23. It follows that under the act of 1886, creating commissioners for Hall county, the power to dispose of the real property belonging to that county is vested in the commissioners of roads and revenues.

2, 3. The complaining taxpayers further contend, even if the commissioners of roads and revenues had authority to dispose of the property of the county, that their power to sell is only where the property has become unserviceable, and that in determining that the property had become unserviceable they had abused their discretion. Petitioners in their sworn petition, which was used as evidence on the hearing, alleged that the pauper farm consists of about 315 acres of land, the larger portion of which is in a high state of cultivation; that the buildings thereon are in a good condition; that the ownership of the farm by the county is necessary for the purposes and requirements of the county; that the county has no other place or farm suitable for the accommodation and keeping of its paupers; that the farm is necessary to the county for the raising of supplies for the convicts of the county, of which the county has a large number at work on the roads, and for the support of its paupers; that it is located at the center of the county, and at the most convenient and accessible point, and has not become in any way unserviceable. At the hearing they supported their contentions by an affidavit, signed by several citizens, to the effect that the property is in every way well located and arranged for the purpose for which it is used, and is not unserviceable in any sense, but, on the contrary, is necessary for the comfortable caring for the county paupers, and that the property is well adapted for the use of a stockade for keeping the county convicts, and it would be injurious to the interests of the county, and unwise, to sell the property.

The county commissioners, in their answer, which was used as evidence on the hearing, averred that about two years be-

fore the passing of the order of sale there had been a popular meeting of the citizens of the county, at which resolutions were adopted requesting that the county pauper farm be moved to some other more suitable and convenient site, where they could be cared for and kept at less expense; that thereupon the commissioners investigated the matter of the suitability of the present farm for the use of caring for its poor; that it appears from the records in their office that the cost of maintenance for several years past has been between \$1,500 and \$2,000 in excess of the revenue derived from the farm, and about a year before the bringing of this petition they had purchased a tract of land containing 100 acres, which they proposed to devote to caring for the county paupers; that the two farms are several miles apart, and cannot be used together; that upon the present pauper farm are several cottages that are expensive to keep up, which will soon have to be recovered and repainted; that the wood upon the present farm is about exhausted, and the arrangement of the houses is such as to render it expensive to look after the paupers; that there are now 20 paupers upon the farm; that the farm can be sold for between \$9,000 and \$10,000, and the necessary improvements can be erected upon the 100-acre tract at from \$3,000 to \$4,000; that the 100-acre tract is well watered, and has a large supply of wood and timber thereon, and is a much more suitable and convenient place to keep the county's poor than the present pauper farm; and that in the erection of the buildings which they propose to build on the 100-acre tract the expense of maintenance will be considerably reduced.

The defendants also introduced an affidavit of four citizens that in their opinion it would be to the advantage of the county and the taxpayers to sell the pauper farm, and to build one large building on the property owned by the county for the purpose of caring for the inmates of the present county farm, and that it would be much less expensive to the county to maintain the inmates in one large central building than to incur the expense of keeping in repair the numerous buildings now on the county farm. Defendants also introduced a certified copy of the following order:

"It appearing to the board that the county of Hall owns a suitable place for county home other than the one now occupied for said purpose, and it further appearing that the present home can be sold for a good price, it is ordered that the present home and farm be sold to the highest bidder for cash, before the courthouse door in the city of Gainesville, Georgia, on Tuesday, October 27, 1908, at 11 o'clock. It is further ordered that a notice of said sale be published in the city papers. Order granted this 12th day of October, 1908. [Signed] W. M. Dyer,

I. F. Duncan, J. D. Welch, Commissioners of Roads and Revenues of Hall County."

Before the commissioners can lawfully proceed with the sale of the real estate of the county it must appear that the same has become "unservicable." This word, as used in Pol. Code 1895, § 278, does not mean that the property proposed to be sold is practically without value, but that it cannot be used advantageously by the county. *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428. Among the definitions of the word "servicable," given in Webster's International Dictionary, are "beneficial; advantageous." A county may own two tracts of land suitable or beneficial for the same purpose, and yet may not be able to devote both properties to beneficial use. One tract may be sufficient to answer the county's needs, and the other would not be needful or servicable to the county. In such a case it would be the part of wisdom for the county commissioners, charged with the administration of the county affairs, to investigate and determine which tract of land was not needed, or was unservicable to the county. Under the Code section above cited it would be within the power of the proper officials of the county to order the sale of the least desirable piece of the property, considering the uses for which it was intended to be put. In the present case it appears that the county owns two tracts of land, upon one of which the county poor are maintained. So far as the record discloses, the other tract is not put to any county use. In the administration of the county affairs the commissioners have determined that one of these tracts is unservicable, and that it is to the best interests of the county, a saving to the taxpayers, and a convenience to the paupers who partake of the county's liberality, that the home for the paupers be located on the 100-acre tract, and the larger tract be sold. This was clearly within the discretionary powers of these administrative officers; and, unless their discretion has been abused, the courts have no revisory power. As was said in *Commissioners v. Porter Mfg. Co.*, 103 Ga. 617, 30 S. E. 549: "The discretion vested in the county authorities must be, from the nature of the case, a broad one, and therefore the reviewing power of the judge of the superior court must be exercised with caution, and no interference had unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law." See, also, *Anderson v. Newton*, 123 Ga. 512, 51 S. E. 508; *Gaines v. Dyer*, 128 Ga. 590, 58 S. E. 175.

When the commissioners ordered the sale of the pauper farm, they exercised an administrative act; and the courts have no authority to inquire into the expediency of their action, unless it is made to appear that they either exceeded their powers under

the law, or in the exercise of that power there was a manifest abuse of discretion. When their action, within the scope of the powers conferred on them by law, is sought to be restrained by a complaining taxpayer, the question is, not whether the court or other taxpayers may have honestly differed with the commissioners as to the wisdom of their course, but whether that course of action is so palpably against the best interests of the county as to amount to an abuse of their discretion. We are aware that a judge of the superior court, in passing upon an application for interlocutory injunction, is also invested with a discretion; and this court has repeatedly held that his discretion upon the facts will not be disturbed, unless it is abused. But it must also be borne in mind that a court of equity will not interfere with the administrative action of the governing officials of a county, within the scope of the powers delegated to them by the law, unless the act complained of is arbitrary and amounts to an abuse of discretion. An examination of the evidence presented to the judge of the superior court shows that there is a difference of opinion among the citizens of the county as to whether the pauper farm should be retained at its present location, or established upon the 100-acre tract. Looking at the reasons advanced for the different conclusions in a calm and dispassionate way, we can see how the commissioners might incline to one or the other proposition. They were called upon under the circumstances to act, and we can see nothing in the evidence submitted to the chancellor which would justify him in holding that they were guilty of an abuse of discretion.

Judgment reversed. All the Justices concur.

(132 Ga. 517)

SMITH et al. v. LESTER.

(Supreme Court of Georgia. April 19, 1909.)

JUDGES (§ 8*)—VACANCY IN OFFICE.

Under the provisions of Civ. Code 1895, § 4284, declaring that "it shall be illegal for the judge of any city court in this state to also hold any municipal office or appointment in the city where such court is held," the judge of such city court is ineligible to hold, and cannot make a valid acceptance of, any municipal office or appointment referred to in such section; and an information in the nature of a quo warranto, alleging that the judge of a city court accepted and holds such municipal office or appointment, and praying that the office of judge of the city court be declared vacant and to oust the incumbent thereof, was properly dismissed on general demurrer.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 32; Dec. Dig. § 8.*]

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Ragan, Judge.

Application by James M. Smith and others for writ of quo warranto, against C. J. Lester. From a judgment dismissing the application, relators bring error. Affirmed.

A. A. Murphy and Rollin H. Kimball, for plaintiffs in error. O. H. B. Bloodworth and J. F. Redding, for defendant in error.

HOLDEN, J. James M. Smith and others, relators, made application to the judge of the superior court of Pike county for leave to file an information in the nature of a quo warranto in order that they might inquire into the right of the respondent to hold the office of judge of the city court of Barnesville. The information, which was ordered filed, contained the following material allegations: Prior to the filing of the information the respondent was commissioned as judge of the city court of Barnesville and has since been acting as such judge. Prior to the filing of the application he was elected city attorney of Barnesville by the mayor and council of that municipality, which position he accepted, and has since been exercising the duties thereof. The office of judge of the city court of Barnesville was vacated by respondent when he accepted the office of city attorney. Respondent is paid a regular salary as city attorney, and is required to represent the city in all litigation. Copies of ordinances of the mayor and council were attached to the application, wherein the appointment and duties of respondent as city attorney are shown, and also the fact that he received a monthly salary as such. Relators prayed that respondent show cause why he should not be ousted from the office of judge of the city court and such office be declared vacant. The respondent demurred to the application, on the ground that there was no cause of action set forth in the same, and that it showed on its face that the relators were not entitled to maintain said cause, or to the relief sought therein. To an order sustaining the demurrer, and dismissing the application, the relators excepted.

The relators contend that the office of judge of the city court of Barnesville was vacated by the respondent when he accepted the office of city attorney of Barnesville, for the reason that the duties of the two offices are incompatible in fact, as well as rendered incompatible by the provisions of Civ. Code 1895, § 4284. That section is as follows: "It shall be illegal for the judge of any city court in this state to also hold any municipal office or appointment in the city where such court is held." If this section has application to city courts of the character of that existing in the city of Barnesville, and if the position of city attorney of Barnesville is an appointment of the kind referred to in the section above quoted, did the acceptance of such appointment by the respondent vacate, or render subject to vacation, the other of-

office which the respondent held as judge of the city court of Barnesville? In *Throop on Public Officers*, § 30, it is said: "At common law there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other. * * * If two offices are incompatible, by the acceptance of the latter the first is relinquished or vacant, even though it should be a superior office."

While this is the common-law rule, we do not think it has any application in this case, in the presence of the Code section above quoted. Under the provisions of this section it is made illegal for the judge of any city court to also hold any municipal office or appointment in the city where any such court is held. The meaning of this section is that, after a person becomes judge of the city court, he cannot, while holding such office, legally accept or hold any municipal office or appointment therein referred to. The effect of making it illegal for the person holding the office of judge to accept and hold such municipal office or appointment is to make him ineligible for such office or appointment while holding the office of judge. The provisions of this section are not the same as providing that one person shall not at the same time hold the office of judge and a municipal appointment; but these provisions mean that, after a person becomes judge of a city court, it shall be illegal for him, while holding such office, to accept or hold any municipal office or appointment referred to in the section. The common-law rule was that a person could not hold two incompatible offices, and, while holding one, the acceptance of another was an implied resignation of the former. In such cases the person has the right to resign the office which he holds, and has the right to accept the other office; but in this case, under Civ. Code 1895, § 4284, the judge of the city court has no right to accept a municipal office or appointment in the city where such court is held, and his pretended acceptance and holding of such municipal office or appointment is illegal and without authority of law.

Having no right to accept and hold such municipal office or appointment, such pretended acceptance and holding of such office or appointment no more vacates the office of judge of the city court than would the performance of any other illegal act which does not, by provision of law, vacate the office. In *Throop on Public Officers*, § 32, it is said: "An exception also occurs where the second office is conferred by an appointment in violation of statute. Thus, where a statute rendered the members of a city council ineligible to certain offices, it was held that the appointment by the council of one of its members to such an office, and his acceptance thereof, did not effect an abandonment or

forfeiture of the office of councilman, because the appointment was absolutely void." In this connection, see *McWilliams v. Neal*, 180 Ga. 733, 61 S. E. 721, and authorities there cited. The effect of making it illegal for the judge of the city court, while holding such office, to hold any municipal office or appointment is to render him ineligible to hold the latter; and the effect of his pretended holding, or undertaking to hold, the municipal office or appointment, does not operate to vacate the office of judge.

The court committed no error in sustaining the demurrer, and the judgment is affirmed. All the Justices concur.

(132 Ga. 457.)

CORBITT v. NEBERN.

(Supreme Court of Georgia. April 17, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 174*) — ALLOWANCE TO WIDOW—PRIORITIES.

The act of August 17, 1903 (Acts 1903, p. 76), which provides that whenever the vendor of personal property shall, at the time of selling and delivering such property, take a mortgage thereon to secure the purchase money thereof, which shall expressly state that it is for such purpose, neither the widow and minor child or children, nor the minor child or children of the vendee shall be entitled to a year's support in such personal property as against the vendor, his heirs, executors, administrators, and assigns, until the purchase money of said property is fully paid, has a prospective operation, and as against the right of a widow to year's support it did not give priority to a mortgage executed before its passage, although such mortgage recited that it was given for purchase money of the personal property described in it, and although the mortgagor did not die until after the passage of the act.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 655; Dec. Dig. § 174.*]

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

E. D. Nebern was appointed as administrator of the estate of one Flanders. On report of appraisers allowing a widow a year's support, I. H. Corbitt filed a caveat, for the use of the Pierce Trading Company. From a judgment of the superior court allowing the widow's claim, Corbitt brings error. Affirmed.

Benj. T. Allen, for plaintiff in error. J. W. Quincey, for defendant in error.

ATKINSON, J. On September 16, 1902, Corbitt took a note from Flanders, due on November 16, 1903, and, besides the promise to pay, the instrument contained a mortgage on a mule, and after the description were added the words, "and for which this note is taken." It was recorded. On the back of the note was indorsed a credit of \$20, dated November 24, 1903. On August 17, 1903, an act was approved regulating the law of year's support (Acts 1903, p. 76) Flanders died on March 29, 1904. On April

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4, 1904, his widow applied for year's support. Appraisers were appointed, and to their report a caveat was filed by Corbitt, for the use of Pierce Trading Company. The case was carried to the superior court by appeal, and was submitted to the presiding judge without a jury. He held that, inasmuch as the mortgage was given prior to the act of 1903, the widow's claim for year's support was superior to the lien of the mortgage. The mortgagee excepted.

Prior to 1875 it was held that a widow's claim for dower and year's support was superior to the lien of the mortgage for purchase money of land. On February 24, 1875 (Acts 1875, p. 100), an act was approved which provided that "whenever the vendor of land shall make a deed to land, and at the same time take a mortgage for the purchase money, the widow of the vendee shall not be entitled to dower in said land as against such vendor until the purchase money is paid." In *Wilson v. Peeples*, 61 Ga. 218, it was held that, where a mortgage was executed prior to the date of such act, a mortgage executed to secure the repayment of money used by the mortgagor in the purchase of real estate would be postponed to the widow's dower and the year's support of the family, although it appeared that the mortgagor died in 1877. On September 16, 1891 (Acts 1890-91, p. 227), the provisions of the act of 1875, preventing the taking of dower as against a purchase-money mortgage given concurrently with the execution of a deed to the vendee, were extended so as to include year's support. Both of these acts referred only to real estate. On August 17, 1903 (Acts 1903, p. 76), an act was approved which provided that "whenever the vendor of personal property shall, at the time of selling and delivering such personal property, take a mortgage thereon to secure the purchase money thereof, neither the widow and minor child or children, nor the minor child or children of the vendee, shall be entitled to a year's support in said personal property so mortgaged, as against said vendor, his heirs, executors, administrators, and assigns, until the purchase money of said personal property is fully paid; provided, that said purchase-money mortgage shall expressly state that the same is executed and delivered for the purpose of securing the debt for such purchase money."

The general rule is that laws have a prospective rather than a retrospective effect, and this law on its face shows that it was intended to operate in respect to sales and mortgages which should be thereafter made. It uses the future tense, not the present or past, and requires that mortgages given under it, to have the effect provided by it, "shall" contain a certain recital. It did not undertake to change the status of every

instrument which might have been executed in the past, although such a paper might contain a statement similar to that provided for in the act. In principle this case is controlled by that of *Wilson v. Peeples*, supra. The widow's right to a year's support was superior to the lien of the mortgage, and the presiding judge properly so held.

Judgment affirmed. All the Justices concur.

(133 Ga. 400)

NEAL et al. v. BOYKIN.

(Supreme Court of Georgia. April 14, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 32*)— SETTING ASIDE LETTERS OF ADMINISTRATION —EVIDENCE.

The allegations of the equitable petition brought to set aside the judgment of the court of ordinary granting letters of administration on the estate of a nonresident, to the effect that he left no property in the county where the application was made at the time of his death, and that none was there at the time when the application was made, except a promissory note on an insolvent debtor residing in another county of this state, which had been fraudulently carried to the county where the application was made for the purpose of giving colorable jurisdiction there, were not sustained by the evidence.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 32.*]

2. EXECUTORS AND ADMINISTRATORS (§ 12*)— APPOINTMENT OF ADMINISTRATOR—VALIDITY.

Although a resident of another state left, at the time of his death, no property in the county of this state where application for letters of administration was subsequently made, yet where personal property of the estate was brought into such county after his death, and was there located at the time when application was made for letters of administration and when they were granted, the court of ordinary of that county had jurisdiction to grant the letters, unless the property was carried there in bad faith, and with the intention of conferring improperly a colorable probate jurisdiction.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 24; Dec. Dig. § 12.*]

3. EXECUTORS AND ADMINISTRATORS (§ 12*)— GRANT OF LETTERS—ASSETS OF NONRESIDENT DECEDENT.

Where assets forming a part of the estate of a nonresident decedent are located in two counties of this state, administration can be granted in either, and the ordinary first commencing the exercise of jurisdiction will retain it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 24; Dec. Dig. § 12.*]

(Syllabus by the Court.)

4. EXECUTORS AND ADMINISTRATORS (§ 11*)— ASSETS—"BONA NOTABILIA."

The term "bona notabilia," as used in the English probate law, means notable goods, or property worthy of notice, or of sufficient value to be accounted for.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 25; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 830.]

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by John Neal and others against B. M. Boykin. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. J. Bull and J. D. Kilpatrick, for plaintiffs in error. Green, Tilson & McKinney, for defendant in error.

LUMPKIN, J. John Neal and others filed their equitable petition against B. M. Boykin for the purpose of setting aside the grant of letters of administration to the defendant by the court of ordinary of De Kalb county and of enjoining him from exercising any authority thereunder. On demurrer the petition was dismissed, and the plaintiffs excepted. The judgment was reversed. *Neal v. Boykin*, 129 Ga. 676, 59 S. E. 912, 121 Am. St. Rep. 237. On the trial the case was submitted on an agreed statement of facts, and each side contended that the presiding judge should direct a verdict. The judge directed a verdict for the defendant. The plaintiffs moved for a new trial, which was refused, and they excepted.

The disposition of the case made by the presiding judge was correct. The case made by the petition was not sustained by the evidence. The plaintiffs alleged that the judgment of the ordinary of De Kalb county, granting letters of administration to Boykin, was procured by fraud; that Boykin and Dixon (who was apparently the executor of Neal under a will probated in Florida) had conspired together, and the latter had sent to the former a promissory note due by one Culpepper, a resident of Talbot county, who was insolvent, and so known to be at the time; and that this was done for the purpose of giving jurisdiction to that court, Neal having left no assets there. It was, moreover, alleged that the application of Boykin for letters of administration was kept concealed from the relatives of the decedent and their attorney, who also had acted as agent for the decedent and for the Florida executor. As a ground for appealing to a court having equitable jurisdiction, it was alleged that, "the appointment of the defendant being obtained by fraud, and the court appointing him being without jurisdiction, the petitioners, being remediless in a court of common law, bring this their petition in equity." The agreed statement of facts showed no conspiracy, fraudulent effort to confer jurisdiction, or concealment on the part of Boykin. It showed that, in addition to the note, at the time when the application for administration was made, there were in De Kalb county certain articles of silverware and a gold watch and chain; that Neal left a will, which was probated in Florida, but not in Georgia, because it had only two witnesses; that prior to the discovery of this fact the executor named in the will had sent the note of Culpepper to Boykin, with

the request that he endeavor to collect it; that it was a sealed note, and not barred by the statute of limitations; and that Culpepper resided in Talbot county. There was no evidence that he was insolvent, or the note worthless. While Neal left, at the time of his death, a considerable amount of real and personal property in Talbot county, and also certain nephews, before his death he had adopted, by legal proceedings in Florida, the two half-sisters of Boykin, who were minors. After his death they came to De Kalb county, bringing with them the small articles of silverware, and lived with Boykin, who became their guardian. They were the sole legatees under Neal's will, and, if the adoption was valid, would be his sole heirs in the absence of a will; he leaving neither wife nor other children.

There is some suggestion of a desire on the part of the plaintiffs to attack the validity of the will and the proceedings in Florida by which Neal adopted these two minor girls; but there is no indication in the record that there is any valid ground for making such an attack. The will was probated in Florida, and admitted to record according to the laws of that state. The order or decree of adoption was granted by the circuit court there. No reason is shown why either of them is invalid, except in so far as the lack of attestation according to the laws of this state may effect the recognition of the will here. A nephew, other than those who are parties to the present proceeding, made an application in Talbot county to be appointed administrator, after the grant of letters in De Kalb county, and his application is still pending. He and two other nephews have already applied, by petition to the court of ordinary of De Kalb county, to have set aside the grant of letters of administration to Boykin, on the ground of want of jurisdiction, and their petition has been refused. That court, with knowledge of the facts, was of the opinion that it had jurisdiction. If the adoption of the two girls by Neal was valid, they became his heirs, his nephews had no interest in the estate, and there would be no reason to set aside the grant of administration in De Kalb county at the instance of the latter. This would leave as plaintiffs in the present proceeding only two creditors of the decedent.

Though not sustaining the equitable allegations in the petition, the plaintiffs relied upon the naked legal proposition that the court of ordinary of De Kalb county was without jurisdiction, because there was no property of the deceased there at the time of his death, while there was such property in Talbot county, and that the existence of personal property in De Kalb county at the time of the application for administration did not confer jurisdiction upon the court of ordinary of that county. Civ. Code 1895, § 3393, is as follows: "Every application for letters

of administration must be made to the ordinary of the county of the residence of the deceased, if a resident of this state, and if not a resident, then in some county where the estate or some portion thereof is." Section 4234 is as follows: "The ordinary can grant administration upon no person's estate who was not a resident of the county where the application is made at the time of his death, or being a nonresident of the state, has property in said county, or a bona fide cause of action against some person therein." The question arising under these sections is whether a court of ordinary in this state is without jurisdiction to grant letters of administration upon the estate of a nonresident decedent, unless at the time of his death he leaves property located in the county where the administration is sought, or whether the location of personal property within the state at the time when the application is made will confer jurisdiction in the county where it is located. The section first quoted above provides that, as to nonresident decedents, every application for letters of administration must be made "in the county where the estate or some portion thereof is." Does this mean "is" at the time when the application is made, or at the time when the owner died? In the second of the above-quoted sections does the statement that the ordinary can grant administration upon the estate of no person who was not a resident of the county of the application at the time of his death, or, being a nonresident, "has property in said county," restrict the jurisdiction to the existence of property in the county at the time of the death of such person?

If the sections of the Code are to be construed as excluding jurisdiction to grant letters of administration in Georgia altogether unless the decedent left property in this state at the time of his death, then any one might remove personal property of an estate into Georgia, and hold it indefinitely without the courts of this state having power to preserve it by administration and placing it in the hands of a legally appointed administrator, who is under bond for the proper performance of his duty. If there were Georgia heirs and creditors, they could not have the property administered in a regular and orderly manner for the payment of their claims and distribution according to law. If there were no foreign administrator to recover the property, it would remain in an unprotected condition, for lack of a legal custodian, unless this should be held to be a case where "the law by reason of its universality is deficient," and equity should give aid. If there were a foreign administrator, and "if there be none appointed in the state," under our statutes he might bring suit, subject to the requirement that he file an exemplification of his letters of administration. Civ. Code 1895, §§ 3521, 3522. If he recovered the property, it would be to carry it to a foreign jurisdiction

for administration. In the present case there was no effort to probate a foreign will, by production of the will itself (Civ. Code 1895, §§ 3297-3300), or such a will devising realty, by means of an exemplification of the probate in another state (sections 3301, 3302), or a foreign will bequeathing personalty, by means of a similar exemplification (section 3303). Nor was this a controversy between the executor appointed in the foreign jurisdiction and the applicant for administration in De Kalb county. Both the plaintiffs and the defendant treat the Florida will as invalid in Georgia. Both proceed on the theory that there must be an administrator in Georgia, but they differ as to who should be appointed and the court which should appoint him.

Referring to Civ. Code 1895, §§ 4234, 4235 (which latter section provides that the ordinary first granting letters acquires exclusive jurisdiction), Bleckley, J., says: "Substituting counties for ecclesiastical divisions and subdivisions, these sections are not substantially different from the common law." *Arnold v. Arnold*, 62 Ga. 637. There is no statutory provision in this state limiting the amount of property which will authorize an administration, and; unless in extreme cases the doctrine of *de minimis* should apply, assets of the decedent may be said generally to be "bona notabilia." As used in the English probate law, these words mean notable goods, or property worthy of notice, or of sufficient value to be accounted for (which by the statute of 1 James I was established at £5). 1 *Williams on Executors* (3d Ed.) 250. If all the goods of the deceased lay within the same jurisdiction, an administration granted by the ordinary was proper; but, if the deceased had bona notabilia (that is, goods of sufficient amount) in different dioceses, administration was granted by the metropolitan of the province, by way of special prerogative, to prevent the confusion arising from the appointment of many different administrators. 2 *Bl. Com.* 508. The question of whether assets must have been located within the diocese at the time of the death of the decedent does not seem to have been a subject which received much consideration in decisions, although in some of the text-books such appears to have been assumed to be the case. The questions arising were also usually as to the grant of letters by the ordinary or the metropolitan of the same ecclesiastical province, not as to property which might be brought from another country. See, on the subject, *Scarth v. Bishop of London*, 1 *Hagg.* 273.

In *Schouler on Executors* (3d Ed.) § 25, it is said: "The rule of strict construction would seem to refer the locality of personalty in such cases to the situs as existing at the time of the deceased owner's death. Such an interpretation, however, is too narrow to meet the practical needs of a pro-

bate appointment for local purposes in modern times—an appointment which perhaps may not be invoked for years after one's death. Hence, for the welfare of creditors and other interested parties, this right of local appointment is more liberally asserted in many of the courts, and local jurisdiction is upheld on the ground that bona notabilia exist when letters are applied for, notwithstanding the goods were brought into the country, or the debtor removed thither, subsequently to the death of owner or creditor; and this seems the better opinion, unless such a bringing in or removal was in bad faith, and with the intention of conferring improperly a colorable probate jurisdiction." A quotation was made from this authority approvingly when the case was formerly before this court; but, as it was alleged that the note was fraudulently sent to De Kalb county in order to confer colorable jurisdiction, Mr. Justice Beck says: "And so we hold in the present case that if the note was brought into De Kalb county, as alleged in the petition, as a part of a fraudulent scheme for the purpose of giving falsely a colorable and pretended jurisdiction to the court of ordinary of that county, it would not be bona notabilia within the county of De Kalb for the purpose of founding administration." 129 Ga. 680, 59 S. E. 912, 121 Am. St. Rep. 237. It was also said that the note, which then appeared to be a simple contract, would be an asset at the domicile of the debtor in Talbot county. It was thus impliedly recognized that, had there been bona fide assets in De Kalb county at the time of the application for administration, the court of ordinary of that county would have had jurisdiction. In *Ott v. Hutchinson*, 91 Ga. 31, 16 S. E. 106, the exact point now before us was not discussed. The decedent, at the time of his death, left assets in the county where the application for administration was made, and the court says: "Where a nonresident dies leaving property in this state," etc.; but the charge of the judge of the trial court, to which exception was taken, stated that if, at the time when the application was made, the applicant was a creditor of the nonresident decedent, and the latter then had some estate in the jurisdiction, the jury should find for the applicant. The judgment was affirmed by this court. See, also, *Pinney v. McGregory*, 102 Mass. 186.

The charge of fraudulently carrying property to De Kalb county to confer jurisdiction upon the court of ordinary is eliminated under the evidence, and there is no question of mere temporary presence of property within the jurisdiction, as where a foreign administrator or traveler is passing through the state, carrying with him property left by a decedent in another state. Under the agreed statement of facts, there was sufficient property in De Kalb county to confer jurisdiction upon the ordinary of that county, whether or not the sealed note be treated as a

specialty having a situs there. The cases of *Arnold v. Arnold*, 62 Ga. 637, *supra*, *McLaren v. Bradford*, 52 Ga. 649, and *Patillo v. Barksdale*, 22 Ga. 356, do not conflict with the ruling here made. The point now decided was not then under consideration, and expressions used in the opinions must be considered in the light of the questions before the court.

Doubtless preceiving what might arise from holding that no court of ordinary in this state could grant letters of administration, unless the decedent left property located in this state at the time of his death, it was suggested in the brief of counsel for the plaintiff in error that if there were no county in the state in which the nonresident decedent left property located at the time of his death, and no court of ordinary in the state would have jurisdiction to appoint an administrator immediately upon the death of the decedent, and if thereafter some person should tortiously and wrongfully bring property into some county in this state, and should wrongfully and tortiously hold it there, probably the courts would so construe the two sections of the Code cited above as to permit the appointment of an administrator in the county where such property was thus held; but it was urged that where a nonresident decedent left, at the time of his death, property located in a county in this state, thereby giving jurisdiction in that county, the court of ordinary of no other county in the state could acquire jurisdiction to appoint an administrator, even though other property belonging to the estate of the decedent should be tortiously brought into such other county and be there held. This argument commingles two separate questions: First, are the courts of ordinary of this state without jurisdiction to grant letters of administration on the estate of a foreign decedent, unless at the time of his death he leaves property located in this state, or (omitting the question of a fraudulent effort to confer jurisdiction) is the existence of personal property located in a county of this state at the time when an application for the grant of administration is made, and so remaining, sufficient to confer jurisdiction upon the court of ordinary of that county? And, second, if the location of personal property at the time of the application and the hearing thereof is sufficient to give the county where it is situated jurisdiction to grant letters of administration, but there is another county in the state where there was property at the time of the death of the decedent, and where it has since remained, which court of ordinary would have priority of jurisdiction in respect to the grant of letters? The first of these questions is one of the existence of jurisdiction. The second refers to the matter of priority as between two courts, either of which might have had jurisdiction before one undertook to exercise it. There is nothing in the statutes which would

authorize the construction that sometimes the location of personal property in Georgia at the time of the application for administration would confer jurisdiction upon a court of ordinary, and sometimes it would not. The question last stated is answered by the decision in *Arnold v. Arnold*, 62 Ga. 623, supra, in which it was held: "Where a nonresident intestate left assets in two counties of this state, administration can be granted in either, and the ordinary first commencing the exercise of jurisdiction will retain it." See, also, Civ. Code 1895, § 4235.

Judgment affirmed. All the Justices concur.

(132 Ga. 491)

BENNETT LUMBER CO. v. MARTIN et al.
(Supreme Court of Georgia. April 19, 1909.)

MORTGAGES (§ 163*)—LIEN—PRIORITY.

Where title to real estate is conveyed by a duly recorded deed to secure a debt, and the grantee takes the deed and advances the money loaned, without notice and before the record of a materialman's lien upon the property, the title thus acquired is superior to such lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 369; Dec. Dig. § 163.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Bennett Lumber Company against Belle Martin and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Moore & Pomeroy, for plaintiff in error.
E. V. Carter and Ebb. T. Williams, for defendants in error.

HOLDEN, J. The plaintiff alleges that Mrs. Martin contracted with Spencer to make certain improvements on a described lot of land owned by her. Spencer purchased from petitioner certain material to be used in making improvements, which was so used. The plaintiff fully complied with its contract with Spencer in furnishing materials between the 2d day of October, 1905, and the 11th day of December, 1905, and the plaintiff claims a lien on the property described in the petition for the purchase price of such materials. On the 3d of October, 1905, Mrs. Martin conveyed the land to the Dickinson Trust Company by deed to secure a loan of \$1,500. The suit was brought against Mrs. Martin, Spencer, and the defendant company, asking that the lien claimed be foreclosed against the property, and that the judgment of foreclosure have priority over the deed of the defendant, and for other relief. Counsel for both parties treat the claim of lien of the plaintiff and the deed of the defendant company as having been duly recorded. The defendant company filed a demurrer to

the petition, and to the order of the court, sustaining this demurrer and dismissing the petition as to the defendant company, the plaintiff excepted.

The question involved in this case is whether or not, under the facts as alleged, the claim of lien of the plaintiff has priority over the deed to the defendant company. The plaintiff in its petition alleges: "That said loan of \$1,500 was made by said Dickinson Trust Company to said Mrs. Belle Martin for the purpose of erecting a residence on said described premises, and that said Dickinson Trust Company well knew that at the time said deed was executed said building had not been erected, nor had the labor and material therein been paid for; * * * that said Dickinson Trust Company did not pay to said Mrs. Belle Martin the sum of \$1,500, or any part thereof, upon the 3d day of October, 1905, but that said amount was paid to said Mrs. Belle Martin, or said Spencer, or materialmen, as the work thereon progressed; and that petitioner furnished all or part of the material set forth in Exhibit A before said sum of \$1,500 had been paid." A bill of particulars of the material furnished by the plaintiff was attached to the petition, and therein, of date October 2d, the day prior to the execution of the deed, several items of material are charged. If it can be said that any of the material was furnished by the plaintiff before the execution of the deed, there is no allegation that the defendant knew of this fact. It is alleged that the defendant paid to Mrs. Martin, or Spencer, or materialmen, as the work on the residence progressed, the \$1,500 loaned by it to Mrs. Martin; but it is nowhere alleged that the defendant knew that the plaintiff furnished any material to be used in improving the property. As it was alleged that the money was loaned for the purpose of erecting a residence on the property conveyed to the defendant, and that the defendant paid to Mrs. Martin, or to Spencer, the contractor, or to materialmen, as the work on the residence progressed, the amount loaned, it is to be presumed that the money was used for the purpose for which it was loaned, to wit, the erection of the residence on the property. It is nowhere alleged that the defendant, before paying out the full amount of the loan, had any notice that the plaintiff had furnished, was furnishing, or even would furnish, any of the material for the improvements being made.

Civ. Code 1895, § 2804, provides that liens in favor of materialmen shall be inferior to certain liens and claims therein specified, but that they shall be superior to all other liens not therein excepted. It has been held that under this section the lien of the materialman is superior to the lien of a mort-

gage. *Langston v. Anderson*, 69 Ga. 65; *Tanner v. Bell*, 61 Ga. 585; *Georgia Loan Co. v. Dunlop*, 108 Ga. 218, 33 S. E. 882. This ruling is based on the fact that the lien of a mortgage is not one of the liens excepted in the section above referred to. While that section provides that the lien of a materialman shall be superior to the liens not therein excepted, there is no provision that the lien of a materialman shall be superior to a title acquired without notice of the existence of such lien. It has accordingly been held, in the case of *Ashmore v. Whatley*, 99 Ga. 150, 24 S. E. 941, that a bona fide purchaser of the absolute title of real estate, who buys without notice of a materialman's lien upon the property, which at the time of the purchase has been neither recorded nor foreclosed, takes the property divested of such lien. It does not appear from the allegations of the petition that at the time the defendant company took the deed, or during the time it was advancing the money loaned by it to Mrs. Martin, the claim of lien by the plaintiff was recorded or foreclosed, or that the defendant had any notice of the existence of the claim of lien by the plaintiff.

The rights acquired by the holder of a security deed are in many respects different from those of the holder of a mortgage lien. Civ. Code 1895, § 2771, provides that a deed made to secure a debt shall pass the title of the property to the vendee until the debt is paid, "and shall be held by the courts of this state to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeable to the terms of the contract, and not a mortgage." The title acquired under such deed is superior to the right to a year's support, or dower, though such right to a year's support and dower are superior to the lien of a mortgage. When a judgment has been obtained on any indebtedness secured by the deed, before the property can be levied upon and sold, there must be a reconveyance by the grantee to the grantor. As stated in *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10, a security deed conveys absolute title, and leaves the grantor no interest in the land which can be levied on under a judgment obtained after the deed was executed. This subsequent judgment cannot even be levied upon the land thus conveyed to secure a debt, without first tendering to the holder of the security deed his debt, with interest. If the debt secured by the deed is infected with usury, the deed is void. This is not true with reference to a mortgage. If there is no waiver of the right to homestead by the debtor, he can homestead the property mortgaged, and the exemption will be good against the lien of

the mortgage. If the grantor in a security deed homesteads the property conveyed, the exemption is not valid as against the title of the grantee in the deed.

It has been held in many instances by this court that a bona fide purchaser of property, without notice of the general and special liens of landlords and laborers, acquires a title superior thereto. In the case of *Frazer v. Jackson*, 46 Ga. 621, it was held: "A bona fide purchaser of the absolute title to personal property, without notice of any unrecorded statutory lien upon it, takes the same divested of any such lien." The lien provided for materialmen is a statutory lien. In the case of *Clark v. Dobbins*, 52 Ga. 656, it was ruled: "A warehouseman and factor who, without notice of any lien, makes advances on cotton which was produced on rented land and stored with him by the tenant, has such a qualified property in and lien on the cotton as to entitle him to reimbursement for such advances and pay for proper charges, before the landlord can enforce his claim for rent against the cotton." On page 658 it was said: "In such case the right of the factor is that of a purchaser to the extent of the advances made, and he has a special property in the thing or article on which he has advanced his money." In the case of *Holmes v. Pye*, 107 Ga. 784, 33 S. E. 816, where it was held that a bona fide purchaser of cotton raised on rented premises, without notice of the lien of the landlord for rent, took the same freed therefrom, on page 786 of 107 Ga., and page 817 of 33 S. E., it was said: "It is to be noted that the superiority of landlord's liens, as fixed by the statute, is over other liens."

So it is with Civ. Code 1895, § 2804, par. 4, above referred to, which provides that the liens of materialmen shall be superior to liens not therein excepted. There is no provision of our law that the lien of a materialman shall be superior to the title acquired by a bona fide purchaser. While it is true that the lien of a materialman for material furnished in the improvement of real estate is superior to the lien of a mortgage, it is not superior to the title acquired by a bona fide purchaser before the record of such liens and without notice thereof, or the title acquired by one to whom a deed is made conveying the property to secure a debt before such record and without such notice. It not appearing from the allegations of the plaintiff's petition that the defendant ever had any notice of the claim of lien by the plaintiff at the time of the execution of the deed, or before the money borrowed was fully advanced, the court committed no error in sustaining the demurrer.

Judgment affirmed. All the Justices concur.

(132 Ga. 464)

BURPEE v. HOLMES.

(Supreme Court of Georgia. April 17, 1909.)

1. PLEADING (§ 49*)—PETITION—CONSTRUCTION—THEORY AND FORM OF ACTION.

The petition in this case was an action for damages for the breach of an implied warranty in the sale of personalty, and not an action for damages from fraud and deceit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 108; Dec. Dig. § 49.*]

2. SALES (§ 283*)—IMPLIED WARRANTY OF TITLE.

In the sale of personalty, if there is no express warranty, the seller in all cases (unless expressly or from the nature of the transaction excepted) warrants that he has a valid title and a right to sell; and there is a breach of such implied warranty if the property, after the sale, is taken and sold under a mortgage, to which it is subject, given and duly recorded prior to the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 799; Dec. Dig. § 283.*]

3. SALES (§ 441*)—IMPLIED WARRANTY OF TITLE—BREACH—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to support the verdict, and there was no abuse of discretion in refusing a new trial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1281; Dec. Dig. § 441.*]

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by W. A. Holmes against Sam P. Burpee. Judgment for plaintiff, and defendant brings error. Affirmed.

E. T. Moon and D. B. Whittier, for plaintiff in error. E. A. Jones and D. J. Gaffney, for defendant in error.

HOLDEN, J. The defendant in error brought suit against the plaintiff in error for damages, making substantially the following allegations: Burpee, the defendant in the court below, through Carlyle, on January 15, 1906, sold the plaintiff a mule, which at the time was incumbered with a mortgage, which was afterwards foreclosed and the mule taken from the plaintiff and sold. "That your petitioner did not know, at the time he purchased said mule, it was under or subject to a mortgage. Neither did said Sam P. Burpee nor Stanmore Carlyle inform him that there was a mortgage on said mule. That at the time the said Sam P. Burpee sold said mule to petitioner he well knew of the existence of the said bank's lien. That he knew of the same when he and the said Stanmore Carlyle, his agent, sold said mule, or induced said W. A. Holmes to purchase the same, knowing full well that the mule was subject to the mortgage held by said bank. * * * That the said Sam Burpee, at the time he sold or had said mule sold to said W. A. Holmes, * * * knew of the existence of the said bank's superior lien, and that said mule was subject to said lien." After the mule was levied upon, the plaintiff

notified the defendant, who agreed to give the plaintiff another mule in the place of the one sold him, or pay him the value of the mule, which promise the defendant failed to carry out. The plaintiff sued out an attachment against the defendant on the grounds of his being a nonresident and causing his property to be removed beyond the limits of the state, and filed his declaration in attachment. The defendant in his answer denied that he sold the mule to the plaintiff, but alleged that the mule was the property of Carlyle, and that Carlyle sold the mule to the plaintiff as his own property. He denied that he knew that there was a mortgage on the mule at the time of the sale. Upon the trial of the case a verdict was rendered in favor of the plaintiff for \$125, and to the order of the court overruling his motion for a new trial the defendant excepted.

1. The evidence shows that Carlyle sold the mule to the plaintiff; but there is evidence that the defendant admitted that the mule belonged to him, and that Carlyle acted as his agent in selling the mule. There is no evidence, however, that Carlyle or the defendant, at the time the mule was sold to the plaintiff, knew of the existence of the mortgage thereon under a foreclosure of which the mule was levied upon and sold. The defendant contends that the action is one for fraud and deceit, and that, there being no evidence that at the time the mule was sold to the plaintiff there was any knowledge on the part of the defendant, or Carlyle, that a mortgage on the mule existed, the verdict was contrary to evidence. In order to recover in an action of deceit, it is necessary to allege and prove the scienter. *Cooley v. King*, 113 Ga. 1163, 1165, 39 S. E. 486. In order to maintain an action under Civ. Code 1895, § 3813, or under section 3814, it is necessary, as stated in *De Vaughn v. Harris*, 103 Ga. 105, 29 S. E. 613, and in *Gordon v. Irvine*, 105 Ga. 144, 148, 31 S. E. 151, respectively, to show actual moral fraud. Is this action one for fraud and deceit, or one for the breach of an implied warranty as to title? There is no allegation that the defendant, or Carlyle, made any representation to the plaintiff that there was no mortgage on the mule at the time of the sale. The petition simply alleges that the defendant knew at the time of the sale of the existence of the mortgage and failed to inform the plaintiff of its existence.

Civ. Code 1895, § 3814, provides: "Willful misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action." Under this provision, proof of concealment in the manner therein set forth would be

sufficient to authorize a jury to infer actual moral fraud on the part of the seller; but the plaintiff does not allege in the petition any intention on the part of the seller to deceive or defraud the plaintiff in withholding from him or concealing the information which the defendant is alleged to have had about the existence of the mortgage. If the seller of the mule knew at the time of the sale that there was a mortgage on the mule, duly recorded and to which the mule was subject, and merely failed to inform the buyer of this fact, without any intention to deceive or defraud him, this would not constitute actual moral fraud. There is an allegation in the petition that the buyer did not know of the existence of the mortgage. There is no allegation of the value of the mule, or the amount due on the debt secured by the mortgage. It may be true that the seller of a piece of personalty may know of the existence of a mortgage thereon to which the property is subject, and may intend to pay off the mortgage himself, or, because of the existence of the mortgage, sell it for a less sum than its value, honestly believing, and for good reasons being justified in the belief, that the buyer also has knowledge of the outstanding mortgage, and expects to discharge it as a part of the cost to him of the property purchased; and the circumstances might be such that there would be no fraud or deceit, or concealment of the existence of the mortgage "in such a manner as to deceive and mislead" the buyer.

There is no allegation that there was any intention on the part of the seller to deceive or mislead the plaintiff, or that the plaintiff was deceived or misled; nor is there any allegation that the plaintiff was "defrauded." The allegation in the first paragraph of the petition is that "defendant is indebted to your petitioner in the sum of \$125, for that" defendant sold plaintiff a mule which was subject to a mortgage, and that the mule was afterwards levied on under the execution issued upon the foreclosure of the mortgage. The second paragraph alleges that the mule was sold under the mortgage execution, "to the loss and damage of petitioner." The petition further alleges that the defendant subsequently admitted "his liability, * * * promising to pay the same." It is nowhere alleged that the plaintiff was misled, deceived, or defrauded, or that the defendant, or his agent, intended to deceive, mislead, or defraud the plaintiff. The allegations that at the time of the sale the defendant knew, but the plaintiff did not know, of the existence of the mortgage, and defendant failed to inform plaintiff of this fact, simply make and emphasize the fact that there was no waiver by the plaintiff of the implied warranty of title by the defendant in the sale, and that the facts and circumstances were such that the implied warranty was not "expressly or from the nature of the transaction excepted." In this case there is no allega-

tion whatever in the petition that the defendant knew that the plaintiff did not know of the existence of the mortgage. In the case of *Perdue v. Harwell*, 80 Ga. 150, 4 S. E. 877, it was held that the action was brought upon the contract, and not upon the tort, and on page 153 of 80 Ga., and page 878 of 4 S. E., the court says: "Another, and perhaps the stronger, reason is that the declaration filed by the plaintiff does not allege fraud or deceit on the part of the defendant. It does not even hint at either in any part of the declaration, showing that the pleader relied upon the contract, and not upon the tort."

We do not think that the petition in the present case was an action for fraud and deceit, but was an action for damages for breach of an implied warranty. Upon the trial of a case, proof of facts connected with the concealment of a material fact might show actual moral fraud; but in construing a petition, to determine whether or not a party is proceeding in an action for moral fraud perpetrated upon him, the absence of an allegation that the defendant actually intended to mislead, deceive, or defraud, and the absence of allegations of circumstances indicating moral fraud, and the absence of allegations that plaintiff was misled, deceived, or defrauded, must be considered in determining whether the action is based on fraud and deceit or is an action *ex contractu*. There is nothing in the ruling herein made in conflict with the decision in the case of *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151.

There are allegations in the petition that the defendant, after the property was taken under the mortgage, promised to deliver to the plaintiff another mule or pay the plaintiff the value of the property. We do not think these allegations can be properly construed as constituting a suit to recover upon such subsequent promise; but they were simply allegations of a subsequent admission of liability made by the defendant.

We do not think there is any merit in the complaint of the defendant that the court committed error in refusing to award a nonsuit, or to direct a verdict, or to grant a new trial on the ground that the action was one *ex delicto*, and there was no evidence showing fraud or deceit on the part of the defendant, or his agent, who sold the mule to the plaintiff. According to a proper construction of the petition, the action was one for damages from breach of implied warranty of title.

2. Civ. Code 1895, § 3555, provides that, if there is no express covenant of warranty, the seller (unless expressly or from the nature of the transaction excepted) warrants that he has a valid title to personalty and the right to sell it. It would be a breach of such implied warranty if, at the time of the sale, there was a valid and duly recorded incumbrance upon the property, to which it was subject and under which it was afterwards

taken from the buyer and sold. *Snowden v. Waterman*, 100 Ga. 588, 589, 28 S. E. 121. See, also, 30 A. & E. Enc. Law, 181.

3. The plaintiff in error contends that the evidence does not disclose the fact that the plaintiff has been damaged, and bases this contention on the following statement made by Holmes in delivering his testimony: "At the time the mule was levied on it was out here in possession of a negro to whom I had sold it." In making the motion for nonsuit, and the motion for the court to direct a verdict for the defendant, he did not claim that by reason of this statement by the plaintiff the evidence showed that plaintiff was not damaged. Holmes further testified: "I kept that mule about 12 months before it was taken away. * * * He [Burpee] said that it was his mule, and that he was responsible to me for the mule. * * * I didn't file any claim to the mule, or try to maintain my title in the mule as against the levy. * * * I told him I wouldn't take \$125 for the mule I had. * * * I swore in that trial * * * that Carlyle had cheated and defrauded me out of \$125. He or somebody had." Another witness testified that the defendant said: "You can just rest satisfied Mr. Holmes will be paid in full for his mule." This witness further testified that Burpee said he would bring a mule "to take the place of the mule that Mr. Holmes had lost." In view of the testimony above quoted, and of other testimony in the case, indicating that the mule belonged to Holmes at the time of the levy and sale, we think the jury were authorized from all the testimony to conclude that at the time the mule was levied upon and sold it belonged to the plaintiff, and that he sustained damages to the amount of the verdict in the loss of the mule. The evidence discloses the fact that the mortgage was duly recorded and a lien on the mule at the time of the sale to the plaintiff. The evidence supported the verdict, and the court did not abuse his discretion in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

(6 Ga. App. 145)

BIBB v. CRAWFORD. (No. 1,500.)

(Court of Appeals of Georgia. May 4, 1909.)

1. LIBEL AND SLANDER (§ 38*)—AFFIDAVITS—PRIVILEGE.

The publication of false and libelous matter only by signing an affidavit to be used upon the hearing of a case in equity, or upon the hearing of any other issue in which the use of affidavits is permissible, is absolutely privileged, and will not support an action for libel.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 119; Dec. Dig. § 38.*]

2. LIBEL AND SLANDER (§ 50½*)—PRIVILEGED COMMUNICATIONS.

If one publishes a libel contained in an affidavit intended for use in a judicial investigation or proceeding, otherwise than in some re-

lation to that suit, the publication is generally not privileged.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 50½.*]

3. LIBEL AND SLANDER (§ 97*)—DEMURRER—DEFENSE OF PRIVILEGE.

The defense of privilege cannot be raised by demurrer to the petition, unless the facts upon which the privilege may be asserted appear upon the face of the petition.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 236; Dec. Dig. § 97.*]

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by M. D. Bibb, administratrix, against W. B. Crawford. Judgment for defendant, and plaintiff brings error. Reversed.

Bibb brought suit against Crawford, alleging that the latter had made and published an affidavit containing certain libelous language set forth in the petition. It is alleged that the language was falsely and maliciously used. It is stated in the petition that the libelous matter was published; but it is not stated how or to whom it was published. The affidavit purports on its face to have been made for use in a suit pending in Bartow county; but whether it was so used or not does not appear from the record. The court sustained a general demurrer to the petition.

Garrard & Meldrim and John T. Norris, for plaintiff in error. Cann, Barrow & McIntire, for defendant in error.

POWELL, J. (after stating the facts as above). 1, 2. It is undoubtedly true that, if the publication of the affidavit by the defendant was only by making it and introducing it or allowing it to be introduced in evidence in the trial of the case pending in a court of competent jurisdiction (and this is the insistence of his counsel), the defendant could not be held liable, no matter how false or malicious it might be, for he could claim an absolute privilege. *Francis v. Wood*, 75 Ga. 648; *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274; *Conley v. Key*, 98 Ga. 115, 25 S. E. 914; *Hendrix v. Daughtry*, 3 Ga. App. 481, 60 S. E. 206; *Buschbaum v. Heriot*, 5 Ga. App. —, 63 S. E. 645. "An action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction, such as defamatory bills or proceedings filed in chancery, or in ecclesiastical courts, or affidavits containing false and scandalous assertions against them." 2 *Addison on Torts*, § 1092.

However, the present petition does not state how or in what manner the libel was published, nor was the plaintiff required by special demurrer, or otherwise, to give this information. So far as we are judicially in-

formed, the defendant may have caused it to be published in a newspaper, or may have shown it to persons other than those connected with the court. The privilege that a witness may speak freely upon the stand, or in affidavits, where that form of testimony is permissible, gives no immunity as to any publication of the scandalous matter, other than as connected with the suit or action in which the testimony is given. Where the libel is contained in an affidavit used in a judicial proceeding, as is true in cases where the testimony is delivered upon the witness stand, the sole redress against the witness is by a prosecution for perjury. But if a witness who has testified by affidavit publishes the false matter otherwise, as by exhibiting it to persons not connected with the suit or the court, the fact that the same paper might afterward be used in a judicial proceeding, or that it has been previously so used, affords no protection.

8. The defense of privilege, being affirmative in its nature, can be raised by demurrer only when all the facts essential to its existence appear in the petition.

Judgment reversed.

(6 Ga. App. 147)

SUMMIT WAGON CO. et al. v. LOWERY.
(No. 1,518.)

(Court of Appeals of Georgia. May 4, 1909.)

1. SUFFICIENCY OF EVIDENCE.

The evidence supports the verdict.

2. EVIDENCE (§ 99*)—RELEVANCY.

"It is relevant to give in evidence any circumstance which tends to make the proposition at issue either more or less probable." *Todd v. German-American Insurance Co.*, 2 Ga. App. 794, 59 S. E. 94.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 123; Dec. Dig. § 99.*]

(Syllabus by the Court.)

Error from City Court of Swainsboro; Frank Mitchell, Judge.

Action between the Summit Wagon Company and others and H. M. Lowery, for the use, etc. From the judgment, the Wagon Company and such others bring error. Affirmed.

Saffold & Larsen, for plaintiffs in error.
Lee Godfrey and Jas. K. Hines, for defendant in error.

POWELL, J. Judgment affirmed.

(6 Ga. App. 159)

DOWDY v. STATE. (No. 1,770.)

(Court of Appeals of Georgia. May 4, 1909.)

LARCENY (§ 40*)—INDICTMENT—VARIANCE.

The evidence was sufficient to authorize the conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 111; Dec. Dig. § 40.*]

(Syllabus by the Court.)

Error from City Court of Washington; Wm. Wynne, Judge.

Green Dowdy was convicted of larceny from the house, and he brings error. Affirmed.

I. T. Irvin, Jr., for plaintiff in error. R. C. Norman, Sol., for defendant in error.

POWELL, J. The defendant was charged with larceny from the house, in that he stole certain cotton seed from an outhouse of a Mr. Ray. The proof was that he and another negro, named Bradley, went "to the cotton seed house" of Mr. Ray and stole the cotton seed therefrom. The only point made as to the legal sufficiency of the evidence is that the indictment charged an outhouse and the proof showed a cotton seed house. This is not a material variance. The judge, who tried the case without the intervention of a jury, was authorized as a trier of the facts to infer from his general experience and observation that a cotton seed house is an outhouse.

The plaintiff in error cites the case of *Thompson v. State*, 92 Ga. 448, 17 S. E. 265, in which it was held that "an allegation in an indictment that a grindstone was stolen from a 'wagon shed house' is not supported by evidence showing that the grindstone in question was stolen from *under* a 'buggy shed house.'" The italics in the foregoing quotation were inserted by the Supreme Court itself, and plainly were intended to emphasize the fact that the larceny did not take place in the house, or from the house, but "under" a shed. To steal from under a shed is not larceny from the house in this state. *McCabe v. State*, 1 Ga. App. 719, 58 S. E. 277.

The plaintiff in error also excepts to the admission of testimony that the defendant and the negro Bradley were frequently seen together about Mr. Ray's place during the period in which the larceny was supposed to have been committed. There was no error in admitting this testimony.

Judgment affirmed.

(6 Ga. App. 163)

PARRISH v. STATE. (No. 1,792.)

(Court of Appeals of Georgia. May 4, 1909.)

1. CRIMINAL LAW (§ 1144*)—REVIEW—PRESUMPTION AGAINST ERROR—EXCUSING JURORS.

Irrespective of the question whether it would be good cause for challenge to the array that the judge had excused from attendance upon the court, without legal cause, certain of the jurors who had been regularly drawn, and had caused the panel to be filled by the addition of talesmen, this court will not reverse the judgment overruling a challenge based on this ground, where it does not affirmatively appear that the jurors were excused without good and lawful reason. It will be presumed, until the contrary appears, that the judge acted on good and lawful cause. The defendant making the

challenge does not carry the burden resting on him in this respect by showing that certain named jurors regularly drawn were excused and that the clerk of the court knew of no lawful excuse offered by them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3023; Dec. Dig. § 1144.*]

2. SUFFICIENCY OF EVIDENCE.

The evidence fully authorized the conviction.

(Syllabus by the Court.)

Error from City Court of Statesboro; E. W. Jordan, Judge.

Emmett Parrish was convicted of a crime, and he brings error. Affirmed.

Anderson & Speer and A. M. Deal, for plaintiff in error. Fred T. Lanier, Sol., and E. Lee Moore, for the State.

POWELL, J. Judgment affirmed.

(6 Ga. App. 154)

WILLOUGHBY v. MARTIN. (No. 1,550.)

(Court of Appeals of Georgia. May 4, 1909.)

TRIAL (§ 295*)—INSTRUCTIONS—BURDEN OF PROOF.

Plaintiff in error concedes that the evidence supports the verdict, and the only error complained of was the mere failure to charge that the burden "rests upon the plaintiff to establish by a preponderance of the evidence his contentions in the case." In the absence of a request, this was not error, especially where the court fully instructed the jury as to the respective contentions and their duty to determine the truth of such contentions from the evidence. *Small v. Williams*, 87 Ga. 682, 13 S. E. 589; *Gunn v. Harris*, 88 Ga. 439, 14 S. E. 593; *Powell v. Georgia & Fla. Ry. Co.*, 121 Ga. 803, 49 S. E. 759.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

(Syllabus by the Court.)

Error from Superior Court, Walton County; C. H. Brand, Judge.

Action by A. W. Martin against George Willoughby. Judgment for plaintiff, and defendant brings error. Affirmed.

Walker & Roberts, for plaintiff in error. W. O. Dean, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 157)

DOUGLAS v. STATE. (No. 1,767.)

(Court of Appeals of Georgia. May 4, 1909.)

CRIMINAL LAW (§§ 534, 535*)—CONFESSIONS—CORROBORATION.

There was sufficient evidence to authorize the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1223, 1224, 1226; Dec. Dig. §§ 534, 535.*]

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Sib Douglas was convicted of illegally selling intoxicating liquor, and he brings error. Affirmed.

H. A. Wilkinson, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and Jas. G. Parks, for the State.

POWELL, J. The defendant was convicted for illegally selling liquor. The testimony for the state shows that a Mr. Lee gave his negro porter, Tom Brinson, 25 cents, and told him to go to the defendant and buy him a half pint of whisky. As soon as the porter left on this mission, Lee called to a Mr. Pritchard and told him that he had sent for the liquor, and asked him to watch the transaction, so that if the defendant sold the liquor he could furnish testimony in addition to that of the porter. The porter went to the defendant's house and returned with a half pint of corn whisky, which he delivered to Lee. Lee then turned this bottle of whisky over to Pritchard, who had seen the porter go into the defendant's house, and who was awaiting the result of the visit. Pritchard and another person then went to the defendant's house and found a jug of whisky containing about three quarts of the same kind of liquor. When this jug of whisky was found in the defendant's house, and he was confronted with the situation, he admitted that he had sold the bottle of whisky to Lee's porter that morning. The porter, however, when called to the stand by the state to testify, said that, although he was given the quarter by Mr. Lee to buy the whisky, when he approached the defendant he said he did not have any to sell; that a proposition was then made to borrow some, and the defendant loaned him a half pint under a promise that he would return it in a few days; and that on the following Tuesday morning he went to another town and purchased a two-gallon jug of whisky, filled up the half-pint bottle, and returned it to the defendant. Upon the statement of the Solicitor General that he had been entrapped by the witness, the judge allowed the state (after laying the usual foundation) to prove that when this witness returned with the liquor and delivered it to Mr. Lee he stated that he had bought the whisky from the defendant. In connection with the admission of this testimony the judge cautioned the jury that it was not admitted as independent proof of the defendant's guilt, but that it was admitted solely for the purpose of impeaching the negro porter as a witness. It was further shown that the witness' statement to the effect that he had gone to another town and bought whisky, which he had returned to the defendant, was untrue. The defendant, in his statement, denied selling the whisky, admitted that he had delivered it to the porter, and claimed that he

had merely loaned it to him, and that the loan had been repaid the following week.

The contention of the defendant's counsel is that there is no proof of the corpus delicti—the sale of the whisky—otherwise than by the alleged confession of the defendant. This court thoroughly recognizes the rule that the corpus delicti must be established by evidence other than a confession; that a confession, wholly uncorroborated by other evidence, will not support a conviction. However, it is a part of the same rule that the corroborating testimony need not show the fact beyond a reasonable doubt, but is adequate if it tends materially to corroborate the confession and to connect the defendant with the crime. The circumstances that the defendant had been sent to buy the whisky, and not to borrow; that he proceeded forthwith on the mission, and returned with the whisky, and not the money; that there had been a delivery of the whisky; that the defendant's subsequent explanation that he had made a loan proved in part at least to be untrue, by reason of the fact that the person to whom the whisky was delivered, and by whom it was said to have been returned, had had no opportunity to have gone off for it and to have returned it—all tends strongly to raise the inference that the defendant had sold the whisky, and was certainly sufficient to corroborate his voluntary confession that he had sold it.

The point is also made in the motion for a new trial that the court erred in allowing the state's counsel to show that the negro porter had stated to Mr. Lee that he had bought the whisky from the defendant; but it is not meritorious, when considered in connection with the purpose of its admission and the cautionary remarks made to the jury by the presiding judge at the time of its admission.

Judgment affirmed.

(6 Ga. App. 151)

WELLBORN v. SOUTHERN RY. CO.
(No. 1,527.)

(Court of Appeals of Georgia. May 4, 1909.)

CARRIERS (§ 62*)—PRINCIPAL AND AGENT (§ 101*)—IMPLIED CONTRACT OF CARRIAGE—SPECIAL CONTRACT—EFFECT.

Whenever a shipper delivers property to a common carrier for transportation, there arises at once by implication of law a contract of carriage between the parties. Where the shipper seeks to hold the carrier liable for breach of this contract in failing to deliver the goods safely at destination, he need not, in order to make out a prima facie case, show any written bill of lading, but may prove the contract of carriage by showing delivery of the property to the carrier, through himself or agent. If the agent delivers the property in his own name, and his principal is undisclosed, the latter is bound by any special contract, so far as the terms thereof are legal and binding, which is made between the agent and the carrier; but if the company receives the goods as those of

the principal, and without knowledge or consent of the latter the carrier attempts to make a special contract with the agent, the principal is not bound thereby, unless he does some act from which the law infers a ratification.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 195-206; Dec. Dig. § 62;* *Principal and Agent*, Cent. Dig. § 256; Dec. Dig. § 101.*]

(Syllabus by the Court.)

Error from Superior Court, Franklin County; Jos. N. Worley, Judge.

Action in a justice's court by W. G. Wellborn against the Southern Railway Company. There was an appeal to the superior court, where a nonsuit was granted, and plaintiff brings error. Reversed.

Wellborn brought an action against the Southern Railway Company in a justice's court, and alleged a breach of the company's contract to carry the property safely. The case was appealed to the superior court, and there a nonsuit was awarded. It appears from the testimony that Wellborn desired to ship a car load of stock from Lavonia, Ga., to Atlanta, and that he instructed a Mr. Jones to deliver the stock to the railroad company and to load the same upon the cars. Jones had no further authority in the matter than to load the stock for Wellborn. The agent of the company, however, asked him to sign a special contract of shipment in the name of the plaintiff, and he thereupon at the agent's request signed the plaintiff's name to the special contract. One of the horses sent by this shipment was injured while being transported. The plaintiff, on the witness stand, denied that he had signed the special contract, or had authorized Jones to sign it, and stated, further, that he did not know of the existence of the contract at the time he paid the freight on the car of stock when it was delivered at destination. When it thus appeared that there was a written contract of shipment, and the plaintiff was unable to produce it and introduce it in testimony, the judge excluded testimony offered for the purpose of showing that there had been a delivery of the property to the carrier, and awarded a nonsuit on the ground that the written contract was the highest evidence.

H. H. Chandler and Jas. H. Skelton, for plaintiff in error. A. G. & Julian McCurry, for defendant in error.

POWELL, J. (after stating the facts as above). If Jones, without disclosing his agency, or without the agent of the company being aware that the plaintiff was his principal, had offered the shipment to the railroad company for transportation, and had made, as a part of this transaction, a special contract of carriage, or if the plaintiff, knowing that Jones had made this special contract, had ratified his act in so doing, by taking the benefit of any particular ad-

vantage which had accrued by reason of that contract, such as riding on a pass given as a part of it, then the rights of the parties would have been governed by the special contract of shipment, so far as legally enforceable. *Central of Ga. Ry. Co. v. James*, 117 Ga. 832, 45 S. E. 223; *Durant Co. v. Sinclair Co.*, 2 Ga. App. 213 (4), 58 S. E. 485.

It appears from the testimony in the present case, however, that the agent had no further authority than merely to carry the stock to the railroad and put it upon the car, and that the agent of the railroad knew that Wellborn was the real shipper, and, indeed, had this servant who brought the stock to sign a special contract in Wellborn's name. It further appears that Wellborn did not know of this transaction, and there is no testimony that he ever in any way ratified it. It was, therefore, no contract of his. He did not sue upon this contract of carriage, but sued upon that implied contract which arose from delivery of the shipment to the carrier for transportation. It is not necessary to produce or account for a bill of lading, in order to show that property has been delivered to a carrier for transportation. The plaintiff had a right to stand upon the implied contract, and the court erred in granting a nonsuit.

Further, it would seem that the act approved August 18, 1906 (Acts 1906, p. 102), would prohibit the making of special contracts of carriage with a view of limiting the carrier's liability as against the initial shipper or holder of the bill of lading.

Judgment reversed.

(6 Ga. App. 154)

WILLIAMS v. STATE (No. 1,758.)

(Court of Appeals of Georgia. May 4, 1909.)

1. MASTER AND SERVANT (§ 67*)—CONTRACT OF EMPLOYMENT.

A contract "to pull and tie a certain 14-acre tract of fodder on the Barrow place, when the same was ready to be pulled, at the rate of 60 cents per day, or 70 cents per 100 bundles," is sufficiently definite as to time of beginning, work to be performed, and wages to be paid.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 67.*]

2. MASTER AND SERVANT (§ 67*)—CONTRACTS TO LABOR — OBTAINING ADVANCEMENTS FRAUDULENTLY—EVIDENCE.

The evidence, taken in connection with the defendant's statement, affirmatively shows that there was no intent to defraud when the provisions were procured from the prosecutor by the defendant on his labor contract, and therefore the verdict was unauthorized.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 67.*]

(Syllabus by the Court.)

Error from City Court of Leesburg; H. H. Long, Judge.

Al Williams was convicted of procuring advancements fraudulently on the faith of contracts of labor, and brings error. Reversed.

Howell B. Simmons, for plaintiff in error.
W. G. Martin, Sol., for the State.

HILL, C. J. Plaintiff in error was convicted of a violation of the act of 1903 (Acts 1903, p. 90) providing for punishment of those who with fraudulent intent, procure advances on the faith of contracts of labor. The evidence, briefly stated, is as follows: According to the prosecutor, the defendant came to his place and wanted some provisions, and he let him have "one sack of flour, worth 80 cents, 4 lbs. meat, 45 cents, 1 plug of tobacco, 15 cents, and a package of soda, 5 cents," on the promise of the defendant that he would "pull and tie a certain 14-acre tract of fodder on the Barrow place, when the same was ready to be pulled," and he was to pay the defendant for this work at the rate of 60 cents per day, or 70 cents per 100 bundles. The defendant never pulled the fodder or paid for the provisions. At the time that the agreement was made with the defendant, he was working on a neighboring farm for Mr. Bryant, who got sick and died in the fall. The prosecutor testified that he frequently saw the defendant, and never made any demand on him to pull the fodder or to return the money nor informed him that the fodder was ready to be pulled. He also swore that the defendant came to see him about pulling the fodder, but it was "after everybody in the neighborhood had finished pulling fodder." This was all the evidence for the state.

The defendant, in his statement to the jury, admitted that he had made the contract in question with the prosecutor, and had received from him the provisions named in the accusation. He gave, as a reason why he was late in his offer to perform his contract, the fact that his employer, Mr. Bryant, was taken sick in the summer, that he was kept busy waiting on him until he died in the fall, and that after his employer's death he helped the widow gather her crop; that after his employer died, and he had finished helping gather the crop for the widow, he went to Mr. Scott, the prosecutor, to pull the fodder for him according to his contract, and found that the fodder had been pulled; that he then made arrangement with his "boss" to pay all that he owed the prosecutor, and he did not know that the claim of Mr. Scott had not been paid, until he had him arrested a year later.

It is insisted that the evidence in this case is not sufficient to warrant a conviction, because the alleged contract was not definite as to the time it was to begin or end, or as to the labor to be performed. We do not concur in this opinion. We think the contract was definite in every particular. The defendant was to do a definite, specified piece of work, for a definite, specified wage (to pull and tie a certain 14-acre tract of

fodder on the Barrow place, when the same was ready to be pulled), for which the defendant was to be paid at the rate of 60 cents per day, or 70 cents per 100 bundles. The defendant agreed to pull the fodder when "ready to be pulled." We think, however, that the prosecutor should have informed the defendant when his fodder was ready to be pulled, in view of the fact that the defendant, according to the prosecutor's own testimony, was permanently employed elsewhere, and was only to do this special piece of work for the prosecutor "when the fodder was ready to be pulled." Now, the prosecutor testifies that he saw the defendant every day, but made no demand on him to do the work, and did not inform him that the fodder was ready to be pulled. All fodder does not ripen at the same time, and the fact that defendant was late in offering to perform his contract was not material, unless it was necessary to pull and tie the fodder before he offered to perform. It does not appear, from the evidence, that it became necessary for the prosecutor's fodder to be pulled before the defendant offered to pull it. It may have been "late corn," and the best agriculturists differ as to the stage of ripeness when fodder should be pulled (so says Russell, J.). The defendant, in his statement, gave good reasons why he was delayed in performing his contract. He was compelled to wait on his employer, who was sick during the whole summer, and to help gather the crop for the widow after his employer had died.

We are clear that the evidence in this case, taken in connection with the defendant's statement (which on material facts is fully corroborated), proves that the defendant had no fraudulent intent when he procured from the prosecutor the small quantity of provisions on his promise to do the particular work; and for this reason the verdict of guilty was unauthorized, and a new trial should have been granted.

Judgment reversed.

(6 Ga. App. 154)

SMITH v. CHIVERS. (No. 1,559.)

(Court of Appeals of Georgia. May 4, 1909.)

1. JUSTICES OF THE PEACE (§ 92*)—DEFENSE AT FIRST TERM.

The defendant in a justice's court, when sued on an unconditional contract in writing, must appear and make his defense at the first term, either by pleading, or by marking his name, or that of his attorney, on the docket. Civ. Code 1895, § 4134; Heyward v. Field, 95 Ga. 714, 22 S. E. 653; Morgan v. Prior, 110 Ga. 791, 38 S. E. 75.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 92.*]

2. JUSTICES OF THE PEACE (§ 92*)—DEFENSE AT FIRST TERM.

When no defense whatever is made at or before the first term to a suit in a justice court on an unconditional contract in writing, no

plea can be filed on an appeal to a jury from the judgment rendered in favor of the plaintiff. The justice did not err in dismissing the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 92.*]

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Action by W. R. Chivers against John A. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

M. L. Gross and A. R. Wright, for plaintiff in error. J. L. Kent, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 124)

FRED WAGNER & SON v. WHITFIELD,
(No. 1,384.)

(Court of Appeals of Georgia. May 4, 1909.)

APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT—VERDICT APPROVED BY LOWER COURT.

No error of law appears. The conflict in the evidence was settled by the verdict, which the trial judge approved. This court will not interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3949; Dec. Dig. § 1005.*]

(Syllabus by the Court.)

Error from City Court of Cordele; E. F. Strozier, Judge.

Action by T. B. Whitfield against Fred Wagner & Son. Judgment for plaintiff, and defendants bring error. Affirmed.

Whitfield brought suit against Fred Wagner & Son, a partnership composed of Fred Wagner and Fred Wagner, Jr., to recover damages for breach of contract. He alleged that he entered into a contract with the defendants to paint the courthouse which the defendants were constructing for Crisp county; that he was to be paid the sum of \$450 for this work; that the defendants agreed to furnish him all of the materials to be used at dealers' prices, with the exception of 400 pounds of lead, which they agreed to furnish him free of charge, and they also agreed to advance him sufficient money to pay his laborers at the end of each week; that he entered upon the performance of his contract, employed laborers, bought material, and carried on the work under the contract for 30 days or more, when the defendants violated the contract with him by stopping him from performing the same and refused to carry out their agreement to furnish money for his weekly pay roll, or to pay for the material bought and used by him in doing the work under his contract; and that by reason of the breach of their contract the defendants have injured and damaged him in the sum of \$250.93—this aggregate amount consisting of \$55.35, which he

had actually expended for material that went into the building under the terms of his contract, and the amount of \$195.58 paid by him to laborers for their work under the contract. He attaches a bill of particulars containing an itemized statement for both items of damages claimed. The defendants filed a plea of the general issue. The contract was admitted, and the fact that it was not completed by the plaintiff was also admitted. The evidence was in conflict only on the one issue as to whether the plaintiff had voluntarily abandoned his contract, or whether the defendants, without cause, had prevented him from performance. The verdict was in favor of the plaintiff.

J. T. Hill, for plaintiffs in error. Land & Hall, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 133)

SOUTHERN STATES PORTLAND CEMENT CO. v. HELMS. (No. 1,530.)

(Court of Appeals of Georgia. May 4, 1909.)

APPEAL AND ERROR (§ 1002*)—CONFLICTING EVIDENCE—REVIEW.

The motion for a new trial rests solely on the ground that there is no evidence to support the verdict. An inspection of the record discloses that this contention is not well taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

(Syllabus by the Court.)

Error from City Court of Polk County. Action by F. M. Helms against the Southern States Portland Cement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Tison, for plaintiff in error. Janes & Hutchens, for defendant in error.

POWELL, J. This case previously came to this court on demurrer, and we held that the petition set out a cause of action. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 S. E. 524. The case then proceeded to trial, and resulted in a verdict in favor of the plaintiff. The case comes here again on exceptions to the refusal of the trial judge to grant a nonsuit, and to the overruling of a motion for a new trial, based on the general grounds alone.

It is never necessary to pass upon a refusal to grant a nonsuit where the record contains the exception that the verdict as finally rendered is without evidence to support it, since the latter exception raises the whole question more adequately than an exception to the overruling of a motion for nonsuit would present it. Even if the motion for nonsuit were well taken at the time it was made, and was therefore improperly

overruled, yet if the subsequent testimony cured the deficiency in the plaintiff's proof, the judgment would not be reversed because the court refused to grant the nonsuit at the time the motion was made. On the other hand, if the subsequent testimony did not cure the deficiency, a verdict in favor of the plaintiff would be without evidence to support it, and would be set aside on that ground; so there is never any need to except to the refusal of a nonsuit, where the case has resulted in a verdict in favor of the plaintiff, and the defendant has excepted to the verdict on the ground that it is without evidence to support it.

The evidence in this case is conflicting as to almost every material question of fact; but construing it most favorably to the plaintiff, it will support the verdict. This court has no power to interfere with the action of the jury and of the trial judge upon the mere question of fact involved.

Judgment affirmed.

(6 Ga. App. 133)

WELLS v. STATE. (No. 1,791.)

(Court of Appeals of Georgia. May 4, 1909.)

MASTER AND SERVANT (§ 67*)—FRAUDULENT BREACH OF CONTRACT—STATUTORY PROVISIONS.

The conviction in this case is utterly contrary to the law and the evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 67.*]

(Syllabus by the Court.)

Error from City Court of Reidsville; C. L. Morgan, Judge.

Jasper Wells was convicted of procuring money and supplies on a contract to perform services with intent to defraud, in violation of Act Aug. 15, 1903 (Acts 1903, p. 90), and he brings error. Reversed.

H. C. Beasley, for plaintiff in error. H. H. Elders, Sol., for the State.

POWELL, J. The defendant was charged with cheating and swindling under the act of 1903 (Acts 1903, p. 90). The state's contention, supported by the testimony of the prosecutor, was that the defendant contracted with the prosecutor to work for him as an ordinary farm laborer at \$16 per month until he should pay and return to him the sum of \$30.85, which the prosecutor had paid to another person at the defendant's request; that in addition to paying this \$30.85 the defendant was to work on until he had repaid all advances that the prosecutor might make him in the meantime. The defendant went to work, and worked 3 months and 6 days, and then moved away. At the time he left the prosecutor's place the defendant still owed him the \$30.85, after crediting him with his wages, and also owed a bal-

ance of \$16.66 for supplies advanced to him pending the performance of the labor.

If we should hold that the act of 1903 covered such a transaction as this, no court having jurisdiction to do so would hesitate to declare the act unconstitutional and void, for its repugnancy to the federal Constitution and the peonage statutes enacted thereunder, as well as for its repugnancy to our own state Constitution. It has been held, too often to require the citation of any authority, that this statute is applicable only where the cheating and swindling has been accomplished through the fraudulent procurement of money, under a definite contract of employment. It may be that under the testimony in the record the contract between the prosecutor and the defendant as to the time of its beginning is definite enough; but when was it to end? The defendant was to work until he repaid not only the \$30.85, but also all further advances. After three months had elapsed, the defendant owed the \$30.85 and also \$16.66 more; and at this rate the defendant, though he were a young man at the beginning, and though he might live to the ripest old age, would go down to his grave with his contract still unperformed. Under every decision rendered by this court and by the Supreme Court upon the application of this statute, the defendant is not guilty.

Judgment reversed.

(6 Ga. App. 147)

LAMPTON v. CEDARTOWN CO.
(No. 1,520.)

(Court of Appeals of Georgia. May 4, 1909.)

1. MASTER AND SERVANT (§ 315*)—INDEPENDENT CONTRACTOR—NEGLIGENCE.

One who employs an independent contractor to do a specific piece of work, not in itself unlawful, is not liable for an injury caused by a casual act of negligence of the contractor while the work is in progress.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241-1256; Dec. Dig. § 315.*]

2. MASTER AND SERVANT (§ 318*)—INDEPENDENT CONTRACTOR—LIABILITY OF OWNER.

The fact that the owner of a building to be constructed furnishes to the contractor the material for the building, or stipulates in the contract that the work of constructing the building shall be performed by the contractor according to plans and specifications of an architect, and to the satisfaction of the engineer of the owner, does not make the latter liable for an injury resulting proximately and solely from a negligent act of the contractor in the work of construction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*]

3. NEGLIGENCE OF INDEPENDENT CONTRACTOR.

The evidence for the plaintiff clearly showed a case of employer and independent contractor, and a tort for which the latter, if any one, was liable. The judgment of nonsuit was therefore properly awarded.

(Syllabus by the Court.)

Error from City Court of Polk County; T. A. Irwin, Judge.

Action by Ella Lampton against the Cedartown Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Ella Lampton sued the Cedartown Company for damages on account of personal injuries. At the conclusion of her evidence the court awarded a nonsuit, and this judgment is assigned as error. Briefly stated, the evidence makes the following case:

While the plaintiff was walking on the sidewalk of Main street in the city of Cedartown a piece of lumber fell from the top of a building in course of construction and owned by the defendant, not striking her, but causing her, in order to avoid injury therefrom, to make a sudden jump and to fall against a pile of brick, from which she received the injuries complained of. The building was being erected by two separate contractors for the defendant. One of these contractors was to do the woodwork, and the other the brickwork. The piece of lumber which fell was described as a "scantling," which the contractor for the brickwork and one of his employes were using as a "straight edge," and at the time that it fell these two men were using it in their work; one having one end of it and the other the other end. The contracts for the erection of the building were in writing, and provided that the contractors, for a stipulated sum, were to furnish all the labor and tools and to do all the work in the construction of the building in a most thorough and workmanlike manner, and according to plans and specifications prepared by the architect and to the satisfaction of the engineer of the defendant. It further provided that the contractors were to take all precautions required by the city authorities to protect the public from injury, and were to be responsible for any and all damages occurring to passers-by resulting from the neglect of such precautions and care. The engineer testified, for the plaintiff, that all the work of erecting the building was done under the two contracts in question, and that he had no connection with the work, except to see that it was done according to the plans and specifications of the architect.

Wm. Janes and Janes & Hutchens, for plaintiff in error. C. R. Turner and Trawick & Ault, for defendant in error.

HILL, C. J. (after stating the facts as above). The general and well-settled principle of law that where one person employs another by contract to do a particular piece of work, reserving to himself no control over the manner in which the work is to be performed, except that when completed it shall comply with certain plans and specifications prepared by an architect, he is

not liable for any injury which may occur to others by reason of any negligence of the contractor, has been adopted as statute law of this state. Civ. Code 1895, § 3818, provides as follows: "The employer generally is not responsible for torts committed by his employé when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer." In other words, a person who employs an independent contractor to perform a specified piece of work is not liable for injuries caused by any mere casual tort which the latter's servants may commit while the work is in progress. The application and limits of this doctrine are to be determined by the particular facts of each case.

Independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by the courts to determine whether a contractor is an independent one or not, and this is the test applied by the statute of this state, *supra*. The test has never been better expressed than by Wood in his work on Master and Servant (section 593): "When a person lets out work to another to be done by him, such person to furnish the labor and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor." This does not mean that the specific work to be done shall not be done according to definite plans and specifications of the employer, or that he may not reserve, through the direction of an architect or an agent, a general supervision, to see that the work is properly done according to plans and specifications, provided the methods and instruments of doing the specific work are left under the exclusive control of the contractor.

It is contended in this case that the work was not to be done by an independent contractor, because the owner of the building furnished the material for its construction, and that the work was to be done according to the plans and specifications of the architect and to the satisfaction of the engineer of the owner; in other words, that by these stipulations the owner of the building in question reserved the right to exercise control over the details of the work in question. The injury in this case had no connection with any material that was used, but was purely a casual act of negligence occurring in the course of construction, when the con-

tractor had absolute and entire control of the work. In nearly all cases of independent contractors the owner or proprietor usually retains control by a skilled architect, "not for the purpose of controlling the contractor in his methods, but for the purpose of assuring himself that the results enumerated in the specifications of the contract are reached by the contractor step by step as the work progresses." 2 Thompson on Negligence, § 41.

Nor did the fact that the contract in this case required that the work was to be done to the satisfaction of the engineer of the defendant make the case one of master and servant. Certainly, it would not prevent one from being an independent contractor that the stipulation in his contract required that his work be done to the satisfaction of the contractee or employer. The Supreme Court of this state has in several cases made an application of the principle of law now under discussion to particular facts. See *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Atlanta & Florida R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; *Ridgeway v. Downing Co.*, 109 Ga. 591, 34 S. E. 1028. And it deduces from all the cases this general rule, which, after all is but a judicial interpretation and elaboration of the principle announced in section 3818 of the Civil Code of 1895: "Where an individual or corporation contracts with another individual or corporation exercising an independent employment, for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods and not subject to the employer's control or orders, except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or the contractor's servants." See, also, *Johnson v. W. & A. R. Co.*, 4 Ga. App. 131, 60 S. E. 1023. And in the case of *Atlanta & Florida R. Co. v. Kimberly*, *supra*, after stating this general rule, the court enumerates and defines the exceptions which are now embodied in section 3819 of the Civil Code of 1895.

It is not pretended that the facts of the present case bring it within any of the enumerated exceptions to the rule. The principle of law is so well settled that we deem it entirely profitless to extend this discussion. We think the facts clearly show that this was a case of an independent contractor, and that the judgment awarding a nonsuit should be sustained.

Judgment affirmed.

(150 N. C. 596)

LYNCH et al. v. MELTON et al.

(Supreme Court of North Carolina. May 5, 1909.)

1. WILLS (§ 439*)—CONSTRUCTION.

A will must be so construed as to effectuate the evident intent of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955-957; Dec. Dig. § 439.*]

2. WILLS (§ 663*)—CREATION OF REMAINDER—DEFEAT.

Where testatrix devised her estate to her husband for life, with remainder to her niece, provided she lived with the husband until she became free by age or marriage, the devise was not defeated because, on account of the insanity of the husband, his admission to an asylum, and the breaking up of his home, the niece was without her fault, and contrary to her will, compelled to leave.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1559; Dec. Dig. § 663.*]

Appeal from Superior Court, Cleveland County; Justice, Judge.

Special proceeding by Ursulla Lynch and others against Ralph Melton and others for the sale for partition of certain land. From the judgment, plaintiffs appeal. Affirmed.

Ryburn & Hoey, for appellants. Quinn & Hamrick, for appellees.

CLARK, C. J. By consent the judge found the facts which may be succinctly stated as follows: The testatrix, wife of J. D. Simmons, was childless and took her orphan niece, L. E. Melton, to live with her at the age of four years on the death of the latter's mother. When the child had reached 10, the testatrix died, leaving a will with the following clause therein: "I give and devise to my beloved husband J. D. Simmons, the tract of land on which we now reside, containing 33 acres of land and also all my personal effects of whatsoever character, for his special benefit during his natural life, then to go to my niece L. E. Melton, if anything left at his death, provided she lives with her said uncle until she becomes free by age or marriage, otherwise to go as the law directs." After the death of the testatrix the little girl continued to live with her uncle a few months, when he evinced symptoms of insanity, and, being conscious of it, he asked her father to take the child to his home in Oklahoma, which he did. The child was willing and anxious to stay with her uncle, but it was unsafe to remain and he had decided to break up his home. Soon after he was admitted to the insane asylum, and died something over two years after the testatrix.

A will must be so construed as to effectuate the evident intent of the testator. Here the child was evidently the object of the testatrix's bounty, and the just construction of the clause of the will above quoted is that she devised a life estate in the land to her husband with a vested remainder in fee to

her niece, defeasible if she voluntarily failed to live with her uncle until she became married or of age. Without her fault and contrary to her will, she was compelled to leave by the insanity of her uncle, and his determination to break up his home, and at the uncle's request the child was removed by her father to his own home. His honor properly held that the fee was vested in remainder in L. E. Melton expectant upon the death of the life tenant, and had not been divested. The performance of the condition having become impossible without any fault on the part of the devisee, the condition in the eye of the law was not broken, and there was no defeasance. *Woods v. Woods*, 44 N. C. 290; *Thomas v. Howell*, 1 Salk, 170; 1 Inst. 206; *Hammond v. Hammond*, 55 Md. 575; *Merrill v. Merrill*, 10 Pick. (Mass.) 511. Where plaintiff, to whom a tract of land was devised upon condition that he should remain with the widow of the testator until her death, was wrongfully ejected from the land by the agent of the widow (who was a devisee of the land of which the plaintiff's was a part), the plaintiff's estate upon the widow's death cannot be defeated upon the ground that the condition was not performed by the plaintiff's not remaining on the plantation until the widow's death. *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751.

In *Finley v. King*, 3 Pet. 346, 7 L. Ed. 711, Marshall, C. J., said: "It was admitted in argument, and is certainly well settled, that there are no technical or appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the will shows that the particular clause, or if the whole will shows that the act on which the estate depends must be performed before the estate can vest, the condition is, of course, precedent, and, unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting, and where the estate had previously vested, it will become absolute by the death of such person." Again in the same case he says: "Conditions belong to cases where all means to accomplish the testator's purpose are in his view and being; but when subsequent events change the existing state of things so essentially as to render the performance impossible, for instance, if a devise be made on condition that the devisee consent to marry a particular person, and that person dies, the performance is rendered impossible by the happening of an event subsequently which the testator never contemplated; and, where the estate had previously vested, it will become absolute on the death of such person."

The appellants rely upon *Tilley v. King*,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

109 N. C. 461, 13 S. E. 936, but the facts in that case are not similar to this. There the testator clearly intended to provide support and attention for himself and wife in their declining years, and the devise to his grandson was made to compensate him for his services if he "stays with us until after our death and takes care of us." The devisee P. H. Tilley voluntarily left the wife of the testator about one year after the death of testator and seven or eight years before her death. There was no providential hindrance to his compliance with the prescribed conditions as in the case at bar.

The judgment below is affirmed.

(150 N. C. 351)

STATE v. DAVIS.

(Supreme Court of North Carolina. May 5, 1909.)

1. FALSE PRETENSES (§ 38*)—INDICTMENT—VARIANCE.

There was a variance between the allegations and the proof, in a prosecution for obtaining goods by false pretenses, where the indictment charged that accused, by false and fraudulent representations as to the qualities of a sorrel horse, obtained a claybank mare, etc., and the proof tended to show that the claybank mare was obtained by accused in exchange for a bay saddle horse.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 53; Dec. Dig. § 38.*]

2. FALSE PRETENSES (§ 4*)—"OBTAINING GOODS BY FALSE PRETENSES"—ELEMENTS OF OFFENSE.

To constitute the offense of "obtaining goods by false pretenses" there must have been a false representation of a subsisting fact, which was calculated to deceive, intended to deceive, and which did deceive, and by which one obtained value from another without compensation.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 1; Dec. Dig. § 4.*]

3. FALSE PRETENSES (§ 39*)—BURDEN OF PROOF.

In civil actions for losses from false representations, and in criminal prosecutions founded on the same species of fraud, the burden is upon plaintiff or prosecutor to show, not only the false representation, but also that a reasonable reliance upon its truth induced him to part with his money or property; the only difference in the two cases being as to the quantum of proof.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 54; Dec. Dig. § 39.*]

4. FALSE PRETENSES (§ 49*)—PROSECUTION—EVIDENCE.

Evidence held not to sustain a conviction of obtaining goods by false pretenses.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

Appeal from Superior Court, Gaston County; Council, Judge.

Walter Davis was convicted of obtaining goods by false pretenses, and appeals. Reversed, and remanded for new trial.

Geo. W. Wilson, Tillett & Guthrie, O. M. Gardner, and S. B. Sparrow, for appellant. T. W. Bickett, Atty. Gen., for the State.

HOKE, J. The charge in this bill of indictment was, in substance, to the effect that the defendant, by means of false and fraudulent representations in reference to the qualities of a certain sorrel horse, obtained from the prosecutor, G. B. Ford, a claybank mare, in good condition, sound and gentle, and worth \$225. The proof on the part of the state tended to show that the claybank mare was obtained by defendant in exchange for a bay "saddle horse," and in reference to this trade there was no charge, or evidence tending to support it, that the exchange was affected by means of false representations. Under the authorities cited there would seem to be a clear case of variance between the allegation and the proof, and the jury should have been so instructed. *State v. McWhirter*, 141 N. C. 809, 53 S. E. 734; *State v. Corbett*, 46 N. C. 264.

Apart from this, there was no sufficient evidence presented in the case to sustain a conviction of the offense charged, or to justify the submission of the question to the jury. Considering the proof offered in the light most favorable to the prosecution, it appears that, after the exchange of the mare for the bay horse, the prosecutor, having kept the horse about a week, became dissatisfied and sent him back to defendant's stable, with a message that the horse did not suit, and that he would call to see defendant about it later; that the prosecutor did call, and told defendant that the horse taken in exchange for the mare was not sound, and he wished to set aside the trade. The defendant declined to do this, but offered to let the prosecutor have another horse, if he could suit him, and showed prosecutor one of the horses in the stable. Prosecutor asked defendant if he would guarantee the horse to be sound and all right. Defendant replied he would not, nor would he guarantee any horse in his stable to be sound and all right. Prosecutor replied, "Well, if you won't, you can keep both horses," and started away. Davis then said, "How do you like that sorrel horse there in the wagon?" "Will you guarantee that to be sound and all right?" Defendant replied, "No; I will not guarantee any horse, nor a hair on any horse, I have, to you," and prosecutor replied, "Then I don't want it," and started off. When he had gotten away about 30 yards, defendant said, "If you think the sorrel horse will suit you, I will guarantee him to be sound and all right in every way, and a good worker," and prosecutor said, "Well, then, send it down." The horse was sent, and at dinner time prosecutor went out to his stable to make examination of it, and discovered that it was either blind, or had such deficient eyes that it could not see its way in traveling. On cross-examination prosecutor said that, while not a horse trader, he did trade

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

horses sometimes, and was a fair judge of a horse.

In *State v. Phifer*, 65 N. C. 321, "this crime of obtaining goods by false pretense is said to exist where there has been a false representation of a subsisting fact, which is calculated to deceive, intended to deceive, and which does deceive, and by which one man obtains value from another without compensation." And this definition, in the same or substantially similar terms, has been approved by us in numerous decisions of the court. Speaking of this offense, and more especially of the requirement that the statement must be "calculated to deceive," in *State v. Moore*, 111 N. C. 672, 16 S. E. 885, Associate Justice Avery, for the court, said: "As well in civil actions brought to recover of another for losses incurred by false representations, as in criminal prosecutions founded upon the same species of fraud, the burden is on the actor or prosecutor to show, not only the false representation, but that a reasonable reliance upon its truth induced the plaintiff or prosecutor to part with his money or property, the only difference being as to the quantum of proof."

There was evidence on the part of defendant tending to exculpate him entirely from the charge; but, considering the testimony in the light most favorable to the state, we do not think the facts bring the case within the principle of these decisions. Claiming to have been already once deceived by defendant, the prosecutor, standing within a few feet of the horse in question, and after having been twice told that no warranty would be given, without making any examination whatever, directs that the animal be sent to his stables on a guaranty by defendant that the horse is sound and all right, and when the alleged defect is so observable and patent that it was at once noticed as soon as the horse was looked at. It is plain that the prosecutor intended to rely on the pecuniary obligations arising by reason of an express warranty, and that the testimony in no sense presents a case of false representations of a subsisting fact, reasonably relied upon by the prosecutor. We must not be understood as holding that the presence of an express warranty in a horse trade of itself protects one from liability to a criminal prosecution under the statute if the facts otherwise justify it; but a careful consideration of all the facts of this transaction leads to the conclusion that no indictment should be sustained. The case comes under the principle announced and sustained in *State v. Moore*, supra, and, on the testimony as it now appears, the defendant was entitled to the instruction prayed for: "That if the jury believed the evidence they should render a verdict of not guilty."

New trial.

(150 N. C. 590)

NORRIS v. LAWS et al.

(Supreme Court of North Carolina. May 5, 1909.)

1. WASTE (§ 1*)—NATURE AND ELEMENTS.

Waste is a spoil or destruction, done or permitted, to lands, houses, trees or other corporeal hereditaments by the tenant thereof, to the prejudice of him in reversion or remainder.

[Ed. Note.—For other cases, see *Waste*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7406-7408, 7833.]

2. WASTE (§ 3*)—"VOLUNTARY WASTE."

"Voluntary waste" is active or positive, and consists in some act of destruction or devastation.

[Ed. Note.—For other cases, see *Waste*, Cent. Dig. § 5; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1807.]

3. WASTE (§ 3*)—"PERMISSIVE WASTE."

"Permissive waste" is such as is merely permitted by the tenant, and consists in the neglect or omission to do what will prevent injury to the estate or freehold, as, for example, to suffer a house to become decayed for want of proper repair.

[Ed. Note.—For other cases, see *Waste*, Cent. Dig. § 5; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5818.]

4. LIFE ESTATES (§ 28*)—WASTE BY LIFE TENANT—QUESTION FOR JURY.

It is for the jury, in an action for waste, to say whether a life tenant of land, in what he has done or omitted, has acted with the same care that a prudent owner of the fee would have exercised had he been in possession, cultivating and using the land for a support or for profit.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 32; Dec. Dig. § 28.*]

5. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS IN DISPUTE.

In an action for waste by cutting timber and clearing land, where the evidence was conflicting whether the value of the land was diminished or increased by clearing, a charge that the jury should consider the changed conditions as to the greatly increased value of timber and timber lands in proportion to cleared or farm lands in reaching a conclusion as to the necessity for clearing any part of the premises was erroneous, as assuming that clearing the land diminished its value.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 420; Dec. Dig. § 191.*]

6. LIFE ESTATES (§ 13*)—RIGHT TO CUT TIMBER.

The right of a life tenant to clear land sufficient for her support and a reasonable enjoyment of her estate does not depend solely upon the value of the timber land as compared with the value of cleared land; and, while she would ordinarily have no right to cut the timber merely for the purpose of selling it, she may clear the land to the extent that a prudent husbandman would do under the circumstances, if owner of the fee, without being guilty of waste.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 32; Dec. Dig. § 13.*]

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Wake County; Neal, Judge.

Action by Rufus Norris against John W.

Laws and others. Judgment for plaintiff, and defendants appeal. Reversed for new trial.

This action was brought to recover damages for waste alleged to have been committed by the defendant, Lovie Laws, upon the land described in the pleadings. There was evidence, on the part of the plaintiff, tending to show that in 1901 James Norris died owning 86 acres of land, and leaving a will, by which he devised 10 acres to a nephew, subject to the control of testator's wife, Lovie Norris (now Lovie Laws), until said nephew should become of age. He was 17 years of age at the time of the trial. James Norris devised another 10 acres to his brother, subject to the life estate of his widow, and the remainder of the land, 66 acres, he devised to his wife, Lovie Norris, for life, and at her death to his father, Rufus Norris, the plaintiff in this action. The waste is alleged to have been committed upon the 66 acres of land. At the death of James Norris, in May, 1901, there were about 20 acres of land in cultivation, being a part of the 66 acres in which plaintiff had a remainder. The land and the buildings thereon, though old, were in fairly good condition. James Norris made a living for himself and wife on the place. The first year after his death the land was leased by his widow to her father-in-law, the present plaintiff, Rufus Norris, but on account of the heavy rains her tenant did not make much on the land, and paid her very little rent. Afterward the feme defendant leased the land for a bale of cotton per annum, and thereafter worked for wages until some two or three years later, when she was married to her codefendant, John W. Laws, since which time the defendants have been living upon the land of John W. Laws, which is about eight miles distant from the 66 acres of land above described. During the year 1906 the defendants began to cut and remove wood from a portion of the land, and sold the standing timber, which was fit for sawlogs, to one J. H. Weaver, and thereafter cut the timber on 10 or 12 acres of the land, making about 32 acres in all of open land, including 2 or 3 acres "turned out" or abandoned. The timber was cut from 10 or 12 acres in one place, and from 4 acres on another part of the land, some distance away, and the wood was sold by the defendants. The wood so cut was not dead or fallen trees. The 10 or 12 acres cleared were heavily timbered, and were on a hillside near a branch. There was other land just as good and perhaps better, for farming purposes, being level, thinly timbered, and adjoining the body of cleared land, which would require no dyking. The land which was cleared by the defendants had to be dyked to keep it from washing away, and was not a proper clearing for farming purposes, but was about the roughest part of the land. The defendants sold

10 or 12 car loads of cordwood, which was cut on the premises, and was worth about \$20 a car, and 58,800 feet of lumber, worth about \$2.50 per thousand feet. The timber or wood cut was in excess of what was necessary for farming purposes. The farm had not been properly cultivated since James Norris' death until 1908. The land which was cleared at the time of Norris' death, if it had been properly cultivated, would have supported the widow, who had no children, but since his death it has been injured by poor cultivation, and nothing has been done to restore fertility to the soil, though it was susceptible of improvement. Defendants cultivated a part of the cleared land, sublet a part, and turned out about three acres as "old field," the land thus turned out or abandoned being strong land. If the farm had been properly cultivated, there would have been no need of clearing any of the said land. The former owner, F. M. Norris, had lived and raised a large family on the place by farming, and there was sufficient land already open. The defendants allowed the buildings to fall into decay and the fences about the house to be destroyed. No repairs of any kind were made upon the premises until the spring of 1908 after this suit was brought. The proceeds of sale of wood and timber were used in improving the premises of the defendant, John Laws, and none of it was used in repairs or improvements on the land in question. Defendants contended that this was not so. There was further evidence on the part of the plaintiff, tending to show that cutting the wood and standing timber on the land permanently damaged the premises \$200, and that the damage done the premises as a whole amounted to between \$200 and \$400. The feme defendant told the plaintiff that she intended to have the timber while she was living, as she could not use it after she was dead. There was also evidence on the part of the plaintiff tending to show that the timber is now worth more than the land, and timbered lands more than cleared lands. That all lands, especially timbered lands, owing to the growing scarcity of timber in that vicinity, have greatly risen in value since James Norris' death—that is, from 50 to 150 per cent.—and that a railroad was built shortly before his death and ran within a few hundred yards of the premises. The land was sold for taxes in the year 1905, and was not redeemed by the defendants until after notice from the plaintiff of their default.

There was evidence, on the part of the defendants, tending to show that the clearing was necessary for farm purposes, and was done in good faith; that the land was not damaged thereby, but improved in value, and would rent for more than it did before; that the land was worth more than when James Norris died, as much as \$200 or \$300 more, that the clearing of the 10 or 12 acres was

in a proper place. The lands were worn out and run down by bad methods of farming when James Norris died, and would not produce sufficient crops to support feme defendant, and the two or three acres turned out were worthless, worn out, and wet bottom lands. There was not enough cleared land for the reasonable support of the feme defendant. The buildings and stables have, since this suit was brought, been repaired by the defendants, and are now in as good condition as when Norris died. The crop of 1908 was the best which has been raised on the land since his death, and the farm will sell or rent for more than it would when he died; one witness testifying that it would rent for twice as much, and sell for \$300 or \$400 more. The 10 or 12 acres on which the timber was cut was cleared in the spring of 1908, and put into cultivation. It was not cultivated immediately after the timber was cut, because it would have required "grubbing," which was costly, and the defendants let the land lie idle for two years for the roots to rot, and then dyked it to prevent washing, and cultivated it. The plaintiff offered evidence tending to prove that the defendants did not intend to cultivate at all, but were cutting and selling wood and timber, and using the proceeds in making improvements on the land of the defendant John Laws, and that the claim that the defendants were clearing the lands for cultivation was an afterthought, and first set up after the institution of this suit.

Exceptions taken by the defendants were to the charge of the court, which were as follows: "(1) If the jury shall find from the evidence that the feme defendant sold timber trees, and used the proceeds of such sale, either cash or lumber, in improving other buildings than those on the premises, and neglected to repair the buildings on the premises described in the complaint, this is waste. (2) If the feme defendant had fire wood or timber cut on the premises, or allowed it to be cut in excess of what was necessary for farm purposes, and sold the same for profit, it is waste unless the wood or timber cut and disposed of was from dead or fallen trees. (3) It is the province of the jury, and it is their duty, to consider the changed conditions as to the greatly increased value of timber and timber lands in proportion to cleared or farm lands, in arriving at a conclusion as to the necessity for clearing any part of the premises. The jury should also consider the growing scarcity of timber and wood, and its increasing value, also the improved methods of farming, the improved methods of improving the fertility of 'old fields' and lands depleted of fertility by long cultivation, in arriving at a conclusion as to what was a proper use of the premises; also, in arriving at a conclusion, the character of the cultivation of said lands since the life estate of the feme defendant vested in her, and whether the same was

such as an ordinarily prudent owner of the fee would have used in its cultivation, for exhausting the land by improper tillage is waste. (4) If the life tenant, Lovie Laws, negligently allowed the premises to fall into decay, it would be waste; and this is so even though there was no timber on the place suitable for the purpose of repairing buildings thereon. (5) It is left to you, gentlemen of the jury, to say whether in your 'discretion' the destruction of the timber or giving up a cultivated field in the light of all of the evidence in the case had proved a lasting injury to the inheritance. (6) The defendants would not be liable for mere error in judgment, provided they acted in a prudent manner, exercising that usual good judgment that would be exercised by the ordinarily prudent person under similar circumstances and surroundings; and, touching the question of permitting the buildings to decay and go to waste, the question is as to whether the condition of the buildings was such as that a prudent owner of the fee would have felt that he ought to repair and keep them up in order to prevent permanent injury to the inheritance." The defendants in apt time excepted to each of the instructions given by the court. The following issues were submitted to the jury: "(1) Did defendants commit waste upon the lands in which plaintiff has a remainder? (2) If so, what are plaintiff's damages?" The jury returned as their verdict that the defendants had committed waste upon the premises, and assessed the plaintiff's damages. Judgment was entered upon the verdict for the damages assessed and the forfeiture of the premises, whereupon the defendants appealed.

J. H. Pon, for appellants. B. C. Beckwith, for appellee.

WALKER, J. (after stating the facts as above). The accepted definition of waste is a spoil or destruction, done or permitted, with respect to lands, houses, gardens, trees, or other corporeal hereditaments, by the tenant thereof, to the prejudice of him in reversion or remainder, or, in other words, to the lasting injury of the inheritance. 2 Blk. Com. 281. Voluntary waste is active or positive, and consists in some act of destruction or devastation. Permissive waste is such as is merely permitted by the tenant, and consists in the neglect or omission to do what will prevent injury to the estate or freehold, as, for example, to suffer a house to become decayed for want of proper repair. Black's Dict. p. 1236, and authorities cited. The plaintiff alleges that the inheritance or remainder belonging to him has been damaged by both kinds of waste committed and permitted by the defendants upon the premises in question. We have held that what is a permanent injury to the inheritance must often depend upon the facts and circumstances of the particular case under consideration, and the jury must determine, under

proper instructions from the court, whether the tenant for life, in what he has done or omitted to do, has acted with the same care as a prudent owner of the fee would have exercised, if he had been in possession, cultivating and using the land for a support or for profit. *Shine v. Wilcox*, 21 N. C. 631; *King v. Miller*, 99 N. C. 583, 6 S. E. 660; *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588, and other authorities therein cited.

The charge in many respects is sustained by the authorities we have cited, but in one respect the court committed an error. The jury were instructed as follows: "It is the province of the jury, and it is their duty, to consider the changed conditions as to the greatly increased value of timber and timber lands in proportion to (as compared with) cleared or farm lands, in arriving at a conclusion as to the necessity for clearing any part of the premises." In this and other parts of the instruction, the court assumed that facts had been established about which the testimony was conflicting. There was evidence that, instead of diminishing the value of the land, the cutting of the timber and clearing the land had enhanced it, and also evidence that cleared land had risen in value more than timbered land. It was misleading, therefore, to assume the contrary to be true, and upon that assumption to base an instruction to the jury which might control them in rendering their verdict. That the error was a material and prejudicial one cannot admit of a doubt. The instruction was erroneous in another respect. The right of the tenant for life to clear land sufficient for her support and a reasonable enjoyment of her estate cannot be made to depend solely upon the value of the timbered land as compared with the value of cleared land, because, if this were true, the tenant for life could not clear any land, or not a sufficient quantity for her support, if the timber cut from it, or the land with the timber standing upon it, is more valuable than the land would be when cleared. She would have no right, at least ordinarily, to cut the timber merely for the purpose of selling it, as is held in the cases we have cited; and, if this cannot be done, and there is not sufficient land already cleared for her support, she could not use the land at all, but must let the trees stand and continue to grow for the benefit of the reversioner or remainderman, if the timbered land is more valuable than if it were cleared. It is very true that there should be a due or proper proportion between timbered and cleared land, such, it is said, as a prudent husbandman would maintain in the use and management of the premises. But this is far from saying that the relative value of timbered and cleared land determines the right of the tenant for life to make additional clearing if, in the exercise of prudence and judgment, it was required for her support and the reasonable enjoyment of her estate. The standard by which the conduct of the life tenant is to

be gauged, or the test, as to whether waste has been committed or not is that stated in *Sherrill v. Connor* (which we now approve), and the cases therein cited. It is the rule of the prudent husbandman, and what he would do, under the circumstances, if owner of the fee. This is quite strict enough in its application, and the life tenant should not be held to too rigid an accountability. Judge Gaston, in *Shine v. Wilcox*, supra, said it will not do to hold that the clearing of the forest, so as to fit it for the habitation and use of man, is waste; and we add, whether it is or not must depend upon the peculiar facts of any given case, and the finding of the jury thereon, when properly directed by the court under the rule of law we have laid down, and which has been generally adopted by the courts.

The question presented in this case was not confined alone to the relative value of timbered and cleared land, but the jury should have been so instructed as to ascertain the general result in respect to whether there had been a lasting injury to the inheritance, and especially as to how much land the plaintiff was entitled to clear for her reasonable support, in the exercise of that degree of prudence which the careful husbandman would observe in the cultivation and management of the land. It is true that the jury may consider all the facts and circumstances of the case in order to reach a just conclusion, and, among others, the value of timbered and of cleared land may be considered for the purpose of determining whether the clearing had been done in a prudent manner; but we think the instruction, which we have quoted, was too broad, and was calculated to mislead the jury in passing upon the respective rights of the parties. This error was not corrected by any other instruction given by the court. His honor finally brought the case to the true test in his concluding instruction, but it did not reach and remove the error we have pointed out. The question as to whether timbered land was more valuable than cleared land should have been left to the jury for their determination upon the conflicting testimony, without any assumption of the fact that timbered land was the more valuable. This was not an incurable error, but it was not corrected by anything said by the court in the other parts of the charge.

Other errors are assigned, but it is not necessary to discuss them, as the questions raised by these assignments may not again be presented. The case must be submitted to another jury with proper instructions of the court upon the issues and evidence.

New trial.

CLARK, C. J. (dissenting). The charge called in question was an instruction to the jury that they could "consider the changed conditions as to the greatly increased value of timber and timber lands in proportion to cleared or farm lands in arriving at a con-

clusion as to the necessity for clearing any part of the premises. The jury should also consider the growing scarcity of timber and its increasing value; also the improved methods of farming, the improved methods of improving the fertility of 'old field' and land depleted of fertility by long cultivation; in arriving at a conclusion as to what was a proper use of the premises; also, in arriving at a conclusion, the character of the cultivation of said lands since the life estate of the feme defendant vested in her; and whether the same was such as an ordinarily prudent owner of the fee would have used in its cultivation." It is difficult to see how the judge erred in so charging. He did not assume any facts in regard to which there was conflicting evidence. Nor did he make the reasonable enjoyment of the life estate "depend solely" upon the relative value of timbered and arable land. The learned judge simply placed before the jury, for them to "consider" the surrounding and attendant circumstances, as the jury might find them to be, with the object in view of finding whether or not the conduct of the life tenant was "such as an ordinarily prudent owner of the fee would have used." This conforms to the rule laid down in *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588. What in one age or community under the recognized conditions of agriculture would not be waste, because such as a prudent owner would do with his own, might be waste in another age, or in another community, under changed conditions, because no ordinarily prudent owner would so act. The fact is eminently one for a jury to pass upon.

It would seem that the charge was unobjectionable, and there was no error for which a new trial should be awarded.

HOKE, J., concurs in this dissent.

(150 N. C. 587)

HAUSER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 5, 1909.)

1. NEGLIGENCE (§ 121*)—ACTIONS—BURDEN OF PROOF—PROXIMATE CAUSE.

In addition to showing negligence, the burden is on plaintiff to show that such negligence was the proximate cause of his injury, in order to recover therefor.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 228; Dec. Dig. § 121.*]

2. NEGLIGENCE (§ 56*)—PROXIMATE CAUSE.

Negligence is not actionable unless it is the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. § 56.*]

3. EVIDENCE (§ 90*)—BURDEN OF PROOF.

The burden is always upon plaintiff to prove the essential elements of his cause of action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. § 90.*]

4. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTION FOR DELAY—BURDEN OF PROOF—PROXIMATE CAUSE.

In an action for delay in delivering a telegram by which plaintiff was prevented from attending his sister's funeral, the burden was on him, not only to show negligent delay in delivery, but that he could not have attended the funeral after receiving the telegram by exercising ordinary diligence; that being essential to a showing that defendant's negligence was the proximate cause of plaintiff's damage.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.*]

Appeal from Superior Court, Alexander County; Justice, Judge.

Action by Frank Hauser against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Armfield & Turner and Tillett & Guthrie, for appellant. J. H. Burke and L. C. Caldwell, for appellee.

WALKER, J. This action was brought to recover damages for mental anguish alleged to have been caused by the negligence of the defendant in transmitting and delivering a telegram informing the plaintiff of his sister's death. It is alleged that by reason of the negligence he was prevented from attending the funeral. The message is as follows: "Rockford, N. C. July 20, 1908. Frank Hauser, Taylorsville, N. C. Gertrude Williams dead. Come at once. A. Hauser." It appears that the plaintiff's sister died at Yadkinville, which is about 10 miles from Rockford. He could have gone by either one of two routes from Taylorsville, where he lived, to Yadkinville: (1) By train from Taylorsville to Statesville, and thence by driving to Yadkinville, a distance of 38 miles. (2) By driving to Wilkesboro from Taylorsville, a distance of 20 miles, and thence by rail to Rockford, and thence by driving to Yadkinville. He did not know that he could have gone to Yadkinville by way of Wilkesboro in time for the funeral, and he did not intend to go after he received the message, as it was delayed, and he thought it was too late for him to reach Yadkinville before the funeral, but he would have gone if the message had been delivered before the train left for Statesville. There was other testimony as to whether the plaintiff had exercised care and diligence in attempting to go to Yadkinville after he received the telegram. The court submitted issues to the jury, which, with the answers thereto, are as follows:

"(1) Did the defendant negligently fail to deliver the telegram as alleged in the complaint? Answer. Yes.

"(2) Could and would the plaintiff have attended the funeral of deceased if the telegram had been delivered in reasonable time? Answer. Yes.

"(3) Notwithstanding the negligence of defendant, if any, could the plaintiff, by the exercise of ordinary diligence, have attended the funeral of deceased? Answer. No.

"(4) What damage, if any, is the plaintiff entitled to recover of defendant? Answer. Two hundred dollars."

Numerous exceptions were taken by the defendant during the trial of the case, but the only one which we think it necessary to consider is the following objection to an instruction of the court, which the plaintiff assigns as error: "The defendant contends that if the said plaintiff had exercised due care and reasonable diligence, such as the law exacts of him, he could have attended said funeral after the said telegram was delivered, and, if you should so find from the evidence, you will answer this issue 'Yes.' (The burden of proof upon this issue is on the defendant.)" The burden of proof was not upon the defendant to show that the plaintiff had not exercised diligence, but upon the plaintiff to show, not only that the defendant had been guilty of negligence, but that its negligence was the proximate cause of the damage to him. *Hocutt v. Telegraph Co.*, 147 N. C. 186, 60 S. E. 980. It is not enough to show that there has been negligence in order to entitle a plaintiff to recover. He must, in addition, show that the defendant's negligence was the proximate cause of his injury. Negligence is not actionable unless it is the proximate cause of the damage. *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 885. The burden is always upon the plaintiff to prove every requisite of his cause of action. This is not a question of contributory negligence which would shift the burden of proof to the defendant, but it is one of the essential elements of the cause of action that the negligence of the defendant should proximately cause the damage.

There was error in misplacing the burden of proof by the instruction to which the defendant excepted.

New trial.

(150 N. C. 616)

WHITLOCK v. DIXON et al.

(Supreme Court of North Carolina. May 5, 1909.)

1. DEEDS (§ 68*)—EVIDENCE—CAPACITY OF PARTIES.

That a grantor was 72 years old, and was engaged to marry the grantee, with whom he boarded, was not evidence of mental unsoundness.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 68.*]

2. DEEDS (§ 211*)—UNDUE INFLUENCE—EVIDENCE.

Any burden resting on a grantee to show freedom of the grantor from undue influence was sustained, where she went on the stand and made a full statement of her relations with the grantor, which was sustained by other witnesses,

showing no immoral acts on the part of either, and that he boarded with her, a woman of his own station in life, and paid her board, and intended to marry her.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 211.*]

Appeal from Superior Court, Mecklenburg County; Council, Judge.

Action by Fannie Whitlock against J. C. Dixon and others. From a judgment for plaintiff, defendants appeal. No error.

Action to recover possession of a lot in the city of Charlotte. It was admitted that, prior to November 30, 1907, the title was in Malachai Reinhardt. Plaintiff claims title by virtue of a deed executed by Reinhardt to her November 30, 1907, and duly recorded. The infant defendants claim as heirs at law, being the children of a deceased daughter. The adult defendant represents the infants, who are his children. The plaintiff introduced the deed, and rested. Defendants alleged that the grantor was mentally unsound when he executed the deed, and that it was obtained from him by fraud and undue influence. The controversy was tried upon the general issue, which the jury answered for plaintiff. Defendants assigned errors, and appealed from the judgment.

W. F. Harding, for appellants. Shannon-house & Jones, for appellee.

CONNOR, J. The evidence tended to show that Reinhardt, at the time he executed the deed, was about 72 years old; that after the death of his wife he resided with his son-in-law in the home which belonged to him; that several years prior to his death he suffered a stroke of paralysis, "but got over it, so that he returned to his work." He "got hurt," in November prior to his death, in the shop in which he worked. Some time prior to the date of the deed he "quit staying" with his son-in-law, Dixon, and stayed at the house of plaintiff, where he died February 3, 1908. There was evidence that he was fond of his grandchildren and frequently said that he was going to provide for them. The deed was dated November 30, 1907, reciting a consideration of \$5, and reserving an estate for his own life. On December 9, 1907, Reinhardt executed a will, in which he devised to his grandchildren a lot in Charlotte, worth about \$150, giving to plaintiff his other property. The will was drawn and witnessed by a lawyer. Defendants' witnesses testified that Reinhardt was a man of good sense—seemed all right, except that he complained of a "hurting in his head." Plaintiff testified that she was engaged to be married to Reinhardt, and that he proposed to make deed to her for property—said he was going to see a lawyer. He told her that he had made

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

a will—brought her the papers, sealed, and told her, if he died, to take them to Mr. Whitlock, an attorney in Charlotte, as he was executor. He said he was getting old, and had no one to take care of him. Their relations were proper and lawful. One witness said that he had heard reports affecting plaintiff's character. A number of witnesses testified to her good character.

His honor instructed the jury that the burden of proof was upon defendants to show incapacity and undue influence. He further instructed them that there was no evidence that Reinhardt "was not of a sound and disposing mind," or that he did not know what he was doing, when he executed the deed. Defendants assign this for error. We have examined the evidence carefully and concur with his honor. We do not find any suggestion that he was mentally unsound, unless his age and his engaging himself to marry plaintiff be so taken. This we could not do, in the light of human observation and experience. It may not have been a wise step for a man of 72; but he said "he was getting old and had no one to take care of him." This is not an unusual reason given by men in his condition.

His honor, at the request of defendant, instructed the jury that, "if they found from the greater weight of the evidence that the plaintiff exercised such an influence over Reinhardt as to induce him against the free exercise of his own will in executing the deed, they should answer the issue "No." The defendants' contention that, under the decisions of this and other courts, the burden of proof is cast upon the plaintiff, is based upon the assumption that a relationship has been shown to exist between Reinhardt and plaintiff, lawful or otherwise, from which a presumption of control or power over him arose. Such was the case in *Westbrook v. Wilson*, 135 N. C. 404, 47 S. E. 467. While his honor presented this view to the jury, we think it doubtful whether the evidence sustained it. We do not find any evidence of any improper relations, or certainly, if any, it is very slight, consisting of loose and unsatisfactory declarations. Reinhardt was an old colored man, who had no family, except his son-in-law and his grandchildren. He boarded for awhile with one of the witnesses, and then went to the home of plaintiff, who, it seems, was an ignorant colored woman of his own station in life, and paid her board. There is no contradiction of his purpose to marry her. No immoral act is shown on the part of either. Even if the burden was upon her to explain the circumstances under which the deed was executed, she went upon the stand and made a full statement of her relations with Reinhardt, and was sustained by other witnesses. The jury accepted her

evidence as true. He made provision in his will for his grandchildren, by giving them a lot. It does not appear how much his entire property was worth; but it is evident that it did not amount to much. He was a laboring man, making small wages.

We have examined the entire evidence, and find no error in his honor's charge. He followed the decisions of this court, and the jury found that plaintiff's version of the transaction was correct.

There is no error.

(150 N. C. 573)

BATTLE et al. v. LACY, State Treasurer.
(Supreme Court of North Carolina. May 5, 1909.)

1. STATUTES (§ 15*)—ENACTMENT—READING OF BILLS—"PLEDGE FAITH OF STATE."

Act 1909, authorizing the State Treasurer to deliver to certain persons bonds issued under Act March 4, 1879 (Laws 1879, p. 183, c. 98), in discharge of an indebtedness, does not "pledge the faith of the state," within Const. art. 2, § 14, providing that no law shall be passed to pledge the faith of the state, unless the bill therefor shall have been read three times in each House of the General Assembly.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 12; Dec. Dig. § 15.*]

2. STATUTES (§ 15*)—READING OF BILLS—"PLEDGING FAITH OF STATE."

For the General Assembly to order the State Treasurer to pay a debt with money is not "pledging the faith of the state," within Const. art. 2, § 14, relating to the reading of bills.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 12; Dec. Dig. § 15.*]

Appeal from Superior Court, Wake County; Lyon, Judge.

Controversy between R. H. Battle and another against B. R. Lacy, State Treasurer, submitted without action. From a judgment for plaintiffs, defendant appeals. Affirmed.

Attorney General Bickett, for appellant. Walter Clark, Jr., and Jas. H. Pou, for appellees.

BROWN, J. At the session of 1909 the General Assembly enacted a law intended to be in full settlement of a claim of the estate of David L. Swain against the state, which has been the subject of negotiation between the estate of the late Governor Swain and the state authorities for many years. This settlement has been accepted by the representatives of said estate, but the Treasurer refuses to deliver the bonds called for because the act was not passed in accordance with article 2, § 14, of the Constitution, providing that: "No law shall be passed to raise money on the credit of the state or to pledge the faith of the state, directly or indirectly, for the payment of any debt, * * * unless the bill for the purpose shall have been read three several

times in each House of the General Assembly and passed three several readings, which readings shall be on three different days and agreed to by each House, respectively, and unless the yeas and nays on the second and third readings shall have been entered on the journal." The act in question reads as follows:

"Section 1. That the State Treasurer be and he is hereby authorized and directed to deliver to the said Walter Clark and Richard Battle, executors of Eleanor H. Swain, deceased, thirty-five hundred dollars (\$3,500), par value, of the four per cent. bonds of this state, of the series issued under the act of March 4, 1879, with interest coupons attached only from the ratification of this act. This payment is to be in full satisfaction and discharge of said indebtedness.

"Sec. 2. This act shall be in force from and after its ratification.

"In the General Assembly read three times, and ratified this 6th day of March, A. D. 1909."

From the facts agreed it appears that the act of March 4, 1879 (Laws 1879, p. 183, c. 98), was enacted in strict accordance with the section of the Constitution above cited, and that the bonds referred to in the act of 1909 are bonds heretofore issued under the act of 1879 and purchased by the State Treasurer as a cash investment and carried as treasury bonds or cash and not canceled. It appears also that, since the Legislature of 1879 authorized the issue of certain bonds, it has been customary for the Treasurer to buy and sell the said bonds, as the condition of the treasury might require, and from time to time certain of said bonds have been repurchased and held in the treasury, and the same were available for resale or for such other disposition as might be made of them by the General Assembly, that the General Assembly of 1887 directed that the claim due the estate of the Rev. Solomon Pool be settled and discharged by the delivery of certain of said bonds, and the said debt was so discharged by the delivery of the same, and other claims against the state or departments of the state government have been liquidated by the delivery of bonds in like manner. Upon these facts it would seem that the act of 1909 does not raise money on the credit of the state and does not pledge the faith of the state. The act simply directs the payment of the sum agreed upon out of the cash assets of the treasury, and does not create a new debt. The bonds in question are not due and have never been canceled. They are negotiable securities in daily circulation. It is not "pledging the faith of the state" for the General Assembly to order the State Treasurer to pay a debt with money. Upon the same principle, it is not

"pledging the faith of the state" for the General Assembly to order the State Treasurer to pay a debt by delivering over some of these bonds, previously issued, in lieu of money.

These bonds having been legally issued, the faith of the state is pledged absolutely until they mature and are redeemed by the state. And if any of these bonds, by any means, come into the possession of any department of the state, they are subject to such disposal as the General Assembly may order, as much so as any other property in the possession of that department. While, of course, the State Treasurer has no power to invest his surplus cash in other bonds and securities, there can be no reasonable objection to his investing it temporarily in the state's own obligations which have not matured for the purpose of saving interest and holding the same as cash assets to be reconverted into money or paid out as such, as the exigencies of the state require. At least such has been the custom, and in accordance with that custom the bonds covered by the act of 1909 are held in the treasury as so much cash.

The judgment is affirmed.

CLARK, C. J., took no part in the decision of this case.

(150 N. C. 562)

BAKER v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. May 5, 1909.)

1. RAILROADS (§ 278*)—DEATH OF INFANT LICENSEE ON WORK TRAIN — CONTRIBUTORY NEGLIGENCE.

Where a boy of 14 was permitted to ride on the rear flat car of a work train, and, while it was running at 30 miles an hour, suddenly and voluntarily jumped off and was killed, he was guilty of contributory negligence barring recovery for his death if he can be held responsible in law for his conduct.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 898, 899; Dec. Dig. § 278.*]

2. RAILROADS (§ 278*) — DEATH IN JUMPING FROM TRAIN — RESPONSIBILITY OF INFANT LICENSEE.

The responsibility of a boy of 14 killed in jumping from a rapidly moving train on which he was allowed to ride is not to be judged by the length of his experience with railroads.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 899; Dec. Dig. § 278.*]

3. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—PRESUMPTION AS TO INFANT'S CAPACITY.

An infant of 14 is presumed to have sufficient capacity to be sensible of danger and power to avoid it, and this presumption stands till rebutted by clear proof of absence of the discretion usual to that age.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 223; Dec. Dig. § 122.*]

4. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—COMMENCEMENT OF INFANT'S RESPONSIBILITY—QUESTION OF LAW OR FACT.

At what age an infant is presumed to have sufficient capacity to be sensible of danger and

power to avoid it is not a question of fact, but of law, and the inquiry as to at what age his responsibility for negligence must be presumed to commence cannot be referred to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 348; Dec. Dig. § 136.*]

5. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CARE AND PRUDENCE REQUIRED OF INFANTS.

An infant is held to the care and prudence usual among children of the same age, and if directly injured by his own act, while negligence of another is only such as to expose him to possibility of injury, he cannot recover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 123; Dec. Dig. § 85.*]

6. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—DISCRETION OF INFANT—WEIGHT OF REBUTTAL EVIDENCE—QUESTION FOR JURY.

The weight of evidence to rebut the presumption of discreet judgment of an infant over 14 years of age is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 348; Dec. Dig. § 136.*]

7. RAILROADS (§ 278*)—DEATH OF INFANT LICENSEE—MOTIVE IN JUMPING FROM TRAIN—MATERIALITY.

In determining liability for the death of a boy who recklessly jumped from a rapidly moving train on which he was permitted to ride, his motive in so doing is immaterial.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 278.*]

Appeal from Superior Court, Anson County; Long, Judge.

Action by C. A. Baker, administrator of Carl Baker, deceased, against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Reversed.

John D. Shaw and Murray Allen, for appellant. Robinson & Caudle and L. Medlin, for appellee.

BROWN, J. The defendant in apt time entered motions to nonsuit upon the ground that upon plaintiff's own evidence he is not entitled to recover: (1) Because no negligence is shown; (2) because the intestate was guilty of contributory negligence. We are all of opinion that this last contention is so plainly with the defendant that it is unnecessary to consider the first.

These facts appear from plaintiff's evidence: His son, Carl, 15 years of age lacking one month, was killed by jumping from defendant's work train while running about 80 miles an hour. The train consisted of flat cars, equipped with machinery for ditching. Witnesses for plaintiff, who testify concerning the occurrence, say that on the afternoon of August 15, 1906, the boy Carl and his younger brother, Luther Baker, came up to the train from their home, about three-quarters of a mile away. When they arrived at the train, Herman Shannon, another boy, was standing on a flat car. Carl Baker asked the conductor if he could ride, and the conductor told him to get on the rear end of the train on a flat car out of the way. Carl then climbed up on the flat car

and pulled his younger brother up with him. The train continued the work of ditching. The boys remained on the car an hour. It became necessary for the train to take a siding to let another train pass going towards Monroe. After this train passed, the ditching train pulled out for Waxhaw, two miles away. When the train had gotten up good speed and was running at rate of about 30 miles an hour, Carl Baker got up from where he was sitting on a scantling and sat down on the rear of the flat car and jumped off between the rails. Herman Shannon, who was on the car with plaintiff's intestate, testified that he remained on the train in the position occupied by himself and Carl Baker until it reached Waxhaw, without injury to himself. This witness was nearly a year younger than Carl Baker. According to the testimony of the plaintiff, his son Carl was an "intelligent, smart boy, and of average size for his age," and for two years had been residing within three-quarters of a mile from the railroad.

It is settled beyond controversy by the decisions of this and all other courts in this country that the act of the intestate in jumping off the rapidly moving train of defendant was one of such recklessness as will bar recovery, if the intestate is held in law responsible for his conduct. *Owens v. Railroad*, 147 N. C. 357, 61 S. E. 198; *Morrow v. Railroad*, 134 N. C. 92, 46 S. E. 12. The learned counsel for plaintiff, Mr. Caudle, in an able and elaborate argument, endeavored to show that the intestate, on account of his age, should not be held responsible for his act; but an examination of the authorities in this and other states discloses that they are overwhelmingly against him. The case is not to be judged by the length of experience of the boy Carl with railroads, although the evidence discloses that for two years he had resided near one, and that his 12 year old brother, Luther, is by no means a stranger to them. Carl wore long trousers, was well grown, bright, smart, and intelligent. He was not an infant of tender years, and, in the absence of evidence to the contrary, had the capacity of an adult to appreciate danger. He was three years beyond the age at which he could be employed in a factory, around dangerous machinery, without violating the child labor law, and was old enough to be held responsible for a violation of the criminal law of the land.

An infant of the age of 14 years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age. At what age this presumption arises is not a question of fact, but one of law. The inquiry at what age must an in-

fant's responsibility for negligence be presumed to commence cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would simply produce a shifting standard, according to the sympathies or prejudices of those who composed each particular jury. One jury might fix the age at 14, and another at 18, and another at 20. The responsibilities of infants are clearly defined by text-writers and courts. At common law 14 was the age of discretion in males and 12 in females. At 14 an infant could choose a guardian and contract a valid marriage. After 7 an infant may commit a felony, although there is a presumption in his favor, which may, however, be rebutted; but after 14 an infant is held to the same responsibility for crime as an adult. Sharswood's Blackstone, vol. 1, pp. 20, 435, 404. Inasmuch as an infant, after 14, may select a guardian, contract marriage, is capable of harboring malice and of committing murder, it is no great imposition on him to hold him responsible for his own negligence. In the case of *Tucker v. Railroad*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670, the Court of Appeals of New York says: "The question at what age an infant's responsibility for negligence may be presumed to commence is not one of fact, but of law. In the absence of evidence tending to show that a boy 12 years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult." To same effect is *Nagle v. Railroad*, 88 Pa. 35, 32 Am. Rep. 413. That infants are to be held for the consequences of their own negligence in actions for injuries to them has long been settled by this and other courts and so declared by text-writers. *Shearman & Red. Neg. § 49; Wharton on Neg. 314; Manly v. Railroad*, 74 N. C. 635; *Murray v. Railroad*, 93 N. C. 94; *Railroad v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Railroad v. Stout*, 17 Wall. 657, 21 L. Ed. 745. From all these and other approved authorities the principle is deduced that an infant, so far as he is personally concerned, is held to such care and prudence as is usual among children of the same age, and if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the infant to the possibility of an injury, the latter cannot recover.

The Supreme Court of the United States has substantially held the same to be sound law in the cases above cited.

We find in the books many cases where children of various ages from seven years upwards have been denied a recovery because of their own negligence. *Boland v. Railroad*, 36 Mo. 484; *Meeks v. Railroad*, 52 Cal. 605; *Cauley v. Railroad*, 4 Am. &

Eng. R. R. Cas. 533; *Mathis v. Mfg. Co.*, 140 N. C. 530, 53 S. E. 349; *Murray v. Railroad*, supra; *Beck v. Railroad*, 149 N. C. 163, 62 S. E. 883. In *Meredith v. Railroad*, 108 N. C. 616, 13 S. E. 137, the plaintiff, a bright boy about 13 years old, while passing along the highway, was struck and injured by an engine while attempting to avoid another coming from the opposite direction. The court held that his administrator was not entitled to recover for his death. Judge Avery says: "The witnesses concur in the statement that the boy who was injured was an intelligent youth about 13 years old. In the absence of knowledge or information to the contrary, the engineer was justified in supposing that he would look to his own safety, even when trains were moving on three parallel tracks, if there was manifestly an opportunity to escape by walking across the railway to a neighboring side track." Again, he says: "The boy injured was described by witnesses as being bright and 'smart'; but, if he was apparently capable of appreciating his peril or his situation, it is sufficient to relieve the servants of the company from the imputation of carelessness in assuming that he would step aside before the engine reached him."

This principle has been applied in other states regardless of whether the child was over the age of 14 years. In *Dull v. Railroad*, 21 Ind. App. 571, 52 N. E. 1013, it is held that a child 11 years old and of sufficient intelligence to know the difference between safety and danger is a person *sui juris* so as to be charged with contributory negligence resulting in his being struck by a train. "A boy of 11 years of age knows as well as an adult does what a railroad is and the use to which it is put and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play and lounge amid a network of tracks. It is true that a boy of that age cannot be presumed to have the judgment of an adult, but it does not require much judgment to keep from walking in dangerous places, the dangers of which are fully understood." *Masser v. Railroad*, 68 Iowa, 602, 27 N. W. 776. Also, *Powers v. Railroad*, 57 Minn. 332, 59 N. W. 307. In *Mendenhall v. Railroad*, 66 Kan. 438, 71 Pac. 846, 61 L. R. A. 120, 97 Am. St. Rep. 380, a 15 year old boy paid a brakeman on a passenger train 25 cents to permit him to ride on the train. The brakeman told him to get on the platform of the baggage car and to get off at stopping places and keep out of sight. The plaintiff rode upon the platform to a nearby station and in getting off the train while in motion on the opposite side from the depot stumbled over a semaphore board, fell under the train, and received the injury complained of. The demurrer to the complaint was sustained. The court says: "That he was a trespasser not a passenger. The company

owed him no duty in regard to the construction of its semaphore, or otherwise, except to avoid willful and wanton negligence. The plaintiff was injured not because he was riding on the platform, but because he got off the train while in motion and on the opposite side of the car from the depot. The allegation is insufficient to show the defendant to have been guilty of any willful or wanton negligence or to relieve the plaintiff from the responsibility of his own wanton recklessness." The Massachusetts court holds that: "A street railway corporation is not liable for an injury caused to a boy 10 years old who was when injured playing with other children upon a car left without guard for several days on a public street of a city." *Gay v. Railway Co.*, 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448, 38 Am. St. Rep. 415. In *Studer v. Railroad*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39, recovery was denied in an action for death of a child between 12 and 13 years of age who was killed in attempting to pass between the cars of a freight train. The court says: "The fact that deceased was only about 12 years of age did not require the court to submit to the jury whether his attempt to pass between the cars constituted negligence. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may reasonably be expected in persons of their age and capacity, and children as well as adults must use discretion which persons of their years ordinarily have, and cannot be permitted with impunity to indulge in conduct which they know or ought to know to be reckless." In *Sheets v. Railway Co.*, 54 N. J. Law, 518, 24 Atl. 483, an intelligent child 13 years old was struck by a street car while crossing a public street. Recovery was denied. The court says: "The trial judge laid down the rule of law with respect to her responsibility with substantial accuracy. She was evidently *sul juris*, and the jury were told to consider the degree of care and discretion which would be expected from her. The jury found by their verdict that she was not guilty of contributory negligence; in other words, she was at the time of the occurrence in the exercise of that degree of care which would reasonably be expected from a child of that age and intelligence."

This presumption of discreet judgment which arises after 14 years of age must stand until it is overthrown by clear proof of the absence of such natural intelligence as is usual with infants of similar age. If such evidence is offered by the plaintiff to rebut such presumption, its weight and value are for the jury to estimate. In this case the plaintiff does not attempt to rebut such presumption, nor does he offer even a suggestion that the engineer, after he started his train, caused the injury, or could have prevented it.

The intestate was sitting on the rear end of the last flat car while it was moving at great speed and suddenly and voluntarily jumped off and was instantly killed. What his motive was in so doing is immaterial. The conclusion is irresistible that had the intestate imitated the wholesome example of his more youthful yet more prudent companion, who sat beside him, and had gone on the short distance to Waxhaw, he would have easily returned to his home in safety.

The motion to nonsuit is allowed. *Hollingsworth v. Skelding*, 142 N. C. 252, 55 S. E. 212.

Reversed.

(150 N. C. 555)

BOOKER v. ELLER et al.

(Supreme Court of North Carolina. May 5, 1909.)

JUDGMENT (§ 256*)—CONFORMITY TO VERDICT.

Where, in an action on a note against two defendants, the jury finds that the note was procured from one of the defendants by fraudulent representations of the plaintiff, but was not so procured from the other defendant, it is not error for the court to refuse to sign a judgment tendered by defendants to the effect that plaintiff was not entitled to recover as to the latter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

Appeal from Superior Court, Wilkes County; Justice, Judge.

Action by C. J. S. Booker against H. C. Eller, Jr., and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Finley & Hendren, for appellants. W. W. Barber, for appellee.

WALKER, J. This action was brought to recover the amount of one of a series of notes executed by H. C. Eller, Jr., and his father, H. C. Eller, Sr., to the plaintiff. The defendants admitted the execution of the notes and alleged that they were procured by fraudulent representations made by the plaintiff. We need not inquire whether the fraud is sufficiently pleaded, as we are of the opinion that there was no error committed by the court in its refusal to sign the judgment tendered by the defendants in rendering the judgment which appears in the record.

The note in controversy is as follows: "\$4.00. Wilkesboro, N. C., May 31, 1901. August 20, 1901, after date, I promise to pay to the order of C. J. S. Booker eighty-four dollars. Value received. H. C. Eller, Jr. H. C. Eller, Sr." The court submitted certain issues to the jury, which, with the answers thereto, are as follows: "(1) were the notes sued upon procured from H. C. Eller, Jr., by the false and fraudulent representations of the plaintiff?" Answer: "Yes." "(2) Were the notes sued upon procured from H. C. Eller, Sr., by the false and fraudulent

representations of the plaintiff?" to which the jury, under instructions of the court, answered "No."

It will be seen that the jury found in favor of the defendant H. C. Eller, Jr., and against the defendant H. C. Eller, Sr. The defendant H. C. Eller, Sr., by his counsel, tendered a judgment to the effect that the plaintiff was not entitled to recover as to him upon the verdict. The judge refused to sign the judgment, but signed a judgment as above set forth. The defendant H. C. Eller, Sr., did not request the court to give any instructions to the jury so far as appears in the case, although he relied, in argument, upon the defense that he was a surety for his son, H. C. Eller, Jr., and if the note is void as to him, as principal, it is also void as to H. C. Eller, Sr., as surety. The evidence as to whether H. C. Eller, Sr., was merely a surety is vague and unsatisfactory. Upon the face of the note, he appears to be a principal, but we need not complicate a simple case by any consideration of this question. We are restricted to the assignments of error. The jury have found that H. C. Eller, Sr., was a principal, and, as to him, there was no fraud. There is not a particle of evidence that he was influenced by any fraudulent representation to sign the note, even if, in the state of the record, we are permitted to go behind the verdict. It all comes to this: That the jury have found that H. C. Eller, Sr., made a valid contract to pay the plaintiff the sum of money which he claims in this action, and we are unable to see why, upon the verdict, he is not entitled to judgment.

No error.

(150 N. C. 597)

WILLIAMS v. UNITED STATES CASUALTY CO.

(Supreme Court of North Carolina. May 5, 1909.)

INSURANCE (§ 539*)—SICK BENEFITS—TIME OF NOTICE.

There can be no recovery under a sick benefit policy providing that notice of sickness must be given within 10 days after the contraction of the disease insured against where no notice is given until 50 days thereafter.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1333; Dec. Dig. § 539.*]

Appeal from Superior Court, Wilkes County; Justice, Judge.

Action by A. B. Williams against the United States Casualty Company on a sick benefit policy. From a judgment for defendant, plaintiff appeals. No error.

F. D. Hackett and Finley & Hendren, for appellant. W. W. Barber, for appellee.

CLARK, C. J. The plaintiff seeks to recover on a sick benefit policy. The policy

promises a payment of \$8 a week, not exceeding 26 consecutive weeks, for loss of time from illness, if caused exclusively and directly by any one of certain diseases specifically named. Then follows the following provision in the policy: "Provided such disease is contracted not earlier than 15 days after this policy takes effect and independently of any and all other causes, renders the insured wholly and continuously unable to transact each and every part of the duties pertaining to the occupation described herein and necessitates continuous confinement indoors and treatment by a regularly qualified physician, and provided written notice of such disease be given by the insured or his attending physician to the company at its office within 10 days after its contraction." It is admitted that the plaintiff did not give the notice in 10 days—in fact, he delayed for 50 days. This provision was doubtless intended to prevent imposition. But, at any rate, the plaintiff accepted the policy with that provision, and he is bound by his contract. He did not comply with the conditions which would entitle him to recover, and his honor properly held that he could not recover. *Alexander v. Insurance Co.* (at this term) 64 S. E. 432. If one should suddenly become unconscious as from apoplexy, for instance, so as to be unable to give the stipulated notice within 10 days, whether he would be excused and therefore entitled to recover notwithstanding the failure to give notice is a question which does not arise upon the evidence in this case.

No error.

(150 N. C. 549)

RICHARDSON v. RICHARDSON et al.

(Supreme Court of North Carolina. May 5, 1909.)

1. CURTESY (§ 7*)—REQUISITES—"CURTESY CONSUMMATE."

There are four requisites to make a tenancy by the "curtesy consummate": Marriage, seisin, issue, and death of the wife.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 5; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 2, p. 1797.]

2. CURTESY (§ 5*)—WHEN VESTED INTEREST—"CURTESY INITIATE."

At common law, a husband did not have a vested interest as tenant by curtesy in lands of which his wife was seised, until the birth of issue, and he then became a tenant by the "curtesy initiate" to a separate estate for his life in his wife's lands, the usufruct of profits of which during that period was exclusively his own property.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 11-15; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 2, p. 1798.]

3. CURTESY (§ 2*)—MODIFICATION BY CONSTITUTION—PROFITS OF LAND.

Where a wife, having separate property under Const. 1868, art. 10, § 6, providing that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property of the wife before marriage shall be her separate property, with power to will it, died with issue born after the adoption of the Constitution, leaving a will disposing of the property to persons other than her husband, the husband had no rights in the property as tenant by curtesy, since his interest before the birth of issue, being contingent, and not vested, could be taken by legislation; and hence rents due under a lease given by both parties belonged to the representative of the wife, and not to the husband.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.*]

4. HUSBAND AND WIFE (§ 9*)—PROPERTY OF WIFE—INTEREST OF HUSBAND.

Neither did the husband acquire any rights to the rents by virtue of the common-law rule that a husband was seised in right of his wife of a freehold interest during their joint lives, since by Acts 1848, p. 89, c. 41 (Revisal 1905, § 2097), providing that no lands belonging to a wife at time of marriage shall be sold or leased without the consent of the wife, the rule was changed, so that the husband could not assert any interest as against the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 30-37; Dec. Dig. § 9.*]

5. ACKNOWLEDGMENT (§ 25*)—LEASE BY WIFE—PRIVY EXAMINATION—FAILURE TO TAKE—EFFECT.

Where a lease of lands of the wife is given by husband and wife without a privy examination of the wife, as required by Acts 1848, p. 89, c. 41 (Revisal 1905, § 2097), the lease is void as to the wife, and the husband can acquire by the lease no interest in the rents and profits of the lands.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 133-148; Dec. Dig. § 25.*]

Appeal from Superior Court, Anson County; Long, Judge.

Action by John S. Richardson against John S. Richardson, Jr., and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. A. Lockhart and F. J. Cox, for appellant. Robinson & Caudle, for appellees.

WALKER, J. This action was brought to recover the value of five bales of cotton, which have been sold, the parties agreeing that the proceeds shall be held to await the determination of this case. Judgment was entered for the defendants, and the plaintiff appealed.

The facts are that the plaintiff and Charlotte Leak were married in 1867, she being then seised of land in Anson county, known as the "Brown Creek tract," and containing 878 acres, which is described by its metes and bounds in the record. They had five children, the oldest of them having been born in November, 1868. In December, 1905, the said Charlotte Richardson and her husband leased the land, by a written agreement, for the term of five years to R. J. Beverly, who agreed to deliver, as rent, five bales of cotton on the first day of November of each year during the term. Charlotte Richardson died in October, 1907, leaving a will, by which she devised and bequeathed all of her property and estate to persons other than the plaintiff.

The lessee delivered to Charlotte Richardson, just before her death, 2,004 pounds of cotton, it being part of the rent for the year 1907, and after her death the lessee delivered the remainder of the cotton, in full payment of the rent for that year. The question presented for our consideration is whether the plaintiff, the husband of Charlotte Richardson, or the defendant, John S. Richardson, Jr., her executor, is entitled to receive the proceeds of the sale of the cotton. The plaintiff contends that, by virtue of the marriage and the ownership of the land by his wife, he acquired a vested interest, as tenant by the curtesy initiate, in all crops grown upon the same, without regard to the fact that the first child of the marriage was born after the adoption of the Constitution of 1868, and that he is therefore entitled to the rent due by the terms of the lease; while the defendants assert title to the rent upon the ground that by the Constitution of 1868 the land, with its rents and profits, became the separate property of the wife, the testatrix of the defendant Richardson, as the plaintiff's right or interest in the land, as tenant by the curtesy, was a contingent one until the birth of issue, which occurred after the adoption of the Constitution, and therefore there was no interference with any vested right of the plaintiff by the provision of that instrument that the property of the wife, acquired before marriage, shall belong to her as her separate estate, with the power to dispose of it by will, and also by deed, with the written consent of her husband, as if she were unmarried. Const. art. 10, § 6. We must therefore determine what is the husband's interest in his wife's property by the rules of the common law as modified by the Constitution, if, under the facts of this case, any change in those rights, as they existed at common law, has been wrought by that instrument.

Blackstone says: "There are four requisites necessary to make a tenancy by the curtesy: Marriage, seisin of the wife, issue, and death of the wife." He is referring here, of course, to a tenancy by the curtesy consummate. In regard to the time when the husband first becomes vested with an interest or estate in his wife's land, he says: "As soon, therefore, as any child is born, the father began to have a permanent interest in the lands. He became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy initiate; and this estate, being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant." 2 Blackstone, 127. This is in harmony with the former decisions of this court. As is said in *Morris v. Morris*, 94 N. C. 617: "The husband by the birth of issue became tenant by the curtesy initiate to a separate estate for his own life, in his wife's land, the

usufruct or profit of which, during that period, was absolutely and exclusively his own property. This has not been questioned in this state since the decision in *Williams v. Lanier*, 44 N. C. 30, and others following that case. *Halford v. Tetherow*, 47 N. C. 393; *Childers v. Bumgarner*, 53 N. C. 297; *McGlennery v. Miller*, 90 N. C. 215; *Osborne v. Mull*, 91 N. C. 203." We see, therefore, that the husband's right to the usufruct or rents and profits of the land is contingent upon the birth of issue. It is a mere expectancy or possibility; and, when this is the case, the Legislature may deprive him of his expectant interest at any time before the event occurs upon the happening of which it would become vested. We said, in *Anderson v. Wilkins*, 142 N. C. 158, 55 S. E. 273, 9 L. R. A. (N. S.) 1145: "So long as the interest remains contingent only, the Legislature may act; for a bare expectancy, or any estate depending for its existence on the happening of an uncertain event, is within its control, not being a vested right which is protected by constitutional guaranties. If this be so, the nature of estates and their enjoyment must, to a certain extent, and indirectly, be subject to legislative control and modification in order to promote the public welfare. *Smith on Statutory and Const. Constr.* 412. In this country estates in tail have very generally been turned into estates in fee simple by statutes the validity of which is not disputed. *De Mill v. Lockwood*, 3 Blatchf. 56, Fed. Cas. No. 3,782; *Lane v. Davis*, 2 N. C. 277; *Minge v. Gilmour*, Id. 279." Judge Cooley in his treatise on *Constitutional Limitations* (7th Ed.) at page 513, puts the very case we now have under consideration, and thus states the law applicable to it: "At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away. But other interests were merely in expectancy. He could have a right as tenant by the curtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property subject to conveyance and to be taken for debts, and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely—that is to say, until it becomes initiate—the Legislature must have full right to modify or even to abolish it. And the same rule will apply to the case of dower, though the difference in the requisites of the two estates are such that the inchoate right to dower does not become property, or anything more than a mere expectancy, at any time before it is consummated by the

husband's death. In neither of these cases does the marriage alone give a vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personality of the wife; it is subject to any changes in the law made before his right becomes vested by the acquisition." We are therefore of the opinion that the plaintiff acquired no right to the cotton, as rent for the land of his wife, by virtue of any estate in him as tenant by the curtesy initiate, because of the constitutional provision (article 10, § 6) by which it is declared that a married woman's real and personal property shall be and remain her sole and separate estate, and that she may devise and bequeath the same, thus depriving her husband of any interest therein. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299; *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127. As that article of the Constitution was a valid enactment under the facts and circumstances of this case, the plaintiff has no interest, either as tenant by the curtesy initiate or consummate in rent which was reserved in the lease his wife having bequeathed the same to other persons. *Tiddy v. Graves*, supra.

It is true that at common law the husband, upon the marriage, was seised in right of his wife of a freehold interest in her lands during their joint lives, and that, either as tenant by marital right, or as tenant by the curtesy initiate, he was entitled to the rents and profits, and might lease or convey his estate, and it might be sold under execution against him. But radical changes in this respect were effected by the act of 1848 (Acts 1848, p. 89, c. 41; Revisal 1905, § 2097). Construing this act in *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84, the court said: "Whatever may be the rights of the husband in the wife's land after she may die intestate, the authorities concur in the view that the husband holds no estate during the life of the wife, as tenant by the curtesy initiate, which is subject to execution, and which he can assert against the wife. He has the right of ingress and egress and marital occupancy, but can assume no dominion over her land except as her properly constituted agent." In *Walker v. Long*, 109 N. C. 510, 14 S. E. 299, we find the following reference to the act: "By virtue of the act of 1848, and the further modification made by the Constitution of 1868, the tenancy by the curtesy initiate is stripped of its common-law attributes, until there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress (*Manning v. Manning*, 79 N. C. 293, 300, 28 Am. Rep. 324), and the right to the curtesy consummate contingent upon his surviving her. * * * The husband is still seised in law of the realty of his wife, shorn of the right to take the rents, and of the power to lease her lands. * * * He has, by the curtesy initiate, a freehold interest, but

not an estate, in the property." It would seem that the more recent decision in *Taylor v. Taylor*, 112 N. C. 124, 16 S. E. 1019, is a direct authority against the claim asserted by the plaintiff. In that case the court, speaking by Shepherd, C. J., says: "In all of these cases the actual decision (as distinguished from several expressions founded upon the common law) may, it is thought, be reconciled with the recent ruling of this court in *Jones v. Coffey*, supra, that under the act the husband has no right which he can assert against the wife in her real property. This appears to be in accord with the early declaration of the court that 'the sole object of the act was to provide for her a home, of which she could not be deprived either by the husband or by his creditors.' Conceding that the cases may not be altogether harmonious, we must adopt the later decisions, and according to these the plaintiff is entitled to recover; for, admitting that a divorce a mensa et thoro cannot, as it is claimed, affect the property rights of the parties (*Taylor v. Taylor*, 93 N. C. 418, 53 Am. Rep. 460), the defendant, as against the wife, had no property rights whatever, but simply a right of ingress and egress for the purpose of enjoying her society, and these he has forfeited during the coverture, or until a reconciliation, by his own misconduct. Taking the other view, however, and admitting that the husband had a right to the rents and possession of the land during coverture, we think that such rights must yield when they come in conflict with the paramount rights of the wife, as indicated by the act of 1848."

It appears in this case that there was a written lease, signed by the plaintiff and his wife, but there was no privy examination of the latter, as required by the act of 1848 (Acts 1848, p. 89, c. 41; Revisal 1906, § 2097), and also by Revisal 1906, § 2096. The lease was therefore void as to the wife, and passes no interest to the husband in the rents and profits of the land, if otherwise he would have acquired an interest.

Our conclusion is that there was no error in the judgment of the court.

Affirmed.

(83 S. C. 78)

EX PARTE ZEIGLER et al. T. T. HAYDOCK CARRIAGE CO. v. ZEIGLER et al. UNION SAVINGS BANK & TRUST CO. v. SAME (two cases).

(Supreme Court of South Carolina. May 4, 1909.)

1. ACCORD AND SATISFACTION (§ 7*) — PART PAYMENT—SUFFICIENCY.

The payment of a sum smaller than a liquidated debt under an agreement not under seal to accept such sum in satisfaction cannot be satisfaction of the whole.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. § 46; Dec. Dig. § 7.*]

2. ACCORD AND SATISFACTION (§ 8*) — PART PAYMENT—CONSIDERATION.

Where judgments were rendered against a husband and wife, and the husband was afterwards discharged in bankruptcy, his payment of a part of the judgment debt on the creditor's agreement that the payment should be accepted in full satisfaction was a complete satisfaction of the debt.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. § 62; Dec. Dig. § 8.*]

3. EXECUTION (§ 172*)—PRELIMINARY INJUNCTION.

Where the motion of a husband and wife to enjoin the enforcement of an execution against them alleged the husband's discharge in bankruptcy after the rendition of judgment, a part payment by the husband, and a receipt in full by the creditor, an order enjoining the enforcement of the execution until the case should be heard on the merits was proper.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 497; Dec. Dig. § 172.*]

4. EXECUTION (§ 172*)—PRELIMINARY INJUNCTION—BOND.

It is error to enjoin the enforcement of an execution until the case is heard on the merits without requiring the usual injunction undertaking.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 518; Dec. Dig. § 172.*]

Appeal from Common Pleas Circuit Court of Barnwell County; Robt. Aldrich, Judge.

Actions by the T. T. Haydock Carriage Company and another against Paul J. Zeigler and another. From an order enjoining plaintiffs from enforcing executions on their judgments until the case should be heard on the merits, plaintiff, the T. T. Haydock Carriage Company, appeals. Modified.

J. A. Willis and B. T. Rice, for appellant. L. L. Tobin, for respondents.

WOODS, J. On December 7, 1897, judgments were recovered against Paul J. Zeigler and Virginia S. Zeigler in favor of the T. T. Haydock Carriage Company for \$1,470.75, and in favor of the Union Savings Bank & Trust Company as assignee of the T. T. Haydock Carriage Company for \$761.19 and for \$167.54. The T. T. Haydock Carriage Company, having acquired by assignment the two judgments in favor of the Union Savings Bank & Trust Company, caused execution on all the judgments to be issued against the defendants, and directed the sheriff to levy on and sell thereunder the property of Virginia S. Zeigler. The judgment debtors, Paul J. Zeigler and Virginia S. Zeigler, then filed an ex parte petition in the original causes in which the judgments were recovered, alleging the judgment to be satisfied, and praying for an injunction against the enforcement of the executions. On this petition and exhibits attached Judge Aldrich made a temporary restraining order, in which he required the judgment creditor to show cause why the enforcement of the execution should not be enjoined until the final determination of the questions involved. No summons was issued, and no separate ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion for injunction was instituted; but the judgment creditor filed an answer and return denying that the judgments had been satisfied, or that anything had been paid thereon, except the sum of \$100. Upon hearing the return, Judge Aldrich enjoined the judgment creditor from enforcing the executions until the case should be heard on the merits. From this order the T. T. Haydock Carriage Company, the judgment creditor, appeals.

These facts bearing on the issue made as to the satisfaction of the judgment were alleged in the petition and admitted in the answer. After the judgments were entered, Paul J. Zeigler was adjudged a bankrupt, the judgments were included in his schedule of liabilities, and he was absolutely and finally discharged therefrom. On 24th November, 1903, the T. T. Haydock Carriage Company wrote to Paul J. Zeigler the following letter: "Replying to your favor of recent date offering us \$100.00 in full payment of our claim against you, will say that we will accept same on receipt of post-office order for the above amount, and you may hold this letter as a receipt in full for all claims and demands against you and your wife; and just as soon as the post-office order is received, we will send you the proper kind of receipt. Kindly give this your attention and let us have remittance by return mail, and oblige." On December 3, 1903, the judgment creditor issued a receipt in these words: "Received of P. J. and Virginia S. Zeigler One hundred Dollars in full of all claims and demands to date."

The petition alleges that Paul J. Zeigler entered into negotiations for the settlement of the judgments at the request of his wife, Virginia Ziegler, and in order to relieve her from the judgments entered against her because of her suretyship for him. The answer admits the agreement to accept \$100 in full of the judgments, and the receipt issued in pursuance of the agreement, but denies any other agreement. The payment of a sum smaller than a liquidated debt in pursuance of an agreement not under seal to accept such sum in satisfaction cannot be satisfaction of the whole. Such payment notwithstanding the agreement operates only as a payment pro tanto. This rule was derived from Pinnel's Case, Coke 117a, and is generally accepted where the common law prevails. *Fookes v. Beer*, 54 L. J. Q. B. 130, 1 Eng. Rul. Cas. 370; 1 Cyc. 319; 1 Am. & E. Enc. 413; 1 Smith's Leading Cases, 146. Though much dissatisfaction has been expressed with it, it is firmly established in this state. *Corbett v. Lucas & Dotterer*, 4 McCord, 323; *Hope v. Johnston & Cavis*, 11 Rich. Law, 135; *Arnold v. Bailey*, 24 S. C. 493; *Riggs v. Association*, 61 S. C. 456, 39 S. E. 614. Owing to this dissatisfaction with the rule itself, the courts have resorted to very technical distinctions to escape its application. It has

been held that if the payment of the smaller sums be made with an agreement for satisfaction before maturity (*Eve v. Moseley*, 2 Strob. 203), or by a promissory note (*Libree v. Tripp*, 15 M. & W. 23), or by check (*Godard v. O'Brien*, 9 Q. B. D. 37), or in pursuance of an agreement with other creditors (*Pierce v. Jones*, 8 S. C. 273, 28 Am. Rep. 288), or by money received from a third person under no legal obligation to pay the debt (*Bidder v. Bridges*, 57 L. J. Ch. 300, 1 Eng. Rul. Cas. 393; *Marshall v. Bullard*, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862), the case falls without the rule in Pinnel's Case, and the debt is satisfied. Other cases might be cited on each of these distinctions. All of them are supposed to fall under the doctrine stated by Lord Coke as decided in Pinnel's Case, that, if anything is accepted by the creditor as payment in full which might by possibility be more beneficial to him than his debt, the court will not inquire into the adequacy of the consideration, but will hold the debt satisfied. In this case the debtor, Paul J. Zeigler, had been absolutely discharged from the debt, and if he paid the sum of \$100, as seems to be alleged by the petition, by the request or with the consent of Virginia S. Zeigler, the debtor who remained bound, then the debt was satisfied for the reason that \$100 paid to the creditor's hands by Paul J. Zeigler, a person under no legal obligation to pay the debt, might well be more beneficial than the obligation of Virginia S. Zeigler to pay a much larger sum.

There was no error in granting the order enjoining the enforcement of the execution. There was error, however, in not requiring the usual injunction undertaking.

The judgment of this court is that the order of the circuit court be modified so as to require of the petitioners a written undertaking with sureties to be approved by the clerk of the court of common pleas of Barnwell county to the effect that he will pay to the T. T. Haydock Carriage Company such damages not exceeding \$500 as it may sustain by reason of the injunction, if the court shall finally decide that the petitioners were not entitled thereto.

MERCK et al. v. MERCK et al.

(Supreme Court of South Carolina. May 7, 1909.)

APPEAL AND ERROR (§ 830*)—REHEARING—DIVISION OF COURT.

Where two of the justices vote for reversal and one for affirmance, the case will be ordered reheard by the full court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3211; Dec. Dig. § 830.*]

Appeal from Common Pleas Circuit Court of Pickens County; J. C. Klugh, Judge.

Action by Daniel M. Merck and others

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against Lawrence C. Merck and others. Judgment for defendants, and plaintiffs appeal. Ordered to stand for rehearing.

Breazeale & Long, J. E. Boggs, and Cothran, Dean & Cothran, for appellants. James P. Cary, for respondent Mann.

PER CURIAM. In this cause two of the justices being for reversal and one for affirmance, it is necessary that the case be reheard by a full court. It is therefore ordered that the cause be docketed for a hearing on the call of the Tenth circuit.

(82 S. C. 515)

LOGAN v. ATLANTA & C. AIR LINE R. CO.

(Supreme Court of South Carolina. May 8, 1909.)

1. MASTER AND SERVANT (§ 88*)—INJURIES TO SERVANT—RELATION OF PARTIES—LIABILITY OF LESSOR.

A railway company leasing its road is liable for an injury to an employé of the lessee while acting as yardmaster of the lessee, and due to the lessee's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 149; Dec. Dig. § 88.*]

2. JUDGMENT (§§ 650, 707*)—CONCLUSIVENESS.

A judgment of the federal Circuit Court of Appeals reversing a judgment for an employé suing his employer operating a railroad as lessee for a personal injury, and remanding the case for a new trial, in accordance with the opinion of the court, is not conclusive on the employé suing the lessor for the injuries; the parties not being the same, and the judgment not being final.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1162, 1230; Dec. Dig. §§ 650, 707.*]

3. ABATEMENT AND REVIVAL (§ 12*)—ACTIONS IN STATE AND FEDERAL COURTS.

A pending action in the federal court against the lessee of a railroad for a personal injury to an employé is no bar to an action in the state court by the employé against the lessor for the same injuries.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91; Dec. Dig. § 12.*]

4. TRIAL (§ 139*)—SUBMISSION OF ISSUES TO JURY—EVIDENCE.

Where there is any evidence on an issue on which the jury could find for the plaintiff, it is proper to submit it to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

Appeal from Common Pleas Circuit Court of Greenville County; D. E. Hydrick, Judge.

Action by W. M. Logan against the Atlanta & Charlotte Air Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the opinion of Judge Hydrick, referred to in the opinion:

"The grounds of the motion for a new trial herein are all based upon considerations of the testimony, except the fifth, sixth, and seventh. Notwithstanding the facts of the case have been resolved in favor of the

plaintiff by two juries, I have carefully reviewed the testimony, and have decided not to disturb the verdict. At the time of his injury plaintiff was an employé of the Southern Railway Company, which, as lessee of the defendant, had the possession and operation of the defendant's property rights and franchises. In July, 1903, plaintiff brought an action in the court of common pleas for Spartanburg county against the Southern Railway Company for the same cause of action. That case was removed to the Circuit Court of the United States by the Southern Railway Company, where it was tried, resulting in a judgment for the plaintiff. An appeal was taken to the Circuit Court of Appeals, which reversed the judgment of the Circuit Court, and remanded the case for a new trial. The opinion and judgment of the Circuit Court of Appeals will be found in Southern R. Co. v. Logan, 138 Fed. 725, 71 C. C. A. 281. After the rendition of the judgment of the Circuit Court of Appeals, and, while the case was still pending in the Circuit Court, the plaintiff commenced this action. The defendant pleaded the pendency of the action in the federal court in abatement. The plea was overruled. The defendant then requested the court to charge the jury:

"(1) That the plaintiff in this action is concluded and bound by all questions of fact and law decided by the Circuit Court of Appeals in the judgment hereinbefore referred to which would have bound him in a second trial in the United States court.

"(2) The defendant company, as lessor of the Southern Railway Company, is not liable to a servant of the latter company for injuries received by him in consequence of the negligence of such company."

"These requests were refused. The fifth, sixth, and seventh grounds of the motion for a new trial allege error in overruling the plea in abatement and in refusing said requests.

"The defendant is liable for torts of the Southern Railway Company in the operation of its railroad on the ground that the Southern Railway Company is its agent in the operation of the road. Smalley v. Railway Co., 73 S. C. 574, 53 S. E. 1000. Therefore the law governing the relation of principal and agent is applicable. Upon the principles governing that relation the master is liable for the acts of his servant. It is well settled that the principal and agent are jointly and severally liable for the torts of the agent done within the scope of the agency. Schumpert v. Railway Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802, and cases cited by the court. Sometimes the principal and agent are spoken of as joint tort-feasors, though they may not, strictly speaking, be such. Nevertheless

the nature of their liability makes applicable some of the principles governing the liability of joint tortfeasors. One of these is that they may be sued jointly or severally for the torts of the agent committed within the scope of the agency; and, if sued severally, neither action will abate the other.

"There is another reason why the plea could not be sustained. The actions are pending in jurisdictions which are foreign to each other—at least in the sense and to the extent that an action pending in one will not abate an action pending in the other between the same parties for the same cause. The authorities have agreed that the courts of the different states of the Union are foreign to each other. *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309. There is some diversity of opinion as to whether the courts of a state and those of the United States sitting within the territorial limits of the same state are foreign to each other. One of the reasons why the courts of one state will not abate an action pending therein on the plea that another action between the same parties for the same cause is pending in another state is that the citizens of a state should not be sent into a foreign jurisdiction to get justice. So far as the greater expense and inconvenience attendant upon getting justice in a foreign jurisdiction may affect the question, it would apply with equal force to the decision of the relation of the state and federal courts to each other. To send a citizen of the state into the federal courts to get justice may work as great a hardship upon him in the matter of inconvenience and expense as to send him into a foreign state. In many, if not in most, cases the trial is had as far away from his home, and he has to attend it at as great expense and inconvenience to himself and his witnesses as if he were sent into a foreign state. Moreover, the jurors who are to pass upon the credibility of his witnesses are as complete strangers to them. The Supreme Court of the United States has held (*Gordon v. Gilfoill*, 99 U. S. 169, 25 L. Ed. 383, and other cases) that the state courts are foreign to the federal courts sitting within the same state, and a majority of the inferior federal courts have adopted the same view. See 1 Cyc. 38, and cases cited. 1 Ency. Pl. & Pr. 764. For the sake of uniformity, I think the state courts should adopt the same view with regard to the federal courts sitting within the state, so that we shall not have the federal courts holding the state courts to be foreign and the state courts holding the same federal courts to be domestic.

"The decision of the question of res judicata has been more difficult. The principles of the law of res judicata are few and simple, but the application of them to particular cases is not always easy. A general statement of one of the elementary prin-

ciples of that law is that only parties and privies are bound by a judgment. 'Privies,' in the sense in which the word is here used, includes only those who have 'mutual or successive relationship to the same rights of property.' 24 A. & E. Ency. Law (2d Ed.) 764. 'The ground of privity is property, not personal relation.' Big. Estop. p. 142; Freem. Judg. § 162; *Smith v. Moore*, 7 S. C. 215, 24 Am. Rep. 479. 'Absolute identity of interest is essential to privity. The fact that two parties as litigants in two different suits happen to be interested in proving or disproving the same facts creates no privity between them.' 24 A. & E. Ency. L. (2d Ed.) p. 747. In some of the cases the word is used, somewhat inaccurately, to denote the relation and the consequences thereof between principal and agent, and, unless the sense in which the word is used is kept in mind, we are apt to be led into confusion and error. 'The application of the principle of res judicata to persons standing in the relation of principal and agent or master and servant has, by some authorities, been supported on the ground that privity exists between persons standing in these relations. But other authorities deny the existence of such privity, and hold that in such cases the technical rule is upon grounds of public policy expanded so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies.' 24 A. & E. Ency. L. (2d Ed.) 752. Where an agent is sued, and, after trial on the merits, the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar when sued by the same plaintiff on the same cause of action. *Swygert v. Wingard*, 48 S. C. 324, 26 S. E. 653; *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649.

"A final judgment on the merits in favor of the Southern Railway Company in the case in the federal court would unquestionably have been a bar to this action, because it would have been an adjudication by a court of competent authority that the Southern Railway Company is not liable to the plaintiff, and because the liability of the defendant herein is predicated solely upon that of its agent, the Southern Railway Company. This is true, even though the defendant was neither party nor privy to that suit. The authorities generally agree that, when the principal is sued for the act of his agent, he can vouch the agent to defend by giving him notice of the action and an opportunity to defend, and if the agent fails to defend, or if judgment goes against the principal, the agent will be concluded by the judgment; and all agree that the judgment would be conclusive as to the amount which the principal had to pay, and prima facie evidence of the liability of the agent to his principal therefor. But the conclusive effect of the judgment depends upon notice of the pendency of the action and an oppor-

tunity to defend it. *Smith v. Moore*, 7 S. C. 209, 24 Am. Rep. 479; *Robinson v. Baskins*, 53 Ark. 330, 14 S. W. 93, 22 Am. St. Rep. 202, and notes; *Freeman on Judg.* § 164; 24 A. & E. Ency. L. (2d Ed.) 741; *Catterlin v. Frankfort*, 79 Ind. 547, 41 Am. Rep. 627; *Emma Silver Mining Co. v. Emma Silver Mining Co.*, etc. (C. C.) 7 Fed. 401; *Gillingham v. Charleston Towboat, etc., Co.* (D. C.) 40 Fed. 649; *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387.

"I have found no case which holds that the agent would be concluded by a judgment against his principal without notice and an opportunity to defend the action. A fortiori, the principal would not without notice and opportunity to defend be concluded by a judgment against his agent—especially in favor of a third person, the plaintiff in that judgment—because to so conclude him and make him responsible for the agent's 'bad pleading, or blunders in the trial of the cause * * * would be to deprive him of his property without due process of law. Yet, as regards the plaintiff who has before sued the agent, and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity.' *Emma Silver Mining Co. v. Emma Silver Mining Co.*, supra. Upon the authority of the cases above cited, as well as upon reason, I hold that the defendant in this action would not have been concluded by a final judgment in favor of the plaintiff against the Southern Railway Company in the federal court. This being so, the defendant cannot avail itself of any adjudication in that case in this action, unless, as before held, the judgment had been final against the right of the plaintiff to recover; for estoppels must be mutual. It must be such a judgment as would conclude the party invoking it as well as the other party. 24 A. & E. Ency. L. (2d Ed.) 730. While, as we have seen, a final judgment against the plaintiff in the federal court would have been a bar to this action, a final judgment against the Southern Railway Company without satisfaction would not have been a bar to this action, because the plaintiff has the right to pursue both companies to judgment, though he can have but one satisfaction. Suppose he had obtained judgment against the Southern Railway Company and found it insolvent, or for any reason had been unable to collect the judgment, unquestionably he could have sued the defendant to judgment also, and then it would have been his right to elect against which company he would demand satisfaction. *Hawkins v. Hatton*, 1 Nott & McC. 318, 9 Am. Dec. 700; *Smith v. Singleton*, 2 McMul. 184, 39 Am. Dec. 122; 1 *Herman on Estoppel*, § 177.

"This conclusion is not in conflict with the principle of *res judicata* decided in *Jones v. Railway Co.*, 65 S. C. 410, 43 S. E. 884.

There is a distinction between *res judicata*, which is merely the law of that case, in the further progress of it, and the estoppel of a final judgment, especially when invoked by one who is neither party nor privy to the record. Suppose, for instance, Jones had obtained a judgment against the railway company and found that he could not collect it for any reason, and had brought suit against the servant of the company by whose negligence he was injured, I do not think that either would have been concluded by the decision of the Supreme Court in the first appeal in the case against the railway company, unless, of course, the servant had been so connected with that case by notice of the action and defending it as to be concluded by the judgment. To support the plea of *res judicata* the judgment must be final and on the merits. 24 A. & E. Ency. L. (2d Ed.) 792-794. I must not be understood as holding that the principle of law decided by the federal court in the case of Logan against Southern Railway Company is not sound. I was not requested to pass upon that principle or to change it. I was merely requested to hold and charge that Logan was bound in this case by all questions of law and fact decided in that case, as he would be upon a second trial of that case.

"The motion is overruled."

Cothran, Dean & Cothran, for appellant.
John Gary Evans and J. A. McCullough, for respondent

JONES, C. J. This action was instituted in Greenville county December 5, 1906, to recover of the lessor, Atlanta & Charlotte Air Line Railroad Company, damages for personal injuries sustained by plaintiff at Spartanburg, S. C., April 17, 1902, while acting as yardmaster of the lessee, Southern Railway Company, as the result of the alleged negligence of the employes of the Southern Railway Company. Plaintiff recovered judgment for \$3,488.

Both in request to charge and on motion for a new trial defendant-appellant raised the question that defendant company as lessor is not liable to a servant of the lessee for injuries received by him through the negligence of the lessee. In the case of *Reed v. Railway*, 75 S. C. 168, 55 S. E. 218, this court has expressly decided the question against appellant's contention, and we are satisfied with the decision. It appears that in July, 1903, plaintiff brought an action in Spartanburg county against the Southern Railway Company to recover damages for the same injury, which cause was removed to the federal Circuit Court and was there tried, resulting in a verdict for the plaintiff, from which an appeal was taken to the Circuit Court of Appeals, whereupon that court reversed the judgment and remanded the case for a new trial *de novo* in accordance with the opinion of the court. *Southern Ry. Co. v. Logan*, 138 Fed.

725, 71 C. C. A. 281. The defendant requested the court to instruct the jury that plaintiff is concluded and bound by all questions of fact and law decided by the Circuit Court of Appeals in the judgment referred to which would have bound him in a second trial in the United States court. The refusal of the court to give this instruction is vindicated by the opinion of Judge Hydrick, herewith reported, refusing the motion for a new trial based upon that ground. The parties are not the same, and the judgment of the federal court granting a new trial is not final. The defendant's plea that the pendency of the said action in the 'federal' court is a bar to the present action was properly overruled under the authority of *Mayfield v. Atlanta & Charlotte Air Line Ry. Co.*, 79 S. C. 558, 61 S. E. 106.

The exceptions that there was no testimony tending to show negligence of defendant, that the testimony shows conclusively that plaintiff assumed the risk of injury, and that the testimony shows conclusively that plaintiff was guilty of contributory negligence cannot be sustained; there being some testimony sufficient to carry the case to the jury upon these issues.

The judgment of the circuit court is affirmed.

(88 S. C. 90)

**GREENVILLE-CAROLINA POWER CO. v.
UNITED STATES FIDELITY &
GUARANTY CO. †**

(Supreme Court of South Carolina. May 8, 1909.)

**APPEAL AND ERROR (§ 1010*)—FINDINGS OF
FACT—REVIEW.**

The Supreme Court, in an action at law, has no jurisdiction to review the trial court's findings, if supported by any evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from Common Pleas Circuit Court of Greenville County; D. E. Hydrick, Judge.

Action by the Greenville-Carolina Power Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the decree referred to in the opinion:

"This is an action to recover \$25,000, the penalty of a bond given to Federal Construction Company and Saluda River Power Company by John F. Grandy & Son, as principals, and the defendant, as surety, for the faithful performance of a contract made by Grandy & Son with Federal Construction Company to furnish all the materials and do all the work necessary to build a dam and power house on Saluda river, near Greenville, S. C., according to plans and specifications prepared by Lockwood, Greene & Co., engineers. A jury trial was waived, and the case was

heard by the court. The plaintiff is the successor of Saluda River Power Company, and has, by assignment, all the rights of Federal Construction Company in the contract and bond.

"The plans and profiles of the dam, upon which the bidders based their estimates, showed the approximate line of the ledge of solid rock in the bed of the river and the adjacent banks upon which the dam was to be built. This line was ascertained by soundings made in the river with a steel rod and by test pits dug on the banks along the proposed line of the dam. The invitation for bids contained the following statement: 'It is very desirable that all bidders should visit the site of the dam, to observe the character of the country and the exceptional advantages afforded for cheap construction by natural conditions. It is believed abundance of stone for use in the concrete can be secured from the steep hillsides along the river, and that plenty of sand can be secured from bars where it has been deposited along the river near the site; but no guarantee is made on these points. * * * It has been the endeavor to have the plans and specifications indicate clearly and definitely the intent of the work, and your proposals are accepted based on these plans and specifications, any variations therefrom to be taken account of and allowed for by the resident engineer as the work proceeds, on a suitable basis of unit prices which you will name with your proposal.' The contract provides that the dam shall be built on the solid ledge under the river bed, and provision is made for variations from the plans and specifications 'in order to meet the natural and unforeseen conditions of the site and still secure the prescribed limits of safety.'

"Before making their bid Grandy & Son examined the site. They sounded in the river with a steel rod and in the test pits made by the engineers, and became satisfied that the approximate ledge line and the other physical conditions were represented in the plans and profiles with conservative accuracy. Their bid was \$98,460. The next lowest bid was \$115,000. The highest bid was \$185,000. Although their experience with that kind of work was limited, they were anxious to get the contract, and brought to bear all influences they could to get it. In the letter accepting their bid, which is dated June 3, 1905, they were informed that a surety bond for \$25,000 would be required. As they had put in their estimate the premium on a bond for only \$15,000, the company agreed to pay the additional premium for a \$25,000 bond. They began work about the 7th or 8th of June, and abandoned it about the middle of December. It was completed by another contractor. The total cost was \$213,499. If the Grandys had carried out the contract, they

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on rehearing, see 64 S. E. 964.

would have received about \$121,871. So the dam and power house cost \$91,628 more than the Grandys agreed to build it for. The great increase over the estimated cost is accounted for, in part, by unforeseen conditions, a great increase in the price of labor and materials, the change of contractors, which necessitated a change of the equipment, and perhaps, also, by the fact that the Grandys' bid was too low.

"After they had been at work some weeks, and before the formal contract was signed, they discovered that the stone which they had expected to use in the dam was unsuitable, and that they would have to excavate deeper than they expected to secure a solid foundation for the dam. On account of these developments, they became discouraged. They asked for and had a conference with the president of the company and the resident engineer at the site, where these unforeseen conditions and difficulties were discussed, especially the difficulty of getting suitable stone. They say that they decided to give up the contract unless they could get assurances from the company and engineers that they would receive such compensation, on account of the unforeseen difficulties, as would make them whole, and that such assurances were given them. This is denied by the president of the company and the resident engineer. However, they afterwards signed the contract, without having any provision inserted therein with regard to such compensation.

"These unforeseen conditions were not made known to the defendant by any of the parties interested. It does not appear whether the defendant was otherwise informed of them. None of the parties interested, except the Grandys, knew that the defendant had been applied to for the bond, until the bond, signed by the defendant, was tendered to the company. No inquiries were made of the company, the owners, or the engineers by the defendant. The Grandys and the local agent of the defendant urged the acceptance of the bond. The methods employed to ascertain the ledge line were such as are ordinarily employed by competent and skillful engineers, and they usually prove to be correct within reasonable limitations; but in this instance the variations on the banks of the river were very great. The contractors knew, however, what methods had been employed, and themselves employed the same methods in their own investigations, and were satisfied the results were truly represented in the drawings, as in fact they were.

"The defenses are: (1) A general denial. (2) Misrepresentation on the plans of the physical conditions, and fraudulent concealment of the facts in regard to them. (3) The failure to disclose the facts discovered after the contractors began work and the inducing them to sign the formal contract and procure the bond under agreement to make them whole and pay part of the premiums for the bond. (4) The loan of \$8,000 to Grandy

& Son by Colonial Securities Company, which is alleged to have been an advance payment on the contract. (5) Anticipated or advance payments in variation of the contract.

"The first and second defenses are disposed of by the statement of facts.

"The third defense depends upon the extent to which that good faith which must be exercised by the obligee in dealing with the surety requires the obligee to disclose to the surety facts known to him which might operate upon the mind of the surety in making the contract. On the one hand, it is certain that the obligee must not, directly or indirectly, misrepresent or conceal material facts which he ought to disclose, and he must answer truly all inquiries concerning them. On the other hand, it is equally certain that the relation does not require the voluntary disclosure in all cases of all matters known to the obligee which he may reasonably suppose would affect the mind of the surety. The surety cannot act supinely. He must exercise proper diligence to ascertain the liability which he incurs. The difficulty lies in determining just what facts the obligee must disclose, and under what circumstances the law makes it the duty of the obligee to disclose them.

"To render the allegation of concealment sufficient, it is necessary to show that the creditor either procured the surety's signature, or was present when the instrument was executed, and then misrepresentation of material facts which should have been disclosed. *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 99, 23 L. Ed. 699. 'The test,' says Chancellor Kent, 'is whether one of the parties knowingly suffered the other to deal under a delusion.' 2 Kent, Com. 643. For general statements by other authorities of the circumstances requiring disclosure, see *Franklin Bank v. Cooper*, 36 Me. 176, 196; *Jungk v. Holbrook*, 15 Utah, 198, 49 Pac. 305, 62 Am. St. Rep. 923; *Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 325, and notes; *Brandt on Suretyship*, §20. In *W. C. & A. R. R. Co. v. Ling*, 18 S. C. 120, our own Supreme Court says: 'There must be some positive act of concealment or misrepresentation on the part of the obligee, in cases like this before the court, as to some fact which it was his duty to discharge [disclose], before the sureties can be relieved. Silence merely, especially as to facts within the reach of proper inquiry by the sureties, will not be sufficient. The law stands between the parties perfectly impartial, ready to rebuke fraud, concealment, or misrepresentation on the part of either; but carelessness and want of proper vigilance are left to their own fruits. There must be an intent to deceive, not a mere passive omission to state everything within the knowledge of the creditor. The intent is the gist of the fraud, and this should be made to appear.'

"It was the duty of the contractors to in-

form their surety of the unforeseen conditions which had developed, and if they failed to do so the plaintiff is not responsible, unless the plaintiff knew that the contractors had not done so, and that the surety was relying upon the conditions as represented in the drawings. There is no testimony tending to show that the construction company, the plaintiff, or the engineers knew that the contractors had not fully informed the defendant of the then existing conditions, or that the defendant was ignorant of them. In fact, it is only an inference that the defendant acted upon the drawings, though I think the inference that it did reasonable. As no inquiries were made of any of the parties connected with the plaintiff, I think they had the right to assume that the Grandys had done their duty and informed the defendant of the conditions as they had then developed, and hence it was not incumbent upon them to volunteer any information in regard to them. Page v. Kreky, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731, and notes. The defendant must have known that the Grandys had been at work for some time before the bond was executed, because it refers to the contract as dated June 3d and the bond is dated July 21st. At least that was sufficient to excite inquiry which would probably have disclosed the then existing conditions.

"The contractors say they knew at the time of the conference it would be impossible for them to complete the work at the contract price, and that they would not have signed the formal contract and procured the bond, but for the assurances made them by the plaintiff and engineers that they would be made whole. The fact that they did sign the contract and did not have that agreement inserted into it militates very much against that position. If the parties made that agreement, it should, by all means, have been put into the written contract, which is conclusively presumed to embody all prior negotiations. I conclude, from the testimony, and from their signing the contract and procuring the bond, after the conference at the dam, that, while the unforeseen conditions had then developed sufficiently to greatly discourage them, they had not developed as fully as they did afterwards; for it is not reasonable to suppose that they would have gone forward in the face of difficulties which they then knew would result inevitably in their financial ruin. It is often difficult to remember past occurrences, except as colored by the light of subsequent events.

"The fourth defense charges that Colonial Securities Company and Federal Construction Company were substantially the same corporation, and that after the contract was made the Colonial Securities Company advanced the contractors \$8,000, which was an advance payment, in violation of the terms of the contract and to the prejudice of the

surety, whereby it is discharged. Colonial Securities Company is a corporation engaged in a general banking business and in financing development enterprises. It signed the contract as surety or guarantor of the Federal Construction Company. At the time of the contract it held all the stock of the Federal Construction Company. Some of its stockholders were also stockholders and officers in Federal Construction Company and Saluda River Power Company, and, of course, to that extent they were interested in the performance by the contractors of their contract. But the testimony shows no other connection between these companies or interests in the affairs of each other. It also shows that the transaction in question was a loan, and not an advance payment for or on account of Federal Construction Company or Saluda River Power Company.

"The fifth defense also charges generally that the contract was violated by the making of advance or anticipated payments. The payment relied upon is that for structural steel, which was at the railroad side track some two or three miles from the dam, where the material shipped in by the railroad was delivered to the contractors. The estimate of September 2d contained this item: 'Structural steel delivered on ground at oil switch, 118,100 lbs., at .03, \$3,543.' The amount of this estimate was certified to be due under the terms of the contract by the engineers, and paid by the company. Advance payments, or payments of amounts greater than is due under the terms of the contract, will ordinarily discharge the surety. Greenville v. Ormand, 51 S. C. 121, 23 S. E. 147.

"It is contended that the surety is a favorite of the law, and is entitled to stand upon the strict terms of his contract, and that any material variation or alteration thereof, without his consent, will operate to discharge him from liability. While that is true, the contract must receive a just and reasonable interpretation, with a view to ascertaining the intention of the parties, which, when discovered, must control; for the bond is, by its terms, subject to the contract, and the surety thereby becomes a party to the contract. The rule is applied with greater strictness in cases where there has been an alteration of a written agreement than in cases where there has been only a breach or a variation from the terms of the contract. In the latter, the inquiry is whether the surety's security has been lessened by what has been done by the creditor. Calvert v. Dock Company, 2 Keen, 644. Moreover, the rule of strictissimi juris does not apply to the case of a compensated surety. Walker v. Holtzclaw, 57 S. C. 466, 35 S. E. 754; Cowles v. U. S. Fid. & Guar. Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 840, and notes; Remington v. Fid. & Co., 27 Wash. 429, 67 Pac. 989.

"The compensated surety is regarded rather as an insurer, and his contract one of insurance. This class of sureties seek the business for the profit there is in it. The risk is carefully considered, usually by experts, and the compensation, which is proportioned to the risk, is usually, and especially in cases like this, included in the estimates of the bidders, and paid by the obligee. The only proper solution of the problem seems to be that adopted by so many courts of high authority, namely, to treat the compensated surety in all cases as an insurer, subject in all respects to the general principles of insurance law, modified to a limited extent by the quasi suretyship nature of the contract, arising from the dual relationship sustained by the insurer to the insured and the 'risk.'" Frost, Guar. Ins. § 4.

"In the light of the foregoing principles let us examine the provisions of this contract relative to the matter of payments. 'On the 1st day of each month during the progress of said work the company, through the engineers, shall estimate the value of the work completed and materials furnished and put in place during the previous month, and within five days thereafter eighty-five per cent. (85%) of the value thus determined * * * shall be paid to the contractor. * * * All payments shall be made only upon certificates of the engineers, and based upon their estimates of the amount of work done and materials furnished.' Taking the language of the first part of the section and the second part above quoted together, I think there can be no doubt that it expresses the intention that payment should be made for 'materials furnished.' This construction is strengthened by reading the whole contract, where reference is made to the matter of payments. In construing a contract, we must not be governed by fragmentary facts of it; but it must be considered as a whole, and every part must be given some meaning and effect, if practicable, and such meaning and effect as will make it a consistent whole. To say that payment for 'materials furnished' is not required would render those words, in the sentence last quoted, nugatory.

"But, if this were not so, the fact that it was estimated and certified by the engineers is, I think, conclusive of the question; for the contract provides that payments shall be made only upon the estimates and certificates of the engineers, and, further, that 'if any question or dispute shall arise during the progress of the work * * * as to the certifying or auditing of accounts, it is to be referred at once to the said engineers, whose decision thereof shall be binding and conclusive upon both parties.' Such a stipulation is valid, and the decision of the engineers, in the absence of fraud or collusion, or mistake so gross as to imply bad faith, or the failure to exercise an honest judgment,

binding upon the parties to the contract. *Sullivan v. Byrne*, 10 S. C. 122; *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106; *Boettler v. Tendick*, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270; *St. Paul & N. P. Ry. v. Bradbury*, 42 Minn. 222, 44 N. W. 2; *Elliott v. Missouri*, etc., R. R. Co., 74 Fed. 707, 21 C. C. A. 5; *Choctaw*, etc., Co. v. *Newton*, 140 Fed. 225, 71 C. C. A. 655. In the case of *Boettler v. Tendick*, supra, it was contended that the decision of the architects was not final and binding, unless made after a controversy had actually arisen; but it was held otherwise.

"Even if the engineers erred in construing the contract, which I do not think they did, the surety should not be released on that account. To so hold would be to discharge the surety in nearly every case of a building contract; for they are rarely completed without some variations or departures from the strict terms of the contract, and engineers and architects are not, as a rule, learned in the law of the construction of contracts. The case of *City of New Haven v. National Steam Economizer Co. (Conn.)* 65 Atl. 959, was similar to this case in several respects. In that case the Supreme Court of Connecticut say: 'It is unnecessary to inquire whether, under the terms of the instrument, when such certificates were given, the plaintiff, in the absence of collusion and unfair dealing, was or was not under a present legal duty, enforceable at law, to pay to the contractor the amounts so certified. He was at least entitled to make the payments, and was under no duty to review or revise the work which the parties had committed to the architects'—citing *McAvoy v. Long*, 13 Ill. 147; *Chapman v. Kansas City & R. R. Co.*, 114 Mo. 542, 549, 21 S. W. 858; *Chapman v. Eneberg*, 95 Mo. App. 127, 68 S. W. 974. See, also, *Hand Mfg. Co. v. Harks*, 36 Or. 235, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549; *Grafton v. Homkly*, 114 Tenn. 569, 86 S. W. 859. The estimate and certificate was made in good faith, and was paid in good faith, and the surety is not thereby discharged.

"It is therefore ordered and adjudged that the plaintiff, Greenville-Carolina Power Company, do recover of the defendant, the United States Fidelity & Guaranty Company, the sum of \$25,000 and the cost of the action."

Jos. A. McCullough, for appellant. Haynsworth, Patterson & Blythe, for respondent.

JONES, J. The plaintiff sued defendant upon a \$25,000 bond, guaranteeing the faithful performance of a contract by John F. Grandy & Son for the construction of a dam and power house for plaintiff on Saluda river, in Greenville county, S. C. The issues were by consent submitted to Judge Hydrick, without a jury, and judgment was rendered against defendant for \$25,000.

This being a case at law, it is conceded that the Supreme Court has no jurisdiction to review the findings of fact by the circuit court, where there is any testimony whatever in support of the same. After careful consideration we conclude that the findings of fact by Judge Hydrick, whose decree is herewith reported, have support in the testimony, and that upon the facts so found he properly adjudged the defendant was liable upon the bond.

The judgment of the circuit court is affirmed.

(82 S. C. 528)

BROWN v. SOUTHERN RY., CAROLINA DIVISION, et al.

(Supreme Court of South Carolina. May 8, 1909.)

1. MASTER AND SERVANT (§ 286*)—ACTIONS—JURY QUESTION—NEGLIGENCE.

Where, in an action for a conductor's death while engaged in coupling cars, there was testimony that the coupling appliances were defective, a nonsuit on the ground that there was no evidence to show negligence was properly denied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 289*)—ACTIONS—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for a conductor's death while attempting to couple cars, whether intestate was guilty of contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 243*)—INJURIES—CONTRIBUTORY NEGLIGENCE—EMERGENCIES—VIOLATION OF RULES.

Where the evidence tended to show that there was such an emergency as required the conductor to couple cars by going between them, that the company's rules forbid the coupling of cars in that manner would not preclude a recovery for such conductor's death while making the coupling.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 762; Dec. Dig. § 243.*]

4. APPEAL AND ERROR (§ 703*)—RECORD CONTENTS—REQUESTED INSTRUCTION.

Error in refusing a requested instruction cannot be considered on appeal, where the request is not contained in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2931; Dec. Dig. § 703.*]

Appeal from Common Pleas Circuit Court of York County, R. C. Watts, Judge.

Action by L. P. Brown, as administratrix of L. P. Brown, deceased, against the Southern Railway, Carolina Division, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Abney & Muller and J. E. McDonald, for appellants. Jos. A. McCullough, Thos. F. McDow, and J. Harry Foster, for respondent.

GARY, A. J. This is an action for damages. The allegations of the complaint, material to the questions presented by the exceptions, are as follows:

"That, heretofore, to wit, on the 9th day of March, 1907, while L. P. Brown was engaged, as conductor, in the discharge of his duties in the town of Lancaster, state of South Carolina, he met his death by reason of the joint and concurrent negligence, carelessness, recklessness, willfulness, and wantonness of the defendants, in the following particulars: At the said station it was the duty of plaintiff's intestate to pick up five freight cars, which were on the siding at the depot, and attach them to his train on the main line; that he cut his engine loose from the cars on the main line, and backed it upon the side track, and coupled to the cars next to his said engine, for the purpose of pushing the five cars, which he was to pick up, on the main line, and couple them to his train; and after pushing the said cars up the grade on the main line, and while the said L. P. Brown was upon said side track and in the discharge of his duties, he was killed, being caught between the cars, which he was to pick up as aforesaid, and the other cars which were coupled to the engine; the said cars, which he was to pick up, rolling down the said grade in the direction of the said L. P. Brown, who had his back to them, and the backing cars attached to the engine; which collision was due to the joint and concurrent carelessness, negligence, recklessness, willfulness, and wantonness of the defendants (a) in not furnishing plaintiff's intestate a safe place to do the work required of him, the said side track from the point of the switch on the main line in the direction of the depot being upon a dangerously steep grade; (b) in not furnishing plaintiff's intestate with a force of hands sufficiently adequate to handle the said train and cars with safety and to do the work required of him; (c) the brakes and appliances upon the five cars, which he was to pick up on the said siding, were insufficient and defective; (d) the brakemen furnished to handle the said cars were green, inefficient, and inexperienced; (e) in permitting the said five cars, which had been placed on the main line, to roll down the said grade, and not warning plaintiff's intestate of the danger; (f) in backing the train at the same time the other cars were rolling down the said grade, without signal to that effect by plaintiff's intestate, and without warning him of the danger; (g) in not furnishing him with appliances which would enable him to both couple and uncouple the cars, without necessitating his presence between them, the other couplers furnished being unsafe and defective in this particular; (h) this being the second trip of plaintiff's intestate over the said road, furnishing him with a green and inexperienced crew to assist in the management of the said train and the prosecution of his work."

The defendant Southern Railway Company

denied the allegations of the complaint, except the corporate existence of the defendants, and set up the defense of contributory negligence, on the part of the plaintiff's intestate, in endeavoring to cross the track of defendants' railroad while the engine and cars were in motion—the danger being obvious—and in violating the rules of the defendants by going between the cars while the same were in motion.

At the close of the plaintiff's testimony, the defendants made a motion for a nonsuit on the ground that there was no testimony tending to show negligence on the part of the defendants, and, further, that the testimony showed the injury was caused by the negligence of a fellow servant, inasmuch as plaintiff's intestate was injured while discharging the duties of a brakeman. This motion was refused. At the close of all the testimony, the defendants made a motion to direct a verdict on the grounds just mentioned, and upon the further ground of contributory negligence on the part of plaintiff's intestate, which motion was also refused. The jury rendered a verdict in favor of the plaintiff for \$8,000.

The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing the motion for a nonsuit, on the ground that there was no testimony tending to show negligence. It is only necessary to state that there was testimony to the effect that the appliances for coupling the cars were defective, to show that the exception presenting this question cannot be sustained.

We proceed to consider whether there was error in overruling the motion for nonsuit, on the ground that the injury was caused by the negligence of a fellow servant. George W. Harris, a witness for the plaintiff, testified as follows: "Q. Did you, or did you not, hear Mr. Gillespie tell him (plaintiff's intestate) to slack back, couple up, and 'Let's get through'? A. Yes, sir; he told him to hurry up and 'Let's get through'; he wanted to clear the freight train for the passenger train. Q. The passenger was to come soon? A. Yes, sir. Q. Who was Mr. Gillespie? A. He was a train dispatcher, I think—trainmaster." There was also testimony tending to show that the crew was insufficient in number; that the brakes were defective, and that it was necessary to go between the cars to effect the coupling; that previous to going between the cars the deceased made several unsuccessful efforts to couple them by means of an iron lever fastened on the side of the car. This case falls within the principle announced in the case of *Hall v. Ry.*, 81 S. C. 522, 62 S. E. 848, the syllabus of which is as follows: "Nonsuit moved on grounds of assumption of risk and contributory negligence properly refused, as the court could not conclusively decide from the evidence that

plaintiff, a freight train conductor, assumed the risk, or was guilty of contributory negligence, in coupling the cars by going between them when he could make the coupling in no other way, on account of a defective coupling appliance, in such an emergency as would justify a reasonably prudent man in going between the cars, nor could the court conclusively infer from the circumstances that it was contributory negligence for him to go a few inches too far after getting between the cars in making the coupling." See, also, *Carson v. Ry.*, 68 S. C. 55, 46 S. E. 525. This ruling also disposes of the question of contributory negligence.

The next question that will be considered is whether the plaintiff was precluded from recovering damages by reason of the fact that her intestate violated the rules of the defendants forbidding employes to go between the cars for the purpose of coupling, or to attempt to couple while the train was in motion. The testimony tended to show that there was such an emergency as required the conductor to couple the cars in the manner hereinbefore set forth. The case, therefore, comes within the rule stated in *Hall v. Ry.*, 81 S. C. 522, 62 S. E. 848.

The third exception, relating to punitive damages, cannot be considered, for the reason that the request therein mentioned is not set out in the record.

The foregoing conclusions practically dispose of all questions raised by the exceptions.

The judgment of the circuit court is affirmed.

(60 W. Va. 648) (65 W. Va. 401)
COOPER v. UPTON.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906. On Rehearing, March
30, 1909. Further Rehearing De-
nied May 12, 1909.)

1. BROKERS (§ 49*)—RIGHT TO COMMISSIONS—CONTRACT.

Where a contract between the owner of land and a real estate agent provides, in substance, that, if a party or parties presented by the agent want to buy the land at a price satisfactory to the owner, the agent shall be paid 5 per centum commission, the agent must substantially comply with the contract by presenting or producing a party or parties able, willing, and ready to buy the land at a price satisfactory to the owner, before the agent will be entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

2. BROKERS (§ 56*)—COMMISSIONS—NEGOTIATIONS DIRECT WITH PRINCIPAL.

If the negotiation resulting in a sale of the land was not carried on by the agent but by the owner, the agent must show that he was the efficient cause of the negotiation resulting in the sale, before he will be entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

3. BROKERS (§ 86*)—COMMISSIONS—EVIDENCE.

When the owner voluntarily consummates a sale and conveys the land, this is conclusive evidence that the price is satisfactory, and that the purchaser is willing and ready to buy.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 86.*]

4. EVIDENCE (§ 77*)—PRESUMPTIONS—FAILURE TO CALL WITNESSES.

There is no presumption against a defendant for failure to call witnesses, or any particular witness, when the plaintiff, carrying the burden of proof, has not made a prima facie case.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 97; Dec. Dig. § 77.*]

5. EVIDENCE (§ 86*)—PRESUMPTIONS—FAILURE TO CALL WITNESS.

Such presumption cannot be used to relieve the plaintiff from the burden of proving his case.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 86.*]

6. ACCOUNT STATED (§ 3*)—PREVIOUS INDEBTEDNESS.

There can be no account stated where there is no pre-existing debt or liability.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. § 13; Dec. Dig. § 3.*]

7. ACCOUNT STATED (§ 7*)—EFFECT.

An account stated, in the absence of fraud, mistake, error, or omission, determines only the amount of the debt when a liability exists. Alone, it cannot create a liability where none previously existed.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 41-49; Dec. Dig. § 7.*]

8. ACCOUNT STATED (§ 6*)—IMPLIED ASSENT OF PARTY TO BE CHARGED.

Where there is no pre-existing debt or liability, the rendering of an account, to one who keeps it without objection, does not make an account stated.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 30-40; Dec. Dig. § 6.*]

On Rehearing.**9. RIGHTS OF BROKERS.**

The syllabus in this case, reported in 60 W. Va. 648, reconsidered and approved.

Miller, P., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court of Upshur County.

Bill by John T. Cooper against E. M. Upton. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed.

Dent & Dent and Jake Fisher, for appellant. Linn, Byrne & Cato, for appellee.

COX, J. This suit in equity, with attachment, was brought by John T. Cooper, of Parkersburg, W. Va., against E. M. Upton, of Rochester, N. Y., in the circuit court of Webster county, to recover 5 per cent. commissions claimed by Cooper upon the sale price of a certain tract of land known as the "Porter" or "Upton" lands, said to contain 10,012 acres, lying in Webster, Randolph, and Pocahontas counties. The cause was removed to, and heard by, the circuit court of Upshur county, resulting in a decree in favor

of Cooper for \$7,718.25, and costs, with an order of sale of certain real estate levied on to satisfy the decree in favor of Cooper. From this decree, Upton appeals.

The record presents three questions, which will be considered in the following order:

(1) What was the contract, if any, between appellant and appellee in relation to commissions? The contract is disclosed by two letters between the parties—one by appellee to appellant dated November 22, 1900, and a reply thereto by appellant dated November 26, 1900. In the letter of appellee, after naming certain prospective purchasers of the land, he says: "These parties are presented, as are all others, on condition that you secure me in an absolute commission of (5 per cent.) five per cent. in case of sale to or through any of the parties." In the reply of appellant he says: "I have yours of the 22d, and note what you say about the syndicate of eastern and English parties. I will not write these parties at all, but if they want the property at a satisfactory price, we will pay 5 per cent. commissions, although this is an exorbitant price." There was other correspondence between the parties, and their evidence was taken at length, but there is nothing substantially changing the contract as shown by these two letters. The contract in substance was that, if a party or parties presented by appellee wanted to buy the land at a price satisfactory to the owner, the appellee should be paid 5 per centum commissions. Under this contract, before the appellee would be entitled to commission he must substantially perform the contract by presenting or producing a purchaser able, willing, and ready to buy the land at a price satisfactory to the owner. *Nichols v. Whitacre* (Mo. App.) 87 S. W. 594; *Forrester v. Price*, 6 Misc. Rep. 308, 26 N. Y. Supp. 799; 23 Am. & Eng. Enc. Law, 915, 916; 19 Cyc. 240-242; *Greene v. Owings*, 41 S. W. 264, 19 Ky. Law Rep. 580; *Weibler v. Cook* (Sup.) 78 N. Y. Supp. 1029; 5 Current Law, 449-451. If the final negotiation resulting in a sale was carried on by the owner and not by the agent, the latter must have been the efficient cause of the negotiation by the purchaser in order to entitle him to commissions. *Halterman v. Leining* (Sup.) 90 N. Y. Supp. 397.

(2) Did the appellee substantially comply with the contract and thereby become entitled to commissions? At the time of the contract, the records of the counties in which the land was situated showed that appellant was the owner of the land in his own name, and was taxed therewith, but in fact he seems to have held it for the Elk Land & Lumber Company, in which he and others were interested. The sale of the land, at the price upon which appellee claims commissions, was made on the 8th day of April, 1902, through J. K. Moore, of Washington

City, to Arthur Lee, trustee for Henry G. Davis. An agreement or memorandum was on that day entered into by Moore, as agent for the appellant and the other owners of the land, with Lee, trustee, for the sale of the land, at \$13 per acre, and \$5,000 was then paid by check of Henry G. Davis. On the 16th of May, 1902, those interested in the land or in the Elk Land & Lumber Company, including appellant, entered into a written agreement reciting the facts in relation to the sale, and ratifying and confirming the sale. This sale was carried out in part by deed made the 9th of July, 1903, by appellant and wife, and Lee, trustee, and wife, to Henry G. Davis, whereby the facts in relation to the sale were recited, and 7,528 acres of the land (being the part lying in Randolph and Pocahontas counties) were conveyed to Davis. The deed further provided that the title to the residue of the land (being the part lying in Webster county) should remain in appellant, subject to the contract of sale to Arthur Lee, trustee. It is argued that the said agreement of sale is void, and that its date cannot be taken as the date of the sale, because it was made without authority of the owner or owners of the land. The answer to this is that Moore professed to act for the owner or owners, and that the sale was afterwards ratified and confirmed by the owner or owners, and that conveyance of part of the land was made pursuant to the agreement of sale. Consequently, the 8th of April, 1902, must be taken as the date of the actual sale or contract of sale. *Ruffner v. Hewitt*, 7 W. Va. 585; *Union Bank v. Belrne*, 1 Grat. (Va.) 227; *Devendorf v. Oil Co.*, 17 W. Va. 135. The question then is, did the appellee present or produce the purchaser at this sale? The fact that a sale was consummated, and a deed for the land made voluntarily, must be taken as conclusive evidence that the price was satisfactory, and that the purchaser was willing and ready to purchase. 5 Current Law, 450; *Marcey v. Whallon*, 115 Ill. App. 435; *Marks v. Elliot* (Sup.) 90 N. Y. Supp. 331; *Norman v. Hopper* (Wash.) 80 Pac. 551.

The theory of the appellee is that he was the efficient cause of the negotiation and purchase by Davis. He does not claim that he had any correspondence, negotiation, or connection previous to the sale with Davis or Lee directly. He does, however, claim that Henry G. Davis and S. B. Elkins were general business partners, and were partners, or jointly interested, in this purchase at the time it was made, and that his efforts and correspondence with Elkins and with others caused the negotiation and purchase by Davis, and that the purchase by Davis was in fact for Davis and Elkins. That Elkins was interested in the land at a date subsequent to the sale cannot be disputed, but was he interested at the time of the purchase by Davis? This constitutes one of the principal controversies in the case, bearing upon which much of the evidence was introduced. It is

not our purpose to detail at length the evidence, but we shall notice some of the salient circumstances and features of the evidence relied upon by the appellee to show that Elkins was interested at the time of the sale, and that the correspondence and efforts of appellee with Elkins caused the negotiation and purchase by Davis.

(a) Appellee insists that, by failing to deny, the appellant has admitted to be true the allegations of the bill that "at and for a long time prior to the date of the execution of said contract (of sale) Henry G. Davis and S. B. Elkins were, and had been, partners in the purchase, development, and sale of large boundaries of coal and timber lands in that section of the state in which the 10,012 acres is situated," and "that it was their custom, where land purchases were made, to take the title thereto in the name of one or the other of said partners for the benefit of both." Turning to the answer, we find that it denies that Davis and Elkins "were jointly beneficiaries," and denies "that the said Davis and Elkins were business partners," and denies "the allegation in said amended bill that it was and is the custom of said Davis to take property in the name of said Elkins or of a trustee for himself and said Elkins for his benefit in any manner." These constitute a substantial denial of the partnership relations between Davis and Elkins alleged in the bill, and throw the burden of proof thereof upon appellee.

(b) It is shown that Henry G. Davis is the father-in-law of S. B. Elkins and Arthur Lee. Of course, standing alone, this is no proof of partnership or of joint interest.

(c) It is shown that both Davis and Elkins were interested in the purchase or ownership of other lands and business enterprises, and that each was interested in, and the owner individually and separately of, other lands. In no case is it shown that Davis and Elkins were partners. No agreement to share profits and losses is shown. The most that can be said of the evidence in this regard is that it shows that in some cases Davis and Elkins were interested in the same properties and business enterprises. Usually, others also were interested with them. In some cases, each was interested alone. This evidence is insufficient to establish that they were interested together in the purchase in question.

(d) With the evidence of appellee, he files his correspondence with Elkins, covering a period from October 30, 1901, to May 12, 1902, inclusive. This correspondence shows that appellee endeavored to interest Elkins in the purchase of this land and other lands, and that Elkins did become interested to the extent of writing a letter to appellee dated January 30, 1902, asking a price on this land or an interest in it, and also asking how long after April 1st appellee could give an option. On May 12, 1902, after inquiry by appellee as to a resale of the land, Elkins wrote to

appellee: "We will not sell the Upton tract as we bought it to hold." This letter was a month and four days after the sale in question. It is argued that this letter shows that Elkins was interested in this land. If so, it does not show when and how he became interested, or that he was interested at the time of the purchase by Davis.

(e) The plaintiff testifies that on the 19th of April, 1902, in Washington City, he learned from Arthur Lee that he represented Davis and Elkins in the purchase of West Virginia lands, and that they had just bought the Upton lands; that Davis came into the room at the time, and stated: "We have just bought the Upton lands"—and that later in the same day at the residence of Elkins he stated that "he and Senator Davis had bought the Upton lands." These statements fall short of showing with certainty that Elkins was interested at the time the sale in question was made. They would be equally true if Elkins was not interested at the time of the purchase by Davis, but became interested afterward and before the statements were made. No objection to the Elkins letter and to these statements of Davis, Elkins and Lee was brought to the attention of and passed on by, the lower court. Hence they are before us without objection. We do not deem it necessary to decide that, so far as they are purely hearsay evidence, they have or have not any probative force, for the reason that, if given full credit, they fall, in our judgment, to establish with certainty the fact sought to be established.

(f) It is shown that appellant had learned from a third party, before the time of the transactions here involved, that Davis and Elkins were trying to buy land in that section of the state. On April 3, 1902, appellee wrote to appellant saying: "I would advise you to keep matters warm with Senator Elkins, as I believe that he and his associates are in a position to afford to pay a much higher price than any one else." No one is named in this letter except Elkins. Who else was intended by the writer by the phrase "he and his associates"? Certainly only some person or persons who would be interested with Elkins in the purchase of the land. Before the phrase can be taken as a presentation of Davis, it must be shown that he was interested with Elkins in the purchase of this land. It is unreasonable to say that the writer of this letter intended by that phrase to present a person not interested with, but who acted independently of, Elkins, and with whom the writer had no correspondence, negotiation, or connection.

(g) It is shown that appellee made a general effort, by correspondence and otherwise, to make a market for this and other lands. He claims that such general effort caused the negotiation and purchase by Davis. The connection between the general effort and this particular negotiation and sale is not

shown. The conclusion is not warranted that any general effort of the appellee caused the negotiation and purchase by Davis. *Halterman v. Leining*, supra.

Considering all the circumstances and evidence relied upon by appellee, they fail to show that Elkins was interested at the time of the sale in question, or that appellee's efforts with Elkins or others caused the sale to Davis. Many of the circumstances are consistent with the hypothesis that Elkins was interested at the time of the sale, but they are not of that conclusive and convincing nature necessary to prove with certainty a fact. Generally they are consistent with the hypothesis that Elkins first acquired an interest after the sale in question.

It is insisted that there is a presumption against the appellant, who was the defendant below, because of his failure to call J. K. Moore as a witness. If we are correct in our view that the plaintiff did not make a prima facie case, then no presumption can arise against the defendant for failing to call Moore or any other person to testify. No duty or natural motive can be attributed to a defendant to call witnesses until there is a prima facie case against him. The basis of a presumption against a party for failure to produce evidence peculiarly within his power is the natural motive which he is supposed to possess to produce evidence in his favor. Hence the law raises the presumption that, if he does not follow such natural motive, it is because the evidence would, if produced, be against him. The force of the presumption depends upon, and corresponds in degree to, the force of the motive. If there can be no natural motive to produce, there can be no presumption against the party for failure to produce. Such presumption cannot take the place of proof on the part of the other party carrying the burden of proof. *Stout v. Sands*, 56 W. Va. 683, 49 S. E. 428; *Whart. Ev.* § 1267; 16 Cyc. 1064; *Diel v. Mo. Pac. Ry.*, 37 Mo. App. 454. See, also, *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025; *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222; *Vandervort v. Fouse*, 52 W. Va. 214, 43 S. E. 112; *Wells-Stone Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006; *Heffebower v. Detrich*, 27 W. Va. 18; *Dewing v. Hutton*, 43 W. Va. 576, 37 S. E. 670; *Wheeling v. Hauley*, 18 W. Va. 472; *Robinson v. Woodford*, 37 W. Va. 377, 16 S. E. 602. Other reasons, which many authorities hold sufficient to prevent the raising of a presumption, exist in this case. So far as the evidence discloses, the witness Moore was at Washington City and out of the jurisdiction of the court. Also his evidence, if favorable to appellant, could not have been superior to the evidence of Davis and Lee taken for him, but simply corroborative as to the main questions in issue. It is obvious that the presumption cannot be raised against appellant for failing to

call Moore as a witness. 1 Wig. Ev. 285-288. In this case the appellant did not rest upon the failure of the appellee to make a prima facie case. If it might be said that appellee did make a prima facie case, then we have the evidence of Henry G. Davis and Arthur Lee, taken for appellant, positively to the effect that Elkins was not interested in the sale in question at the time it took place, but that Elkins became interested subsequently, and that appellee was not instrumental in causing the negotiation resulting in the sale to Davis. Davis and Lee say that Lee, trustee, acted in the original purchase for Davis alone, and that the purchase was for Davis alone. Unquestionably this evidence overcomes any tendency which might be attributed to the evidence and circumstances in the opposite direction. This court will reverse a decree of the circuit court, determining a question of fact on conflicting evidence, where it clearly appears that the decree is against the weight and preponderance of the evidence. *Wallace v. Douglass*, 58 W. Va. 102, 51 S. E. 869. It is clear to us that it does not appear that appellee substantially complied with his contract and thereby became entitled to commissions.

(3) Is the appellee entitled to recover upon an account stated? By consent, appellee amended his bill so as to set up an account stated, based upon a letter written by him to appellant dated April 19, 1902. The letter is as follows: "Mr. E. M. Upton, Rochester, N. Y.—Dear Sir: I learned to-day that Senator Elkins and associates have taken over the ten thousand and twelve acres. Thus you will see that (notwithstanding the statement made in one of your recent letters that you did not think the Senator meant business) I have succeeded in interesting him to the point of buying. You will remember that, according to our agreement, my commission of five per cent. was to become payable upon execution of the contract of sale. This, on a basis of fifteen dollars per acre, the price named by you verbally in Rochester last September, would amount to \$7,500. Please bear this fact in mind, for I will hold you to your agreement strictly. Yours truly, John T. Cooper." This letter was not replied to by appellant, but he retained the letter without objection to its contents. If we are correct in holding that the appellee did not show himself entitled to commissions under the contract, then the question of account stated is solved. To make an account stated so as to evidence indebtedness, there must be two parties, a debtor and a creditor. 1 Cyc. 365. There must be a pre-existing indebtedness, or there is no account to state. *Hopkins v. Logan*, 5 M. & W. 241; *Lubbock v. Tribe*, 3 M. & W. 606; *Tucker v. Barrow*, 7 B. & A. 624; *Lemere v. Elliott*, 5 H. & N. 656; 2 Chitty on Cont. 961, 962; 2 Chitty, Pl. (16th Ed.) 32; *Mellon v. Campbell*, 11 Pa. 415; *Zacarino v. Pallotti*, 49 Conn. 38; *Van*

Bebber v. Plunkett (Or.) 88 Pac. 707; 1 Am. & Eng. Enc. Law, 440; *Stenton v. Jerome*, 54 N. Y. 480; *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780; *Knight v. Taylor* (N. C.) 42 S. E. 537; 1 Am. & Eng. Enc. Pl. & Pr. 87; *Powers v. Ins. Co.* (Vt.) 35 Atl. 331. "Now to make an account stated the account must be stated with reference to a debt at the time due and owing." Baron Parke, in *Gough v. Findon*, 7 Exc. 48-50. An account stated, in the absence of fraud, mistake, error, or omission, determines only the amount of the debt where a liability exists. It cannot be made the instrument to create per se a liability where none previously existed. 1 Am. & Eng. Enc. Law, 440; *Davis v. Bank*, 19 Wash. 65, 52 Pac. 526. Where there is no pre-existing debt or liability, the rendering of an account, to one who keeps it without objection, does not make an account stated. 1 Cyc. 380; *Davis v. Bank*, supra. These principles apply where it is sought to establish an indebtedness by means of an account stated. It may be said that some cases indicate that, without fraud, mistake, error, or omission, the correctness of the items of the original debt must be taken as shown by the stated account. But this statement must not be taken to mean that the previous transactions cannot be investigated so far as to ascertain whether or not the relationship of debtor and creditor existed previous to the account stated. An examination of our cases will show that they are consistent with the principles above stated. Where the doctrine of account stated or account settled has been applied, it has been in those cases in which there was a previous indebtedness or liability. See *Townes v. Birchett*, 12 Leigh (Va.) 173; *Lyne v. Gilliat*, 3 Call (Va.) 5; *Mertens v. Nottebohm*, 4 Grat. (Va.) 163; *McNeel v. Baker*, 6 W. Va. 153; *Ruffner v. Hewitt*, 7 W. Va. 585; *Robertson v. Wright*, 17 Grat. (Va.) 534; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692; *McCarty v. Chalfant*, 14 W. Va. 531; *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142; *Chapman v. Salt Co.*, 57 W. Va. 395, 50 S. E. 601; and other cases.

For the reasons stated, the decree complained of is reversed, and the bill dismissed.

On Rehearing.

WILLIAMS, J. This case is reported in 60 W. Va. 648 (see page 523, ante), and will be found therein stated. Counsel for appellee, in their supplemental petition for rehearing, assign eight reasons why a rehearing should be had, and the former decree of this court reversed, and the decree of the lower court affirmed. These will be noted in their order.

First. This assignment refers only to the oral argument made in this court by counsel for appellant, which counsel for appellee says was done in violation of an understanding between them that the case was to be sub-

mitted on briefs alone. It does not go to the merits of the controversy.

Second. It is insisted that this court should not have held that the sale of the land was made by Moore to Lee, trustee for Davis, on the 8th day of April, 1902. If the sale was not made on this day, there is no evidence that it was made on any other particular day. A certified copy of the contract entered into by J. K. Moore, as agent for E. M. Upton, and Arthur Lee, trustee, bears date on April 8, 1902. It is signed by J. K. Moore, agent, and is acknowledged by him before, a notary public in the city of Washington on the 24th day of April, 1902, and was recorded in Webster county on May 8, 1902. The copy in the record is an attested copy by the clerk of the county court. It is presumed to have been executed on the day of its date, and the record furnishes no evidence to overcome this presumption. The day of its date, rather than the day of its acknowledgment, will be taken as the actual date of execution. *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591. According to appellee's contention it must have been executed before the 19th, because on that day he says he learned of the sale; and, if executed on any day before the acknowledgment, why not on the 8th. There is no evidence of any other date. Moore embodies the following language in the contract of sale: "My authority for signing this agreement of sale is letters and a telegram from E. M. Upton, dated Rochester, N. Y., April 7, 1902, addressed to me, and which reads as follows: 'Close deal at thirteen dollars net to us, if five thousand dollars is deposited in some bank as trustee.'"

It is insisted that the agreement of May 16, 1902, does not refer to the sale on the 8th of April. But we can hardly see how this omission to mention the date of the sale would be evidence of the date. It neither proves, nor disproves, that the sale was on April 8th. It does not bear on the point. The agreement of May 16, 1902, was entered into between E. M. Upton, who held the legal title to the lands, and five others, who were interested as owners with him, for the purpose of ratifying the sale which had been made by Upton to Lee, as trustee of Henry G. Davis. It recites that the sale had been made "with the concurrence and assent of all of the owners of the land, with the exception of John T. McGraw," and seems to have been made for the purpose of showing his assent to the sale which he had theretofore objected to; he being one of the owners. It does not refer to the sale to Lee by any date. This agreement simply ratifies a sale made by Upton to Lee, trustee, and there is no contention that Upton made more than one sale to him. The plaintiff says that he was in Washington, D. C., on the 19th of April, 1902, and learned from Arthur Lee that he represented Senator Davis and S. B. Elkins in the purchase of West Virginia lands, and that they had just bought the

"Upton lands." He also says: "A little later Henry G. Davis came into the room and stated: 'We have just bought the Upton lands.'" He further states that later on the same day he was at the residence of Senator Elkins, and that "he stated to me in so many words that he and Senator Davis had bought the Upton lands." Suppose this testimony were admissible, it certainly would not disprove the fact that the sale was made on April 8, 1902.

Third. It is claimed by counsel for appellee that the record makes out a partnership, or joint interest, between Davis and Elkins at the time of the purchase. This fact he says is not sufficiently denied in the answer, and is therefore virtually admitted. But we find the answer to contain the following denial: "But he denies that Stephen B. Elkins and Henry G. Davis were jointly beneficiaries, or that said Elkins was in any manner interested with the said Davis, or that any other person participated with him as a sole cestui que trust, or that said Davis and Elkins were business partners." And in another part of his answer he avers that Davis bought the land for himself, and that "prior to the purchase there was no understanding or agreement between the said Davis and Elkins respecting said lands." A denial of the allegation that Elkins was interested with Davis in the purchase could scarcely be framed in more explicit and unequivocal terms.

Upton states in his deposition that the land was sold through Moore, who was acting for him and his associates. Senator Davis, in his deposition, says that Lee negotiated the purchase for him, and that he bought the lands for him (Davis); that during the negotiation no one was interested with him. He further says that, while he had never been on the lands, he had known of them for some 15 years prior to that time, and that at the time of the purchase Senator Elkins had nothing to do with the sale or the purchase, but that he afterwards became interested in it. Mr. Lee testifies that his attention was called to these lands by a letter from Mr. Moore, received early in the year 1902, and that he then opened negotiations with Mr. Moore, which resulted in the purchase of the tract by Senator Davis at \$13 an acre; that, if Senator Elkins had any interest in it, he did not know of it. Mr. John T. McGraw testifies that "Senator Davis knew these lands well," and had talked to him several times about them. The evidence proves that Davis and Elkins were jointly interested in large bodies of lands in West Virginia, and in large business enterprises, and from this we are asked to infer that they were jointly interested in the purchase of the Upton land. But the record shows that each of them is either the sole owner of, or is interested in, large bodies of land and enterprises in West Virginia, in which the other has no interest whatever. The declara-

tions of Lee, Davis, and Elkins, made to plaintiff on the 19th day of April, 1902, even if admissible testimony, are not necessarily inconsistent with the fact that Davis bought the lands on his own account. The evidence does not show when Senator Elkins acquired an interest; but the positive statement of Senator Davis proves that it was after he had bought of Upton.

Before plaintiff can recover he must prove that his correspondence and conversations with Senator Elkins were instrumental in bringing about the sale. The burden is on him to prove all facts material to his case. This important fact cannot be established by vague and uncertain inferences. Any inference that Elkins was jointly interested in the purchase, which might arise from the fact that he is shown to have, subsequently, an interest in the land, and from the further fact that Elkins and Davis were jointly interested in other large bodies of land, is certainly rebutted and overcome by the direct, positive, and unequivocal testimony of Senator Davis to the contrary. Furthermore, Senator Elkins, if plaintiff's contention be true, was a very material witness in his behalf. Why did he not take his testimony? It would have relieved the case from all doubt as to whether or not the purchase from Upton was brought about as a result of the correspondence and conversations between plaintiff and Senator Elkins. But he has given no excuse for not having taken his testimony. The presumption of law, therefore, is that, if he had testified, his testimony would have been against, rather than in favor of, plaintiff. *Vandervort v. Fouse*, 52 W. Va. 214, 43 S. E. 112; *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670; *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025; *Wells-Stone Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006; and *Despard v. Percy* (decided at the present term) 63 S. E. 871.

Fourth. This assignment applies to the amount of plaintiff's commissions, and is not important, since his case fails for want of proof that he found a purchaser. However, we do not doubt but that the numerous letters which passed between plaintiff and defendant relating to the sale of the land established a contract between them as to the compensation in the event plaintiff had found a purchaser. But, in addition to proving the contract, it was necessary to prove services rendered under it, and herein we think lies the weakness of plaintiff's case.

Fifth. Plaintiff insists that Upton had constructive notice that Davis and Elkins were jointly interested in the purchase, and that a prima facie case for plaintiff was thus made, casting the burden of proof on defendant. The evidence shows that Upton had authorized Moore to sell the land at the price of \$13 an acre net to him and his associates, and that he did not know to whom Moore

had sold it until after the sale was made; nor do we see any reason why Upton would have been specially interested in knowing this, as long as he was satisfied the purchase price was properly secured and he would get his money.

Plaintiff did not have exclusive right to sell this land. He had no option on it, because Upton had refused to give him an option. The only contract between plaintiff and defendant was the one to be gathered from the numerous letters, and which is to the effect that, if plaintiff would find a purchaser who would buy the land at a price satisfactory to the owners, he would be paid a commission for doing so. Upton still had the right to employ other brokers at the same time to find a purchaser for the same land, and the law would hold him liable to pay only the one who first found him a purchaser able and willing to buy at a price satisfactory to him. In 19 Cyc. 260, the law is thus stated: "Where several brokers are employed to negotiate the same transaction, the one who first succeeds is entitled to the full commission. Where property is placed with several brokers for sale, the owner is bound to pay the broker who in fact effects the sale; and the commission belongs to the one who first procures a contract of sale, although the other first procures a conveyance. If several brokers are employed to effect the same transaction in behalf of their principal, the one who is the procuring cause of the transaction is entitled to the commission."

Upton appears to have employed two brokers to find a purchaser—the plaintiff, who lived in Parkersburg, and one J. K. Moore, who lived in Washington, D. C. But it does not appear that either knew of the other's employment. Lee says he was acting for Davis in the purchase, and that his attention was first called to the lands by a letter from said Moore early in 1902; that he replied to the letter, asking for description, which was furnished to him, and he thereupon called it to the attention of Senator Davis; and that negotiations finally resulted in a purchase of the lands by Davis at the price of \$13 an acre. Now, upon this state of facts, how can it be said that the plaintiff was the moving cause of the sale, or that the correspondence which he had had previous to that time with Senator Elkins had any influence whatever in bringing about the sale. It cannot be said, except upon pure inference drawn from the relationship and business connection existing between Davis and Elkins; and, as before stated, this inference is overcome by direct and positive testimony.

In fact, the correspondence introduced by plaintiff does not show that Senator Elkins was ready to buy, or that he even wanted to buy, the land as late as March 27, 1902, because plaintiff on that date wrote to Upton, stating that Senator Elkins wanted, by the 1st of April, to know the price, and wanted sufficient time to make examination

of the land and the title. On the next day Upton replied to plaintiff that he had not taken the matter up with Elkins, that he would not be able to do so for some days, stating that there were other parties who wanted to buy the property, and that it was hard to deal with three or four at the same time. In answer to this letter plaintiff again wrote Upton on April 3d, advising him "to keep matters warm with Senator Elkins." He also says in this letter that Senator Elkins preferred to get a price of the land through him (plaintiff). On the 5th of April Upton answered this letter, and, among other things, said: "I am negotiating with other parties just at present, and am not at liberty to do anything with you. Perhaps I will be able to take the matter up with you in about ten days' time." On the 15th of April, in answer to a letter of the 12th, he again wrote the plaintiff, advising him that he thought some disposition had been made of the land.

Does this evidence not show that defendant was dealing altogether with Moore in making the sale, and not with plaintiff? He advised him several days before the sale that he was dealing with other parties, and also advised him that he could not take the matter up with him on that account until he was through negotiating with the other parties. It was not incumbent on him to advise him who the other parties were. He may not have known himself, as the negotiations seem to have been carried on through his broker, Moore. But it is argued that Moore was only the agent of Davis, and not the agent of Upton. There is no proof of this, except the fact that Lee says Davis paid Moore his commission; but if Moore was acting as a broker, simply bringing the parties together, and was not vested with any discretion as to the price and terms of the sale to be made to purchaser, the fact that he received his commission from Davis would be perfectly consistent with his relation to Upton. He was authorized by Upton to close the deal at the price of \$13 an acre, net to him and his associates, and if he got this price it was immaterial to Upton how much Moore made out of the transaction, or from whom he collected his pay. 19 Cyc. 234; 1 A. & E. E. L. 1074; Clark & Skyles on Agency, 823, 1689; Reynolds v. Tompkins, 23 W. Va. 229; Nolte v. Hulbert, 37 Ohio St. 445; Clark v. Allen, 125 Cal. 276, 57 Pac. 985; Rupp v. Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416; Knauss v. Brewing Co., 142 N. Y. 70, 36 N. E. 867; Montross v. Eddy, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 823; Cox v. Haun, 127 Ind. 325, 26 N. E. 822; Orton v. Scofield, 61 Wis. 382, 21 N. W. 261; Mullen v. Keetzle & Lampton, 7 Bush (Ky.) 253.

Sixth. It is claimed that Upton practiced a fraud upon Cooper by "so juggling existing conditions as to rob Cooper of the portion

justly due him," after Upton had seen that Cooper's work was about to result in a sale. This point, we think, is fully answered by the opinion on the other points, because, if plaintiff has failed to make out a case entitling him to recovery in any event, there can be no fraud. There can be no fraud where there are no rights violated. If he is not entitled to recover upon his contract and services rendered, the question of fraud has no bearing on the case; and the same reasons which show that he is not entitled to recovery also show the absence of fraud.

It is insisted that plaintiff has made out a prima facie case by proving his contract with Upton, and by proving that he found for him a purchaser who was able, willing, and ready to buy the land at a satisfactory price. But in order to support this contention it is necessary to assume one of two things, namely, either that Elkins and Davis were jointly interested in the purchase made by Lee, trustee, in which case the price at which the land was actually sold proves that the price was satisfactory to the seller, or, if they were not jointly interested in the purchase, then that Elkins was able, ready, and willing to buy at a price satisfactory to the seller. We have already said that joint interest at the time of the purchase by Davis was not proven; and as to what Elkins was willing to pay for the land the record is absolutely silent. On the 11th of March, 1902, plaintiff wrote defendant that he believed "the senator would examine the property under a 60-day option at \$15 per acre." But there is no evidence in the record that any price was ever stated to him, or that he expressed a willingness to buy it at any price. Neither does the record disclose what price he paid for the interest which he acquired from Senator Davis after the sale.

The eighth point relied on is that there is a legal presumption in favor of the correctness of the decree of the lower court, which operates in this instance in favor of appellee. This is a well-established rule in this state; but it is not superior to another rule, announced equally as often by this court, which is that, when the decree of the lower court is plainly wrong, it should be reversed. It is not so much a case of conflict of testimony as it is a case lacking in sufficient proof to establish plaintiff's claim, even admitting the truth of all his testimony, which we have done in reaching our conclusion.

We think it was error to decree a recovery in favor of plaintiff on the proof, and will reverse the decree appealed from, and will enter in this court such decree as the court below should have entered, which is that the plaintiff's attachment be quashed and his bill dismissed.

MILLER, P., dissents.

(85 W. Va. 210)

WEST VIRGINIA NAT. BANK v.
DUNKLE.(Supreme Court of Appeals of West Virginia.
Feb. 23, 1909. Rehearing Denied
May 12, 1909.)

1. TAXATION (§ 365*)—DISCRIMINATION—NATIONAL BANK STOCK — "OTHER MONEYPED CAPITAL"—DEDUCTION OF DEBTS—STATUTORY PROVISIONS.

Before a state statute denying right in taxation to deduct debts from stock in national banks assessed with taxes, but allowing such deduction from other investments, can be held as in violation of section 5219, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3502), prohibiting a state from taxing such stock at a greater rate than is assessed on other moneyed capital in the hands of individual citizens, it must appear that such other moneyed capital exists and in such amount as to operate as a discrimination against such banks, and that it is of such character as to come in competition with national banks.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 608; Dec. Dig. § 365.*]

For other definitions, see Words and Phrases, vol. 6, p. 5087.]

2. MANDAMUS (§ 16*)—WHEN GRANTED—INEFFICACY OF WRIT.

A peremptory mandamus will not go to compel an assessor to allow a deduction of debts from an assessment of stock in a national bank if at the hearing of the case the assessor had already delivered the personal property book to the sheriff.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 48; Dec. Dig. § 16.*]

(Syllabus by the Court.)

Petition of the West Virginia National Bank for writ of mandamus to B. C. Dunkle, assessor. Mandamus refused.

Vinson & Thompson, Mollohan, McClintic & Mathews, and Holt & Duncan, for petitioner. W. G. Conley and T. C. Townsend, for respondent.

BRANNON, J. Certain stockholders of the West Virginia National Bank at Huntington, when giving in their personal property for taxation for 1908 to the assessor, petitioned him to allow them to deduct from their stock bona fide debts which they owed; but the assessor refused to do so on the ground that section 79, c. 80, p. 372, Acts 1907, provides that no deduction shall be allowed from the valuation of shares of stock in a bank company, trust company, or national banking association on account of debts. The said bank at the instance of said stockholders asks of this court a mandamus to compel the assessor to allow such deduction of debts.

The chief reliance of the bank for a mandamus is that the act denying such deduction violates a federal statute (section 5219, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3502]), which allows the states to tax stock in national banks, provided "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such

state." We do not pass upon the question of the validity of section 79, tested by the said federal statute, because we do not think that the record presents a case calling upon us to pass upon that question. In the first place, it is not proven that there is any amount of moneyed capital in the assessment district to come in competition with national banks. The mandamus nisi awarded in this case does give certain amounts of such moneyed capital other than that invested in national banks; but the return of the assessor denies that such capital exists, and calls for proof thereof, and no proof of the existence of such capital or its amount is furnished. Again, there must be proof, even if there be such capital, that it comes in competition with the business of national banks; for all such capital does not do so. The object of the federal statute is to prevent injury to the national bank stock by discriminating against it in favor of money otherwise invested, since, if national bank stock is taxed and other moneyed capital is not taxed, people would not invest in the stock of national banks, and their efficiency would be injured. It must be made to appear that such moneyed capital does exist, and that from it debts may be deducted. As just stated, there is no proof even of that indispensable fact. Moreover, it is not enough to show that such untaxed moneyed capital exists, but it must be shown that it "is so large and substantial as to amount to an illegal discrimination against national bank shareholders, in violation of the provision of Rev. St. § 5219." First Nat. Bank v. Ayers, 160 U. S. 660, 16 Sup. Ct. 412, 40 L. Ed. 578. In that case the court said (page 667) that there was no proof that the moneyed capital of Kansas from which debts might be deducted as compared with moneyed capital in shares of national banks "was so large and substantial as to amount to an illegal discrimination against national bank shareholders." And the court said that it could not take judicial notice that such was the fact. Boyer v. Boyer, 113 U. S. 689, 5 Sup. Ct. 706, 28 L. Ed. 1069, says that untaxed capital must be "a very material part, relatively, of other moneyed capital in the hands of individual citizens." As I have said, there is no proof in this case that any such moneyed capital exists in Cabell county coming in competition with national banks or the amount thereof. Moreover, for a state assessment to be in violation of the said federal statute, it must be made to appear that such other moneyed capital comes in competition with that of national banks. It must be made to appear that it is composed of investments of that character which will enable us to see and say that it does compete with the capital of national banks; for it is well settled that if it be in railroad investments

or insurance investments—in other words, in any investments that do not come in competition with national banks—the state law allowing deduction or debts therefrom does not violate said federal statutes. In *Nat. Bank of Wellington v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669, the court said that it could not for proof look to the state auditor's report, and further said: "However, if we were to look at this report, we should then see that the total credits do not show what portion of those credits consist of moneyed capital in the hands of individuals which in fact enters into competition for business with national banks. It is only that kind of moneyed capital which this court in its decisions above cited holds is moneyed capital within the meaning of the act of Congress." In *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069, the court held that "money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments in mortgages does not come into competition with the business of national banks, and is therefore not within the meaning of the provision of Rev. St. § 5219, forbidding state taxation of its shares at a greater rate than is assessed upon other moneyed capital in the hands of citizens of the state." In *Commercial Bank v. Chambers*, 182 U. S. 556, 21 Sup. Ct. 863, 45 L. Ed. 1227, the court referred to the cases of *First Nat. Bank v. Ayers* and *First Nat. Bank of Aberdeen v. Chehalis County*, and said: "Those decisions held that the term 'moneyed capital,' as employed in section 5219 of the Revised Statutes, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, does not include capital which does not come into competition with the business of national banks, and that it must be satisfactorily made to appear by proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated. *First National Bank of Wellington v. Chapman*, 173 U. S. 205, 219, 19 Sup. Ct. 407, 43 L. Ed. 669, and cases cited." In our case we are hardly able to say that the alternative writ alleges that the untaxed moneyed capital comes in competition with the plaintiff national bank. The allegation of that fact is not specific or clear; but, treating it as an allegation of such competition, it is denied by the return, and there is not proof of the fact that such moneyed capital does compete with said bank. Therefore, under those federal cases, the plaintiff's case fails for want of proof of the particular fact of competition. As I said above, there is, indeed, no proof that there is any such exempted moneyed capital, and, if there is no such capital, there can be no such competition; but in addition, even if we could say that there is any such capital, there is no proof that any of it, or any

material part of it, comes in such competition. Therefore the plaintiff has not made a case giving it the benefit of the said national law. Gray in *Limitations of Taxing Power*, § 806, says that "other moneyed capital under the federal statute 'means' only capital which comes into business competition with national banking capital and does not mean every form of monetary investment," and cites many authorities.

Another reason exists for refusal of the mandamus. It is this: The mandamus nisi was served upon Assessor Dunkle on the 22d day of August, 1908, and was returnable the 2d day of September, 1908. We heard the case on the 26th day of January, 1909. Code 1899, c. 29, § 119 (Code 1906, § 806), requires the assessor to deliver to the sheriff for collection of the taxes the personal property books not later than the 1st of September, and to deliver to the auditor a copy of the books not later than the 1st day of October. If we go upon presumption, the tax book was delivered to the sheriff for collection of the taxes not later than the 1st of September. The return, if it be evidence, states that delivery of the tax book was made to the sheriff on the 20th day of September. So, when we heard this case, the assessor had parted with the possession of the tax book. He was powerless to do anything to make any changes in it. His function as to it had ceased. Code 1899, c. 29, § 128 (Code 1906, § 814) provides that, "after the copies of the land or personal property books shall have been verified and delivered, no alteration shall be made in them or either of them, affecting the taxes of that year." We held in *State v. County Court*, 47 W. Va. 672, 35 S. E. 959, that "mandamus will not go if it would prove fruitless or impossible of performance, or beyond the power or means of the party to whom it is directed to perform its command." So it is held in *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265. Such appears to be the general rule. 9 Va. & W. Va. Encyclopedic Digest, 518; 26 Cyc. 147. "Mandamus will not go to a board of supervisors requiring them to make corrections in the assessment of taxes in their county after the assessments have been completed and warrants have been issued to the receiver of taxes, and the matter has passed beyond the control of the supervisors, since the writ would be nugatory if issued, and the rule is well established that mandamus will never issue when it would be nugatory from want of power in the respondents to perform the act required." *High's Extra. L. Remedies*, § 140; also *Wise v. Bigger*, 79 Va. 277. To the same effect *Spelling on Injunctions and Extra. Rem.* § 1521. In *Gather v. Tax Collector*, 40 La. Ann. 362, 4 South. 210, it is held that: "Mandamus will not go to the board of commissioners after the levy of the tax has been completed, the tax has been extended on the assessment roll, and

the roll placed in the possession of the tax collector for collection, because it would be nugatory for want of power in such board to make the correction that is required; it being functus officio. * * * Once a tax is in esse, the tax roll placed in the hands of the tax collector, and the levying and assessing officer have become functus officio, the legality of such tax cannot be tested with the collector alone." I find in *People v. Supervisor*, 12 Barb. (N. Y.) 217, this: "It must also appear that the defendant yet has it in his power to perform the duty required of him; for the court will refuse the writ if it be manifest that it would be vain and fruitless." In *State v. Perrine*, 34 N. J. Law, 254, it is held that a writ of mandamus will not be allowed unless the act to be done is legally possible before the writ issued. In *Stacy v. Hammon*, 96 Ga. 125, 23 S. E. 77, it is held that, when at the time of the hearing of a mandamus the time had passed within which the official duty could be performed, no mandamus could issue, as it cannot be granted when it is manifest that for any cause the writ would be nugatory or fruitless. If this mandamus should issue, it would require the assessor to change the tax book, and violate the statute above cited. Mandamus will not go to enforce an officer to violate the law. Whether the assessor did right or wrong in delivering the book to the sheriff pending this writ, he did so, and thus became powerless to act. The mandamus nisi had no effect as an injunction or supersedeas to prevent the assessor from delivering the book without an order to stay him from so doing contained in the mandamus nisi, as was the case in *Alderson v. Commissioner*, 31 W. Va. 633, 8 S. E. 214. I would very much question whether any such staying order should be made operating to stay indefinitely the delivery of the tax books by the assessor, and thus it might be stop the wheels of state and county government. I doubt whether this remedy of mandamus lies in such a case as this, especially a few days before the time for the delivery of the books to the sheriff. It seems to me that the party must resort to some other remedy.

There is another reason for denying the mandamus, and that is under the well-known rule that it will not lie where there is other adequate remedy. Section 129, c. 29, Code 1899 (Code 1906, § 815), gives any person aggrieved by any entry on the tax books right to go before the county court and ask a correction of his assessment, and, in case of refusal, to go by appeal to the circuit court. If it be said that this is not an adequate remedy for want of an appeal from the circuit to the Supreme Court, I would reply that the action of the county and circuit courts in such matters, being of administrative or taxing jurisdiction, not

judicial, would not be res judicata or preclude other appropriate remedy.

Under these rules, it is unnecessary to say whether the act of the Legislature forbidding the deduction of debts from national bank stock is in violation of the state Constitution, providing that taxation shall be equal and uniform, and all property shall be taxed in proportion to its value. The rule is that courts will not pass upon the constitutionality or validity of a legislative act when the case can be decided on other grounds.

For these reasons, we refuse the peremptory mandamus.

(65 W. Va. 276)

CROSS et al. v. GALL et al.

(Supreme Court of Appeals of West Virginia.
March 9, 1909. Rehearing Denied
May 12, 1909.)

1. APPEAL AND ERROR (§ 518*) — RECORD — PLEADING.

A demurrer to a bill contained in the body of an answer thereto, but not filed by any order in the cause, or in any other way called to the attention of the court, will be treated as a fugitive paper.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 518.*]

2. JUSTICES OF THE PEACE (§ 93*)—PLEADING —SET-OFF.

Although section 2006, Code 1906, relating to actions before a justice, provides that "If the defendant, at the time the plaintiff's action is commenced, has any credit, or set-off, or counterclaim to allege in defense or reduction of plaintiff's demand, and be personally served with process in the suit, or appear and answer the action, he shall produce the same, with his evidence in support thereof, in the cause, or be forever precluded from maintaining any action for the recovery thereof," it has application only to such set-off as defendant has right in law, and is bound by the statute, to interpose as a defense to plaintiff's action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 326; Dec. Dig. § 93.*]

3. JUSTICES OF THE PEACE (§ 93*)—PLEADING —SET-OFF.

The general rule is that such set-off must be due in the same right and between the same parties, and a defendant in an action before a justice cannot be compelled to set off against plaintiff's demand against him a joint note of plaintiff and a third person held by him, although it be proven on the trial that the plaintiff is principal and such third person surety only in said note.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 326; Dec. Dig. § 93.*]

4. PRINCIPAL AND SURETY (§ 144*)—DEFENSES BY SURETY—SET-OFF.

Section 3890, Code 1906, which provides that, "Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt, not to all, but only a part of them, this section shall extend to such set-off, if it appear that the persons against whom such claim is, stand in the relation of principal and surety and the person entitled to the set-off is principal," has no application to any case ex-

cept to a joint suit against principal and sureties, particularly covered thereby.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 393-396; Dec. Dig. § 144.*]

5. SET-OFF AND COUNTERCLAIM (§ 22*)—ACTION ON SECURED DEBT—RIGHT OF SET-OFF.

Although a debt be secured by a deed of trust and capable of being rendered certain, yet the debtor is not, as in case of a debt reduced to judgment, precluded from offsetting against such debt a demand against his creditor, if such demand be certain and fixed in amount.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 26; Dec. Dig. § 22.*]

6. JUSTICES OF THE PEACE (§ 125*)—JUDGMENT—ENTRY.

Where a judgment, in an action tried before a justice, is rendered and publicly announced by the justice on the day and at the close of the trial, or within 24 hours after trial, as required by statute, although the clerical work of entering the judgment upon his docket be not performed until a few days thereafter, the statute is substantially complied with. *Affirming Packet Co. v. Bellville*, 55 W. Va. 560; 47 S. E. 301, and *Bank v. Wood*, 60 W. Va. 617, 55 S. E. 753.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 395; Dec. Dig. 125.*]

7. JUSTICES OF THE PEACE (§§ 119, 128*)—JUDGMENT—VALIDITY—CORRECTION.

The judgment of a justice, though erroneous, is not void for offsetting against plaintiff's demand against defendant, and without his consent, and against his protest, a joint note of plaintiff and a third person held by defendant, and such erroneous judgment can be corrected only upon appeal, if an appellate court would have jurisdiction thereof, and a court of equity has no jurisdiction in a suit by or against such defendant to correct such erroneous judgment against him.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 373-376, 402-407; Dec. Dig. §§ 119, 128.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by Charles Cross and others against Isora Gall and others. Decree for plaintiffs, and defendant Gall appeals. Affirmed.

J. Hop Woods, for appellant. W. T. George, for appellees.

MILLER, P. The decree appealed from perpetually enjoins defendants, Isora V. Gall and Charles F. Teter, trustee, from enforcing and canceling and annulling a deed of trust executed April 29, 1889, by Nancy and Charles Cross, purporting to secure payment of their note of same date, at one year, to the order of George W. Gall, Sr., for \$115, with interest, and by an indorsement thereon by him, March 12, 1899, assigned to his daughter, the defendant Isora V. Gall.

The principal grounds for relief alleged in plaintiffs' bill are: That in a prior civil action before a justice brought by plaintiff Charles Cross against defendant Isora V. Gall, upon an account, she had been charged with a cash payment on said note of \$100 of April 4, 1902, and given credit for the

residue thereof, with interest, and judgment given against her for the balance of \$6, found by the justice in his favor, with interest and costs, whereby said note had been fully paid off and discharged, and the rights of the parties in relation thereto fully adjudicated, and which judgment remained in full force, unappealed from and unreversed, whereby said Isora V. Gall was estopped and concluded from enforcing said trust. The transcript from the docket of said justice exhibited with the bill shows that defendant appeared in person and by counsel, filed a plea in writing that she did not owe the plaintiff the account or any part thereof, and that, after hearing all the evidence and the arguments of counsel, the justice was of the opinion that plaintiff was entitled to recover from defendant, after allowing her credit for the balance due upon said note, it being shown that said Charles Cross was principal therein, the sum of \$6, and for which sum judgment was given against her in favor of the plaintiff, with interest and costs, amounting to \$34.15, and which soon afterwards was fully paid off and discharged by her.

Isora V. Gall and E. R. Dyer, administrator of George W. Gall, deceased, separately answered: The answer of the former contains a demurrer to the bill, but no order entered filing the same is found in the record, and it does not appear to have been called to the attention of the court, by any order in the cause, and it must therefore be treated as a fugitive paper. *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618; *McGraw v. Traders' National Bank* (W. Va.) 63 S. E. 398. An order of December 11, 1906, says a demurrer in writing to the so-called affirmative matter in the answer of the said Isora V. Gall was interposed by plaintiff, and which was sustained, and said affirmative matter stricken out, and that plaintiff replied generally to the residue of the said answer. No such written demurrer, however, is found in the record, and we cannot say what part of the said answer was intended to be stricken out. Practically all the matter of the answer is responsive to the matter of the bill, or raises issues of law and fact necessarily involved and determined by the judgment of the justice. The prayer of said answer is that so much of the judgment of said justice as undertakes to extinguish the balance due upon said deed of trust may be set aside as void, the injunction dissolved, and that defendant Teter, trustee, be directed to proceed with the sale of the land, under the notice given by him, to pay and satisfy said debt. As we do not know what part of the answer was intended to be stricken out, and as it contains matter mainly responsive to the bill, we cannot say that any error was committed in sustaining the demurrer thereto and striking out such affirmative matter of the answer. The case was finally heard upon the plead-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ings thus made up and upon the facts agreed.

Isora V. Gall, in her answer, relies mainly on several legal propositions presented by the pleadings and facts as agreed:

First. That, as her plea in the action before the justice was a simple denial of indebtedness, no plea of set-off of the note was involved or in issue, she could not be required involuntarily to litigate with plaintiff in said action her rights as against him respecting said note, and that she is not estopped or concluded by said judgment. To the general proposition thus affirmed, the statute (section 2006, Code 1906) we think makes clear answer. It provides that: "If the defendant, at the time the plaintiff's action is commenced, has any credit, or set-off, or counterclaim to allege in defense or reduction of the plaintiff's demand, and be personally served with process in the suit, or appear and answer the action, he shall produce the same, with his evidence in support thereof, in the cause, or be forever precluded from maintaining any action for the recovery thereof." But the application of this statute depends on the question, to be next considered, whether said note was such an offset against plaintiff's demand as defendant could or was obliged by this statute to put in issue. If it was, of course, the judgment concludes her.

Second. That as a set-off must be due in the same right and between the same parties, and as said note was the joint note of plaintiff and his wife while plaintiff's demand was against appellant alone, it was improperly set off or credited to plaintiff's account by the judgment of the justice. This in general also contains a correct proposition of law. 12 Ency. Dig. Va. & W. Va. Rep. 257; 4 Minor, Institute, 788. But it is said, in answer to this, that section 3890, Code 1906, has so modified the general rule as to give right of set-off of the note, though said note be the joint note of plaintiff and his wife, and that, having that right, said section 2006 imposes the duty to plead it, and inflicts the penalty prescribed thereby for failure to do so. Said section 3890 is as follows: "Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt, not to all, but only to a part of them, this section shall extend to such set-off if it appear that the persons against whom such claim is, stand in the relation of principal and surety and the person entitled to the set-off is the principal." It is obvious that this provision has no literal application to the case at bar. The claim of the plaintiff is not a joint claim against several persons in which one entitled to a set-off is principal and the others sureties. In construing this statute, this court, in *B. & O. R. R. Co. v. Bitner*, 15 W. Va. 455-463, 36 Am. Rep. 820, speaking by Judge Green, said: "It seems to me obvious that the statute therefore cannot be construed to apply to any case, except to a joint suit against a prin-

cipal and his surety or sureties." And Mr. Minor (4 Minor, Institutes, at the page already cited), referring to this statute, says: "In short, joint and separate demands cannot be set off one against another, save in the special case provided for by our statute." And he cites a number of Virginia decisions. But it is said that the last clause of said section 3890, providing that "in the issue, the jury, judge, or justice shall ascertain the true state of indebtedness between the parties, and judgment be rendered accordingly," authorized the justice to pronounce the judgment complained of in this case. This would be so if the set-off was one authorized by law. For these reasons we think the judgment respecting said note was erroneous. There is nothing in the record to show that the offset did not belong to the defendant at the time of the suit, nor that the same was then in suit before any other court or justice, and therefore there is nothing in these suggestions of counsel.

Third. It is claimed that because said note was the joint note of plaintiff and his wife, secured by deed of trust, and thereby rendered certain in amount, it ought to be treated like a judgment, which it is claimed, upon the authority of *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. 10, 11, defendant could not be compelled to set off against the plaintiff's unliquidated demand. We do not think that case has any application to this. It is true, perhaps, that the balance due upon the note was capable of being rendered certain, but there had been partial payments upon it, and not the whole of the note was due. The reason given in *Faulconer v. Stinson* is that: "The owner of the judgment has had his demand judicially ascertained and ended, and shall the other party come with his offset and inaugurate another contest against the judgment, or shall he be compelled, by separate action, to establish his demand at law, and then set off his judgment? The law compels him to do the latter."

The controlling question we have for decision then is: Is the judgment of the justice for the error therein void in whole or in part, or is it conclusive of the rights of Isora V. Gall? Counsel for Miss Gall affirm that the judgment is void for two reasons, namely: First, because it was not entered up in the docket of the justice within 24 hours, as provided by section 2065, Code 1906; second, because it appears on the face of the transcript of his docket that the justice exceeded his jurisdiction in setting off against plaintiff's demand the amount due upon said note, and entering judgment for the balance. On the first proposition, counsel say that *McClain v. Davis*, 37 W. Va. 330, 18 S. E. 629, 18 L. R. A. 634, *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, and *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301, leave this question open; but in addition to those cases we have *McDowell County Bank v. Wood*, 60 W. Va. 617, 55 S. E. 753, reaffirming the rule of

Packet Co. v. Bellville, supra, and effectually overruling McClain v. Davis, holding that, "where a judgment in an action tried before a justice is rendered and publicly announced by the justice on the day and at the close of the trial, although the clerical work of entering the judgment upon his docket is not performed until a few days thereafter, the statute is substantially complied with." This case must therefore be regarded as announcing the settled rule upon the subject.

But is the judgment void on the second ground? Our conclusion is that this proposition must be denied. The judgment of the justice we think must be regarded as merely erroneous and not void, and therefore reviewable only upon appeal, if appeal would lie. But it is argued that, as this court has heretofore denied appellant a writ of prohibition against the enforcement of said judgment, she has no other remedy except in a court of equity. But a court of equity cannot be made to perform the functions of an appellate court, and to correct errors therein. There can be no question but that the justice had jurisdiction of the plaintiff's action, and although, as we have determined, his judgment was erroneous in so far as it undertook to offset against plaintiff's demand the joint note in question, yet it cannot be said that the justice was without jurisdiction so as to render his judgment void. Judgments are not void for mere error therein, and, unless there is total want of jurisdiction, a court of equity has no jurisdiction, for mere grounds of error, to interfere.

We must therefore affirm the decree below.

(65 W. Va. 264)

HOYLMAN v. KANAWHA & M. RY. CO.

(Supreme Court of Appeals of West Virginia.
March 2, 1909. On Rehearing, May
12, 1909.)

1. CARRIERS (§ 333*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

The general rule is that passengers getting off a moving railroad train are chargeable with contributory negligence and cannot recover for injury received therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1391-1393; Dec. Dig. § 333.*]

2. CARRIERS (§ 344*)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1399; Dec. Dig. § 344.*]

3. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CASE—REVERSAL—NEW TRIAL.

When, in an action against a railroad company for personal injury to a passenger, the evidence is such that a verdict for the plaintiff should be set aside, the circuit court, if asked, should direct a verdict for the defendant, and, if it refuses, the appellate court will reverse judgment and verdict and remand the case for a

new trial, unless this court can see clearly that the plaintiff cannot better his case upon another trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1178.*]

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by James H. Hoylman, administrator, against the Kanawha & Michigan Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Brown, Jackson & Knight, for plaintiff in error. A. M. Belcher and C. J. Van Fleet, for defendant in error.

BRANNON, J. John L. Porter took passage on a train of the Kanawha & Michigan Railroad at Charleston to go to Wicher, a flag station on that railroad, and in getting off the train was killed, and his administrator recovered in the circuit court of Kanawha county a verdict and judgment for \$5,000 against the railroad company, and the company brings the case here.

There is no conflict of evidence in the case. Tested by the evidence adduced by the plaintiff, the facts are: That Porter sat in the third seat some 10 feet from the door of the car, and he was engaged in active conversation with a passenger, Garten, in the next seat behind him. A friend named Kirby, when the train stopped, went to Porter's seat and carried a bundle out for him and got off the train. Porter did not go with him. Three or four other passengers got off the train. Porter lingered in his seat, though the train had stopped, talking to Garten in the next seat behind. He lingered so that that passenger, Garten, who remained on the train, warned Porter that he had better get off the train while it stopped. Porter started for the door, and before he got to the door—indeed, before he left his seat—the train started; but Porter went on down the steps when the train was moving and stepped on the platform holding to the railing of the car with his right hand, and did not let go of it, but held to it while he took two or three steps in the direction the train was moving and increasing in speed, and he lost his balance and fell under the wheels. Before he got out of the door, the train was moving. The conductor swears that a stop of the usual length for that station was made. No evidence contradicts this. Other passengers, three or four, got off. This affords evidence that the length of stop was reasonable. Hurt v. Railroad, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374. There was no crowd. The conductor swears that he stood, as he usually did, at the other end of the car before the one in which Porter rode and looked through both cars to see that all the passengers were off and did not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

see Porter. There is no contradiction of the conductor in this. A witness of the defense, uncontradicted, says Porter was still talking to Garten at his seat when the train started. This would show that Porter had not yet come out of his seat into the aisle, but was tarrying in his seat talking to Garten. Garten's evidence confirms this. The evidence clearly shows that before Porter got to the door the train had started. The evidence shows that Porter was well acquainted with this station and had reason to know that the usual stop there was of short duration.

"All experience has demonstrated that to get off a moving car is highly dangerous. Therefore it is held that such an act is negligence per se, and the passenger, if thereby injured, except in very rare cases, is guilty of contributory negligence and cannot recover." *O'Toole v. Railroad Co.*, 158 Pa. 106, 27 Atl. 738, 22 L. R. A. 606, 38 Am. St. Rep. 830. "An adult who knowingly and unnecessarily steps from a railroad train in motion is guilty of contributory negligence as a matter of law." *Walters v. Chicago & N. W. Ry. Co.*, 113 Wis. 367, 89 N. W. 140. Such is held to be the law in most of the courts. 2 *Wood on Railroads*, 1292, says that, in view of the danger necessarily attending such an act, it should be held, as a matter of law, that it is negligence to attempt to board or alight from a train while it is in motion, and the question should not be left to the jury unless there are exceptional circumstances tending to excuse or justify the act. "And the great weight of authority favors this view. The failure of the company to stop its train at a station as it ought to do, or to stop it for sufficiently long time, does not justify a passenger in leaving a moving train. His proper course is to be carried on until the train stops, and, if he sustains pecuniary or other loss from being carried beyond his station, his remedy lies in an action for damages." The same in *Hutchinson on Carriers*, § 1180.

Now, what fault is imputed to the company? Nobody claims that the conductor or other trainman saw Porter getting off. The claim is that the stop was not long enough in time; but, in the first place, the evidence is that the stop was for the usual time at that station, and this is proven by the fact that several other passengers got off safely. There is no proof clear that the stop was not reasonable; but, suppose that the stop was not of the proper length of time, the law just cited from *Wood* and *Hutchinson* says that, even if the company was negligent in this respect, the passenger must not run the risk of alighting. That is no reason for running a plain risk, especially by an aged person. *McDonald v. Railroad Co.*, 87 Me. 466, 32 Atl. 1010, says that it is the duty of the company to stop a sufficient length of time to give passengers reasonable opportunity to alight with safety. "But the failure of the company to stop its train at a station as it

ought to do, or to stop for sufficient length of time, does not justify a passenger in leaving a moving train." In that case we find that he gets off at his own risk. I find in *Simmons v. Air Line, etc., Co.*, 120 Ga. 225, 47 S. E. 570, this: "If, with a clear chance to avoid the consequences of defendant's negligence or breach of duty, the plaintiff voluntarily assumes the risk occasioned thereby, such conduct on his part is not merely contributory negligence, lessening the amount of damages, but a failure to avoid danger, defeating the right to recover." "If all you know of it is that a passenger jumps from a train in motion and is injured, you would charge him with carelessness for the act." *Shannon v. Railroad Co.*, 78 Me. 59, 2 Atl. 678. The case in 87 Me. 466, 32 Atl. 1010, says that: "The burden was on the plaintiff to prove that he jumped from the train under exceptional circumstances that would justify or excuse such an act of imprudence." So holds *Browne v. Railroad Co.*, 108 N. C. 34, 12 S. E. 958. The North Carolina court, in *Morrow v. Atlanta, etc., Co.*, 134 N. C. 92, 46 S. E. 12, held that a person who "alights from the train while traveling at the rate of three to four miles an hour, and with its speed steadily increasing, is guilty of contributory negligence as a matter of law precluding recovery."

The train in this case was going faster than that, the engineer swears 8 or 10 miles an hour, when Porter alighted. The evidence clearly shows that Porter delayed leaving the train and had to be warned to do so by Garten. "Where a passenger delays for an unreasonable time, and it is not apparent to the agent of the carrier that he is either boarding the vehicle or carriage, the carrier will not be held responsible for a resulting injury." 5 *Am. & Eng. Ency.* L. 579. A passenger, seeing that a train had passed a station and was increasing in speed, jumped from it. It was held that he could not recover, "even though the railroad company was negligent in management of the train." *Brown v. Chicago, etc., Co.*, 80 Wis. 162, 49 N. W. 807. *McDonald v. Montgomery R. Co.*, 110 Ala. 163, 20 South. 817, holds: "When a person steps from a moving car without any necessity therefor and is injured, which injury would have been avoided if he had remained on the car, he is guilty of such contributory negligence as will preclude his recovery." That it is negligence to alight from a moving train has been held by the courts of New York, Pennsylvania, Massachusetts, Maine, Michigan, Wisconsin, Iowa, Alabama, Georgia, Tennessee, and North Carolina. *Mearns v. Railroad Co.*, 183 N. Y. 108, 57 N. E. 292; *Brown v. Railroad Co.*, 181 Mass. 365, 63 N. E. 941; *Werbowsky v. Railroad Co.*, 86 Mich. 239, 48 N. E. 1097, 24 Am. St. Rep. 120; *Newlon v. Railroad Co.*, 127 Iowa, 654, 103 N. W. 999; *Whelan v. Railroad Co.*, 84 Ga. 506, 10 S. E. 1091, and cases above cited. Porter was a man of 73 years. This

called on him to be careful and prudent. The case of *Cumberland V. R. Co. v. Maugans*, 61 Md. 62, 48 Am. Rep. 83, says in the opinion that: "Every one would pronounce it an act of reckless imprudence for a person to jump from a train of cars when in rapid motion, or at night and in the dark, when dangers or obstructions that could not be seen were in the way, or for a person of impaired health and in a weak physical condition, or of an advanced age, to make the attempt when the train was in slow motion." 1 Am. & Eng. Ann. Cas. 779, has the following: "Even where the train is moving slowly, the act of alighting therefrom may constitute contributory negligence as a matter of law if the person so alighting is in a weak physical condition or of advanced age." "Even in jurisdictions where the mere act of alighting from a moving railroad train or street car is not considered negligence per se, it is well recognized that cases sometimes arise in which the facts are so clearly established, and the inference as to the course dictated by ordinary prudence is so certain and invariable, that it becomes the duty of the court to take the question from the jury. Thus it has been held that where the act is obviously dangerous and without reasonable necessity, real or apparent, it constitutes contributory negligence as a matter of law, and defeats a recovery by the person injured." 1 Am. & Eng. Ann. Cas. 778, citing many cases. A conductor agreed to let a passenger off at a station, and the conductor rang the bell for a stop. The train did not stop. Held: "When the train fails to stop at the station of destination of a passenger, and he is not directed or induced at the time by act or word of the company's agent to get off, and he does get off, he does so at his own risk." *East Tenn., Va. & Ga. Co. v. Massengill*, 83 Tenn. 328. "The general rule is that passengers injured while getting on or off moving trains cannot recover for injuries. The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course." *Browne v. Railroad Co.*, 108 N. C. 84, 12 S. E. 958.

I find the following syllabus from the United States Circuit Court of Appeals in *Illinois Central v. Davidson*, 64 Fed. 301, 12 C. C. A. 113: "A passenger who unnecessarily and negligently exposes himself to danger while alighting from a train is guilty of contributory negligence, even though he does not know of the danger to which he is exposed." The Texas case (*International, etc., Co. v. Rhoades* [Tex. Civ. App.] 51 S. W. 517) holds: "Where a passenger was injured in alighting from a moving train, he cannot recover, even if he was not guilty of negligence, unless the agent or defendant in charge of the train invited him to so alight, and in so doing he acted with ordinary prudence." "The con-

ductor is required, after having at the proper time announced the station, to stop the train and hold it such reasonable time as will permit passengers to alight in safety. He is not required—to do, what in many cases would be impossible to ascertain—to know that all passengers intending to stop at the station have alighted in safety." *Raben v. Central Iowa Railroad Co.*, 73 Iowa, 581, 35 N. W. 646, 5 Am. St. Rep. 708. "This instruction was erroneous in the particular that it asserts that 'such railroad company is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them down safely thereat.' This in its latter portion states the law too strongly in favor of the plaintiff. All the duty the law imposes upon a conductor, acting as the agent of a corporation, in order to comply with the obligations of the carrier to a passenger, is to carry him safely to his point of destination, announce the arrival of the train at the station, and give him a reasonable opportunity to leave the cars. When this is done, the duty of the conductor ceases. *Sevier v. Railroad*, 18 Am. & Eng. R. R. Cas. 245; *Straus v. Railroad*, 75 Mo. 185. And when the servants of a corporation, engaged in the business of a common carrier, afford passengers a reasonable time to leave the cars after arrival at the end of their journey, they have the right, at the expiration of such reasonable period, to presume that all the passengers, whose place of destination is then reached, have done what is customary for passengers in like circumstances to do, to wit, have left the cars." *Hurt v. St. L., I. M. & S. Ry. Co.*, 94 Mo. 262, 7 S. W. 1, 4 Am. St. Rep. 374.

But the negligence of Porter did not consist alone in getting off the train while in motion. He held to the railing of the car for three steps and was thrown under the train. All the witnesses say this. It is beyond question. This was gross negligence. Porter was in full possession of his faculties. A moving train, increasing speed every inch, is a dangerous carriage from which to alight. Even if going slowly, its momentum makes it dangerous to alight from it. In the case of *Diddle v. Continental Co.* (this term) 63 S. E. 962, we said: That reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent man would have avoided it, if the circumstances do not necessitate encountering it, is a voluntary exposure to danger; that unconsciousness of danger does not change the case; that if the danger is obvious, and nothing to preclude deliberation or freedom of action, such as sudden peril, and he encounters danger, the exposure is voluntary. See *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153, 65 N. E. 877.

The defendant asked, but was refused, an instruction that the evidence was not sufficient to authorize a verdict for the plaintiff, and that the jury should find for the defendant. Now the evidence plainly shows that

Porter was under no necessity to get off the train while moving and increasing its speed. It was simply a rash act of his own for mere convenience, when he could have gone a mile or so further on the train and come back in a few hours. Law above shows that he was chargeable with negligence per se under the evidence, negligence in law. That would inevitably call for a verdict for the defendant, even if we could say, as we cannot, that the company was in fault. We have often said that, where the evidence is such in cases of negligence as that the court would be compelled to set aside a verdict for the plaintiff there, the court ought, if asked, direct a verdict for the defendant. *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683; *Cobb v. Glenn Boon Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734. In *White v. Brewing Co.*, 51 W. Va. 259, 41 S. E. 180, the same test is made; that is, that the court should instruct a jury for a party in whose favor the evidence "plainly and decidedly preponderates." Judge Dent said that, when the evidence was such that two reasonable minds could not differ, the court should not hesitate to direct a verdict, "for thereby justice is promoted, a useless controversy brought to an end, and time, cost, and fruitless labor saved to the litigants, the court, and the public." The same principle is in *Diddle v. Continental Co.* (decided this term) 63 S. E. 962. The Supreme Court of the United States said that it was settled law in that court, "when the evidence given at the trial, with all inferences the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Louisville, etc., Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032. A vast array of authorities for this proposition will be found in *Blashfield on Instructions*, § 5. The court should have given the instruction to find for the defendant. The defendant is entitled to have that matter of error passed on in this court.

This court is of the opinion that the circuit court should have directed a verdict for the defendant. We are clear about this, but the great question then comes up: Shall this court render final judgment for the defendant, or set aside the verdict, reverse the judgment, and remand the case to the circuit court? My own opinion is, long has been, that this court should do what the circuit court should have done, which would be, after verdict for the defendant, to render final judgment for the defendant as if on demurrer to evidence. The plaintiff made his case, and if his case was bad he ought to lose it by final judgment. The suit ought thus to end. This court has so decided in two cases. *Maupin v. Insurance Co.*, 53 W. Va. 557, 45 S. E. 1003, and *Ruffner Bros. v. Insurance Co.*, 59 W. Va. 432,

53 S. E. 943, 115 Am. St. Rep. 924. I later add *Anderson v. Tug River Co.*, 59 W. Va. 301, 53 S. E. 713, and *McMillan v. Coal Co.*, 61 W. Va. 535, 57 S. E. 129, 11 L. R. A. (N. S.) 840. It was decided otherwise this term in *Diddle v. Continental Co.* See full note 8 Am. & Eng. Ann. Cas. 873. I shall not discuss this point further. A majority of the court think that final judgment should not be rendered here, especially as the practice has been generally otherwise, as in *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94. I suppose it true that in the past the practice, I say practice, has been to remand. I would reverse that practice, it being a mere matter of practice. All say that, if it clearly appears that the plaintiff cannot better his case, this court may render final judgment.

Instruction No. 8 says that if the train did not stop long enough to enable Porter to leave it while stationary, and that he stepped off while the train was in motion, it was a question for the jury to say whether he was guilty of negligence and barred from recovery. The law is that: If a man leaves a moving train, he does so at his own risk; it is negligence per se, negligence in law, for which the court may withdraw the case from the jury.

Instruction No. 4 told the jury that it was the duty "of the defendant to use the greatest possible care and diligence to safely carry and deliver Porter to his destination, and to stop long enough to afford him reasonable opportunity, by the use of ordinary diligence on his part, to alight, and not to start until he had alighted. If, by the exercise of great diligence, said defendant could have known that Porter was in the act of alighting," the verdict must be for the plaintiff. This instruction might be readily construed as requiring the trainmen to see that every person wanting to get off had gotten off. It demands that a railroad company must exercise great diligence to know that a passenger is alighting. It is the duty of the passenger to get off the train, and the conductor does not have to hunt each and every one up. Of course, where the conductor knows one is alighting, he cannot start; but he need not examine every car in a train to see who wants to get off, or that every one has gotten off. But why discuss these instructions? They all declare that, if the company was negligent in not stopping long enough or not seeing to it that Porter was off, then it was liable. They ignore the fact that, under the evidence in the case, the plaintiff's evidence, Porter delayed leaving the car and went from it while moving and held on to it while moving, and was guilty of contributory negligence. If we are right in saying that the court should have directed a verdict, then the plaintiff was not entitled to these instructions; they being unsuited to the case and misleading the jury.

Porter's contributory negligence barred recovery.

Again, the court gave for the defendant an instruction that if the train had started while John L. Porter was leaving the car, and was in motion before he went out of said car to the platform, then it was negligence in him to attempt to alight from the car while in motion, and the verdict should be for the defendant. Another instruction was that if the train stopped long enough to allow passengers to alight, and Porter could have left it without injury, had he used diligence, then the jury must find for the defendant. Now, under the evidence, there is no question but that the hypotheses of these two instructions were fully sustained, and therefore this verdict under the evidence is contrary to those instructions given by the court. It is a verdict, as shown by the evidence, against the law of contributory negligence. "A new trial will be granted: (1) Where the verdict is against law. This occurs when the issue involves both fact and law, and the verdict is against the law of the case on the facts proved. (2) Where the verdict is contrary to the evidence. This occurs when the issue involves matter of fact only, and the facts proved require a different verdict from that found by the jury." *Grayson's Case*, 6 Grat. (Va.) 712.

Therefore we reverse the judgment, set aside the verdict, and remand the case for a new trial if the plaintiff shall be so advised.

On Rehearing.

A petition for rehearing attacks the above opinion for saying that the evidence is not conflicting. It is not appreciably so. The plaintiff proved the true status of the case. He proved by Garten, who was face to face with Porter in the car, that Porter stood talking with him, and that either before he left his seat, some 10 feet from the door, or before he reached the door, the train started. Young, a witness for defense, definitely corroborates Garten. He was in the car, saw Porter lingering in conversation with Garten, and, when asked if the train started before Porter left the platform, answered: "Yes, sir; before he went out of the car, before he left Garten, about the time he left Garten." He said further: "At the time the train started, he was shaking hands with Garten. About the time the train started, I seen them shaking hands." The plaintiff and defendant both so prove. Keeny, a witness for plaintiff, says: "When I first saw Porter, he was coming down the steps. The train was moving out as he came down." This renders likely the evidence of Garten and Young, for it shows that Porter did not reach the platform or steps until already the train had started. It was "moving out," how fast Keeny could not say; but it was moving out, and Porter had no right to risk

its speed, as any one may be deceived as to speed or momentum of a starting train, and any one knows it may increase momentum rapidly, even suddenly. Dempsey, another witness for plaintiff, says: "The train was moving out when I looked around, and he was on the steps." Again, I say he corroborates Garten and Young. He, too, proves that the train had started when yet Porter was on the steps. That the train was moving with considerable, with dangerous, speed when Porter alighted, is beyond question from the fact told by several witnesses for the plaintiff, not contradicted, not open to question; that is, that Porter, holding to the railing, was "jerked" and thrown by the car. If it was merely moving at a snail's gait, why did the train "jerk" him and throw him? Here is an undisputed fact proving a physical fact from our knowledge of the law of momentum or force, that the train had already attained a dangerous speed when Porter alighted. Further, Dempsey, a witness for plaintiff, says that Kirby, who had taken Porter's bundle out, was standing there on the back side of the platform as the train pulled out, and "I heard him say to Mr. Carson (brakeman) that old man Porter is on there to get off, and Mr. Carson threw out his hand to shut the engineer off, on the fireman's side, and the fireman, I suppose, was putting in fire. Mr. Carson didn't get any signal from the engine, and he jumped up on the coach as quick as he could and pulled the bell cord, to get hold of the bell cord." This proves that the train had started while Porter was still on the train.

Against all this evidence, counsel appeal to Houchins and Carson, saying that Houchins said, "The first I saw of him I was standing in the baggage car door, and he had one foot on the platform and one on the step, and his right hand holding to the handhold." Asked how far it had moved when he first saw Porter, answered, "Well, it was just starting to move." This does not prove that Porter had alighted before the train started. This does not contradict all the explicit evidence that the train had already started when Porter got off it. In fact, the fair inference from it is that Porter got off while the train was moving, and this is enough to exempt the company, because under the law no one can alight from a moving train except at his own risk, except under peculiar circumstances. This case is not such. Looking at his evidence further, I see that he was asked, "When you first saw him, was the train moving?" He answered, "Yes, sir." Counsel in their petition for rehearing admit that the above opinion lays down the law correctly, but maybe counsel mean that the train was moving slowly. Houchins says, "Well, it was just starting to move." This is indefinite. Are we on this frail, indefinite sentence to contradict and overthrow

all the evidence referred to in the original and this opinion? It does not conflict with it really; no substantial conflict. Afterwards Houchins qualifies this statement by the statement that when he saw Porter the train was moving. Counsel cite us to a statement in the evidence of Carson that just as he gave the signal to start he got on the train, looked back, and saw Porter fall; but the plaintiff by Dempsey proved, as above stated, that, when Kirby told Carson Porter was yet on the train, Carson signaled the train to stop and ran for the bell cord. This denies that when Carson stepped on the train Porter was just alighting. Counsel do not say from this that Porter had alighted when Carson saw him, but was in the act of alighting. He could not safely do so. But go further with Carson's evidence. The question was put to him, "Did you see Porter step to the ground?" Answer: "No, sir; I didn't see him. I don't know whether he was on the coach or the platform, could not tell." Question: "Do you know how far the train had moved before you saw Porter falling back?" Answer: "No, sir; I could not tell." Having stated that he gave signal to start, and got on, and saw Porter just as the train moved, it was stated to him that then Porter must have been on the step when he (Carson) saw him, he answered, "I could not tell where he was." Can we say from Carson where Porter was when Carson signaled to start and got on the train? Can we say the train was not going, or going slowly, when Porter got off it? No tribunal, whether judge or jury, having to deal impartially, from reading all the evidence, indeed from reading only the plaintiff's evidence, can help finding, as facts: First, that Porter was yet in the car when its wheels began to move; and, second, that when Porter got off the car its movement was dangerous, as shown by the fact that it jerked Porter and threw him. To say otherwise would be a travesty upon weighing and dealing with human evidence. If the train was moving, though apparently slowly, he could not get off except at his own risk, except under peculiar circumstances. This case is not such. The evidence does not really conflict. Suppose it did. Counsel would have us say therefore that a court is powerless to overthrow a verdict. That is not law. Though evidence be conflicting, if the verdict is without sufficient evidence, plainly against the decided, clear preponderance, it may be set aside. *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752.

We would not have further detailed evidence beyond the reference to it in the original opinion, but for the assertion in the petition for rehearing that we had heard the case, on only "some of the evidence adduced

by the plaintiff," and tried a case not presented to the jury. We dislike to express opinions on evidence, or detail it, as we do not feel that on mere questions of fact an appellate court is called upon to detail evidence, or go further than find the result and announce it; but, as the petition calls on us to do so, we make this review of the evidence. But for that, we should not have done so.

We reach the judgment on the evidence, taken as a whole, on the plaintiff's evidence. It is not sufficient to sustain the verdict.

(132 Ga. 523)

LOUISVILLE & N. R. CO. v. NEWMAN.

(Supreme Court of Georgia. April 21, 1909.)

1. REMOVAL OF CAUSES (§ 89*)—POWER TO DEFEAT REMOVAL—DISMISSAL.

Where proper application is made by a non-resident defendant for the removal of a case from the state court to the United States court, which application is refused by the state court, whose judgment is reversed on writ of error to the Supreme Court of the state, the plaintiff cannot dismiss the case, so as to defeat the removal of the case to the United States court, by an entry of dismissal made by his attorney on the original papers, before the remittitur from the Supreme Court has been formally made the judgment of the court from which the case was taken by writ of error.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 89.*]

2. ABATEMENT AND REVIVAL (§ 12*)—ANOTHER ACTION PENDING—ACTION IN UNITED STATES COURT.

The pendency of an action in a court of the United States, which has been removed from the state court, will abate a subsequent suit in the state court between the same parties and for the same cause of action, although in such subsequent suit the damages claimed may be reduced below \$2,000.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. § 12.*]

(Syllabus by the Court.)

Error from Superior Court, Gordon County; *A. W. Fite, Judge*.

Action by L. H. Newman against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 128 Ga. 283, 57 S. E. 515.

O. N. Starr and D. W. Blair, for plaintiff in error. J. McCamy and T. W. Skelly, for defendant in error.

EVANS, P. J. The bill of exceptions is to review a judgment of the trial court, which refused to abate the plaintiff's action. This is a second suit by the plaintiff, L. H. Newman, against the defendant, the Louisville & Nashville Railroad Company, for the same cause of action. In the first suit the Atlanta, Knoxville & Northern Railway Company, a Georgia corporation, was jointly sued with

the Louisville & Nashville Railroad Company; and the latter company filed its petition at the appearance term of the court for the removal of the case to the Circuit Court of the United States for the Northern District of Georgia, on the ground of diverse citizenship. The court refused the petition, and on exception taken to the Supreme Court this judgment was reversed. 128 Ga. 283, 57 S. E. 515. The remittitur from the Supreme Court was filed in the office of the clerk of the superior court of Gordon county on May 12, 1907, and on August 30, 1907, the judgment of the Supreme Court was made the judgment of the superior court, and it was further adjudged that "the removal of said case is granted as prayed," and that the railroad company recover the costs of suit of the plaintiff. The costs of taking the case to the Supreme Court were \$35.55, which had been paid by the railroad company. On June 10, 1907, the plaintiff paid to the clerk of the superior court the sum of \$13.50, which the clerk said was all that was due for the costs in the original case, and on June 15, 1907, the clerk turned over this sum to his predecessor in office, who was clerk at the time the case was filed, heard, and carried to the Supreme Court. On June 26, 1907, plaintiff's counsel entered on the original papers of the former suit that the plaintiff dismissed the case without prejudice to bringing another suit, and signed the entry. Thereafter, on July 17, 1907, the plaintiff filed with the clerk her second suit against the Louisville & Nashville Railroad Company for the same cause of action, and the defendant pleaded in abatement the pendency of the first suit, which it averred was pending in the Circuit Court of the United States for the Northern District of Georgia, and also pleaded in abatement that the second suit was begun without paying all the costs of the first suit, or filing an affidavit of the plaintiff's inability to pay. The issues made by the pleas in abatement were submitted to the judge without the intervention of a jury, and he rendered judgment overruling the pleas. The exception is to this judgment.

1. The two matters urged in abatement are antagonistic. The first suit is still pending, or it has been dismissed. Our first inquiry will be directed to determining whether, under the foregoing facts, the plaintiff's first suit still pends. It has been adjudicated by this court that the petition to remove the case from the state court to the Circuit Court of the United States was in compliance with the act of Congress, and that the judge of the superior court erred in refusing to grant the order of removal. 128 Ga. 283, 57 S. E. 515. The act of Congress provides that, upon filing the petition and bond for removal of the case, "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in said suit." 4 Fed. St. Ann. 349. The re-

quirement is that the state court shall accept the petition and bond, which may be done by entering its approval thereon; but the usual and better practice is to pass an order to remove the case, or deny such order, in explicit language. *Jackson v. United States Life Ins. Co.*, 60 Ga. 427. The Supreme Court of the United States has held: "The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show the right of the petitioner to demand a removal. This being made to appear in the record, and the necessary security having been given, the power of the state court in the case ends, and that of the United States begins. All issues of fact made upon the petition must be tried in the Circuit Court; but the state court is at liberty to determine of itself whether on the face of the record a removal has been effected." *Stone v. South Carolina*, 117 U. S. 431, 6 Sup. Ct. 799, 29 L. Ed. 962, quoted in *Steiner v. Mathewson*, 77 Ga. 659. The general rule as to the removal of cases from a state court to a federal court has been thus stated by this court: "When a petition is filed showing proper cause for removal, and a bond given according to the act of Congress, the case is ipso facto removed. Where the right of removal does not clearly appear, the rule seems to be that the state court may take into consideration the whole record, including the petition for removal, and may decide whether or not the cause of removal exists. If any issue of fact is raised, the state court has no jurisdiction to pass upon it, but must allow the removal and let that issue be tried by the judge of the federal court." *Southern Ry. Co. v. Hudgins*, 108 Ga. 524, 33 S. E. 1011. It has been held in Texas that when a motion for removal, accompanied by petition and bond, has been denied by a state court, and the transcript of the record has not been filed in the Circuit Court, the right to remove may, under certain circumstances, be considered as abandoned, where the defendant makes no complaint of the action of the court in the state Supreme Court on an appeal from the judgment. *Texas & Pac. R. Co. v. Davis*, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562. But when exception is duly taken to the order of the state court refusing to remove the case into a federal court, and the order of refusal is reversed, the case is to be considered as out of the jurisdiction of the state court since the filing of a sufficient petition and bond. See, in this connection, *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. The plaintiff cannot defeat a removal on the ground of separable controversy by striking out of his appeal a prayer for the relief which creates the separable controversy. "The plaintiff cannot reduce his claim by amendment, after petition filed,

to prevent removal. *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660. If the right of removal has once become perfect, it cannot be taken away by any subsequent amendment in state court or federal court, or by a release of part of the debt or damages claimed, or otherwise. Dill. Rem. Caus. § 75, p. 93; *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 660; *The Baltic*, 1 Blatchf. 149, Fed. Cas. No. 826; *Muns v. De Nemours*, 2 Wash. C. C. 463, Fed. Cas. No. 9,931; *Gordon v. Longest*, 16 Pet. 97, 10 L. Ed. 900." *Jones v. Foreman*, 66 Ga. 381. See, also, *Cumberland B. & L. Ass'n v. Wells*, 99 Ga. 223, 25 S. E. 246. The conclusion is inevitable that the effort of the plaintiff to dismiss her case was ineffectual, and that the original case is still pending in the Circuit Court of the United States for the Northern District of Georgia, to which jurisdiction the plaintiff should have applied, if she desired to dismiss her action.

2. Does the pendency of the first case in the Circuit Court of the United States abate the present suit in the state court? In the new suit the amount laid in the ad damnum clause was reduced below \$2,000; but as it is the office of such a clause to state the amount of damages which the plaintiff claims on account of the injury, this circumstance does not alter the essential character of the suit. It is well settled that, if two courts of two distinct sovereignties have jurisdiction of the same matter, the filing of suit in one will not furnish a good plea in abatement to the filing of a suit in the other. Generally speaking, the federal courts and the state courts which have concurrent jurisdiction over civil actions may be considered as courts of separate jurisdictional sovereignties; and where an action in personam is brought in the state court, and a suit for the same cause of action is subsequently brought in the United States court, the pendency of the suit in the state court is no bar to the suit in the United States court. *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; 1 Cyc. 39. The reverse of this is equally true as a general proposition, and the pendency of a prior suit in a Circuit Court of the United States is not a bar to a suit in a state court by the same plaintiff against the same defendant for the same cause of action. This is the general rule, but it is not without exception. The several states form a part of the United States. The federal government has power to enact laws on certain subjects, conferred by the Constitution of the United States, and to administer those laws in the federal courts in cases properly confided to their jurisdiction. For reasons which were satisfactory to the legislative discretion, Congress determined that certain cases, when brought in the state courts, might be removed therefrom to the Circuit Court of the United States. The purpose was to allow a transfer of such cases to be made from the state courts, where they might be brought,

and where without such a transfer they would be tried, to the United States court, and to confer upon that court jurisdiction to try them. When a plaintiff institutes a suit in a state court, which is removable to the federal court under the act of Congress, it is the right of the defendant to have a trial of the case in the United States court, upon compliance with the provisions of the act of Congress in regard thereto. It is evident that as to such cases the theory of distinct suits brought in the jurisdiction of separate and independent sovereignties is not applicable. It was never heard of that one sovereign could by law remove to its jurisdiction cases pending in the jurisdiction of an independent foreign sovereign. The government of the United States is complex in character. In many respects each state is a distinct and separate sovereignty with regard to another state and the federal government. But certain matters have been committed by the Constitution of the United States to the general government; and where Congress enacts laws within its constitutional powers, affecting the transfer of a case from the state court to the federal, such enactment and transfer made in pursuance of it is very different from merely commencing two suits in different jurisdictions.

When Congress declared that certain cases might be removed to the federal court and there tried, and that the state court should "proceed no further in such suit," but the cause should then proceed in the Circuit Court of the United States in the same manner as if it had been brought there originally, did it mean to confer exclusive jurisdiction upon the Circuit Court of the United States so long as the suit should be pending there, or did it contemplate that, as soon as the removal should be effected, the same plaintiff could immediately sue again for the same cause of action in the same court whence the removal had been made? Was it the design of Congress that, as fast as a defendant might exercise his right to remove the case to the Circuit Court of the United States for trial, the plaintiff might bring a fresh suit in the state court for the same cause of action? If so, the removal act would practically have no effect. It seems to be clear that the system of removal of cases to the Circuit Court of the United States contemplated that the Circuit Court of the United States should have exclusive jurisdiction of the cause so long as the case should there be pending. See opinion of Swayne, J., in *French v. Hay*, 22 Wall. 253, 22 L. Ed. 857. If the case be remanded by the federal court to the state court, the jurisdiction of the latter court reattaches, or, more properly speaking, the jurisdiction of the state court, which was suspended after the removal, is resumed, and the case becomes triable in the state court. The provision in the act of Congress for the remand of a case emphasizes the difference between two wholly distinct

suits in separate jurisdiction and causes falling within the provisions of the removal act. Suppose we should sustain the judgment of the trial court in this case, holding that the second suit could proceed without reference to the first, and that subsequently the removed case should be remanded from the federal court to the same state court where the second suit was pending, what would be the situation? There would be two suits, then, in the same court; but the time for pleading in abatement would have passed, and it would have been formally adjudicated that the suit first brought furnished no ground for interference with the second.

When a suit is removed from a state court to the United States court, and is there dismissed without a decision on its merits, the plaintiff may bring a new suit in any court having jurisdiction *ab origine*. *McIver v. Fla. Cen. R. Co.*, 110 Ga. 230, 36 S. E. 775, 65 L. R. A. 437; *Webb v. Son. Cotton Oil Co.*, 131 Ga. 682, 63 S. E. 135; *Young v. So. Bell Tel. Co.*, 75 S. C. 326, 55 S. E. 765, 9 Am. & Eng. Ann. Cas. 940, 7 L. R. A. (N. S.) 501, and citations. When the cause has thus terminated in the Circuit Court of the United States without prejudice to sue again, it is no longer in that court. There is, however, no permanent fastening of jurisdiction for all time in the federal court in respect to the matter involved in the suit. But while the case is there pending that court has exclusive jurisdiction in regard to it and that which is involved in the trial of it. If exclusive jurisdiction was in the federal court when the new suit was filed in the state court, then the latter court was without jurisdiction so long as the case was pending in the United States court. The acts of Congress passed in pursuance of the Constitution of the United States are laws in force in this state; and, if what has been said correctly interprets the removal act, it follows that this plea in abatement should have been sustained.

Judgment reversed. All the Justices concur, except BECK, J., absent.

(132 Ga. 484)

LEWMAN v. OWENS.

(Supreme Court of Georgia. April 19, 1909.)

1. DEEDS (§ 97*)—CONSTRUCTION—INCONSISTENT CLAUSES.

The intention of the parties to a deed, from the whole instrument, should, if possible, be ascertained and carried into effect; but, if two clauses in the deed be utterly inconsistent, the former must prevail.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 269; Dec. Dig. § 97.*]

2. DEEDS (§ 97*)—CONSTRUCTION—ESTATES AND INTERESTS CONVEYED.

F. executed to H. a quitclaim deed conveying a one-fourth interest in a certain lot of land. H. concurrently executed to F. a deed purporting to convey an undivided one-half interest in an adjoining lot. In each of the deeds

was inserted a clause, after the clause of conveyance, and near the close of the paper, which recited that each of the parties acquired an undivided one-half interest in the property by inheritance from their mother, they being her sole heirs at law; that the estate of their mother was never administered, there being no necessity for administration, and no debts against it; that they inherited the property free from incumbrance, and, being of full age, had agreed between themselves upon a division of it; and that each of such deeds was the consideration for the other. In the deed from F. to H. it was also recited that F. "retains an undivided one-fourth interest in the lot in which she this day conveys an undivided one-fourth interest to said H." It was admitted that the recitals as to the manner in which F. had acquired title to the property conveyed by her, that she and H. were the sole heirs of their mother, and that the estate of the latter had never been administered, were untrue. In fact the mother left a will devising her real estate to H. and another daughter, who died testate, devising her estate to F. and H., so that the actual interest which F. owned was an undivided one-fourth interest in the lot described in her conveyance. Held, that by her deed she conveyed to H. the undivided one-fourth interest which she owned, and the subsequent clause, reciting that she also retained a fourth interest, reserved no title in her.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.*]

3. ESTOPPEL (§ 25*)—EQUITABLE ESTOPPEL—PERSONS ESTOPPED.

Under the facts above stated, when a judgment creditor of the administrator of F., after her death, caused the execution issued thereon to be levied on an undivided one-fourth interest in the lot as belonging to F. under the subsequent clause of recital in the deed, no estoppel arose in favor of such creditor against one who acquired title under H.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 61, 62; Dec. Dig. § 25.*]

4. DEEDS (§ 109*)—EVIDENCE—ADMISSIBILITY.

Evidence was offered to show that, a number of years before F. executed her deed to H., the mother of F., together with her two daughters other than F., signed a deed to the husband of F., covering a four-fifths interest in the lot adjoining that now involved, on which they lived afterwards, but which former deed was not shown to have been known to F., or to have been delivered or recorded until several years after the deeds between F. and H. Held, that the evidence was properly rejected.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 239, 280; Dec. Dig. § 109.*]

5. DEEDS (§ 109*)—EVIDENCE—ADMISSIBILITY.

An inventory made by the administrator of F., after her death, was not admissible for the purpose of throwing light on her intention when she executed the deed to H.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 239, 280; Dec. Dig. § 109.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

An execution in favor of H. L. Lewman having been levied upon a one-fourth interest in a lot, John S. Owens appeared and interposed a claim. Judgment for claimant, and Lewman brings error. Affirmed.

Mrs. Mariah L. Harris owned certain land in the city of Atlanta. She died testate, leaving three living daughters. By her will she

left the proceeds of a policy of life insurance to be divided among her three daughters and the children of a deceased son. The rest of her property she bequeathed to her two unmarried daughters, Josephine and Matilda. This will was probated in 1885. Subsequently one of the unmarried daughters, Matilda, died, leaving a will which was probated in August, 1897. By one item of it she devised to her two sisters, Josephine E. Harris and Frances F. Farrar, share and share alike, "my one-half interest in the house and lot on Courtland street, * * * willed to me by my mother." On April 2, 1898, Mrs. Farrar executed to Josephine Harris a quitclaim deed, which was recorded in 1899. It recited a consideration of "the sum of \$5 (and the consideration hereinafter mentioned) cash in hand paid, the receipt of which is hereby acknowledged," and conveyed "an undivided one-fourth interest in a tract of land lying and being in the city of Atlanta, county of Fulton," describing the lot on Courtland street. After the conveying clause the deed contained the following: "The parties to this deed each acquired an undivided half interest in the property described herein by inheritance from their mother, Mariah L. Harris; they being the sole heirs at law of said Mariah L. Harris. The estate of said Mariah L. Harris was never administered, for the reason that no administration was necessary, and it owed and owes no debts. The parties to this deed inherited said property in said respective interests free from incumbrance; and they as sole heirs at law of said deceased, being of legal age and in their own right, have agreed among themselves upon a division of the property embraced in this deed and another deed, of same date made by Josephine E. Harris to Fannie F. Farrar, by which said Harris conveyed to said Farrar a one-half interest in another lot of the same size as this. Each of said deeds is the consideration for the other. With all the rights, members, and appurtenances to the said bargained premises in any wise appertaining or belonging. Said Mrs. Farrar retains an undivided one-fourth interest in the lot in which she this day conveys an undivided one-fourth interest to said Miss Harris. To have and to hold the said bargained premises unto the said Josephine E. Harris, heirs and assigns, so that neither the said Fannie F. Farrar, nor her heirs, nor any other person or persons claiming under her, shall at any time have, claim, or demand any right, title, or interest to the aforesaid bargained premises or its appurtenances." On the same day Miss Josephine Harris made to Mrs. Farrar a quitclaim deed which recited the consideration of \$5 "and the consideration hereinafter named," and purported to convey an undivided one-half interest in the lot adjoining that described in the deed made by Mrs. Farrar. This deed contained the same recitals in regard to the source of the title as those in

the deed from Mrs. Farrar to Miss Harris, and also contained the following statement in connection therewith: "Said Mrs. Farrar retains an undivided one-fourth interest in the lot which she this day conveys to said Josephine E. Harris, so that she only conveys an undivided one-fourth interest therein."

It was admitted by the parties that the recitals as to the manner in which Mrs. Farrar acquired title to the property, and that she and Josephine Harris were the sole heirs of Mariah L. Harris, and that the estate of Mrs. Harris was never administered, were untrue. On December 11, 1900, Josephine Harris conveyed an undivided one-fourth interest in the same land to John S. Owens. In 1899 she had made a conveyance to a three-fourths interest to one Matthews, who conveyed to the Equitable Loan & Security Company in 1900, and that company conveyed to Owens in 1906. On June 27, 1902, Lewman recovered a judgment against the administrator of Mrs. Farrar, who had died. The execution issued thereon was levied on a one-fourth interest in the lot of land described in the deed from Mrs. Farrar to Josephine Harris, on February 9, 1906. Owens interposed a claim. On the trial the facts stated above were shown, without conflict in the evidence. There were some other testimony not material to be set out. The presiding judge directed a verdict in favor of the claimant. The plaintiff moved for a new trial, which was refused, and he excepted.

McDaniel, Alston & Black, for plaintiff in error. E. M. & G. F. Mitchell, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1, 2 Mrs. Farrar and her sister, Josephine E. Harris, owned undivided interests in certain land. Two adjoining lots had originally belonged to their mother, who devised them to Josephine and another sister, Matilda, who later died, leaving a will by which she devised her interest in the property to her two sisters. Thus Mrs. Farrar owned a one-fourth interest, and Josephine a three-fourths, in the lot now in controversy. Certain litigation in regard to the lot adjoining that now involved will be found reported in *Equitable Loan & Security Co. v. Lewman*, 124 Ga. 190, 52 S. E. 599, 3 L. R. A. (N. S.) 879. Mrs. Farrar and her sister made cross deeds to each other for the purpose of making a division of the property, as they declared therein. Josephine conveyed to Mrs. Farrar an interest in the adjoining land (referred to as a one-half interest). Mrs. Farrar undertook to convey something in return to Josephine. She owned a one-fourth interest in the lot now involved in litigation and no more. In the conveying clause of her deed she stated that she "has bargained, sold, and does by these presents bargain, sell, remise, release, and forever quitclaim, to the said Josephine

E. Harris, her heirs and assigns, all the right, title, interest, claim, or demand which the said Fannie F. Farrar has or may have had in and to an undivided one-fourth interest" in the lot described in it. In a later clause inserted in the deed it was recited that she conveyed a one-fourth interest to her sister and had a one-fourth interest left. It is admitted that the recitals that she obtained a one-half interest by inheritance were erroneous. In fact, she had no more than a fourth interest.

It is evident that in the division she intended to convey something to her sister in consideration of the conveyance which the sister made to her concurrently with her deed. As she had only a fourth interest, it must follow, either that she conveyed the one-fourth interest to her sister, and had nothing left, or else that she conveyed nothing to her sister, and had a fourth interest left. Under one construction of the deed, she made a division with her sister, receiving a conveyance from the latter as to other property, and conveying to the sister her interest in this property. Under the other construction, in making deeds to effectuate a division of property with her sister, she received a deed and conveyed nothing in return. It is hardly conceivable that such was the intention of the parties, and that they meant that the conveyance of Mrs. Farrar should in effect say that she conveyed her one-fourth interest in the lot to her sister Josephine, but at the same time retained it in herself. The deed, so construed, would be a somewhat elaborate method of conveying nothing. Having but the interest in the lot above stated, Mrs. Farrar could not both convey it and keep it. If the two clauses of her deed were construed so as to have that meaning, they would be utterly inconsistent, and the former would prevail. Civ. Code 1895, § 3607. If by error of the scrivener, or otherwise, it was supposed that she had another one-fourth interest in the lot besides that which she conveyed, such a recital would not destroy the conveyance of the interest which she really had, and thus render the deed wholly ineffective. One can no more convey all of the estate which he owns in a lot, and yet retain some of it, than he can perform that other proverbially impossible feat of eating his cake and still having it left.

3. It was urged that Owens claimed under Josephine Harris, and in his chain of title was the deed from Mrs. Farrar, which recited that she retained an undivided one-fourth interest in the property, and that he was thereby estopped. It was admitted on the trial that the recitals in the deeds made by Mrs. Farrar to her sister, and by the latter to her, purporting to set out how they acquired title, were not true. Those re-

citals furnished the only indication that Mrs. Farrar ever had more than a one-fourth interest in the lot. Lewman, who is making the contention, is a judgment creditor of Mrs. Farrar, not a party in estate with her. See *Equitable Loan & Security Co. v. Lewman*, 124 Ga. 198, 52 S. E. 599, 3 L. R. A. (N. S.) 879. The deed from Mrs. Farrar to her sister conveyed the one-fourth interest in the lot which the maker owned, and there was no error on the part of the trial judge in so holding, and directing a verdict.

4, 5. Counsel for the plaintiff offered evidence to show that a deed dated June 27, 1888, and recorded in 1902, was made by Mariah L., Josephine, and Matilda Harris as grantors, and Robert M. Farrar as grantee, purporting to convey the interest of the grantors in the property adjoining that in controversy, recited to be a four-fifths undivided interest therein. Testimony of Farrar was also offered, indicating that he knew nothing of the deed made to him until 1900, when he went to Texas, and his sister-in-law delivered a lot of papers to him, among which he found it; that he did not know where she obtained it or anything about it; and that he and his wife lived on the lot, and Mrs. Harris lived with them for several years, as did also his sister-in-law. On objection this evidence was excluded. There was also offered a copy of an inventory made by the administrator of Mrs. Farrar in 1903, in which was returned by him a one-fourth interest in this property. This was also excluded on objection. These rulings were correct. The evidence in regard to the deed made to Farrar in 1888, and which he swore without contradiction he discovered in 1900, after the making of the deeds between his wife and her sister, would not serve to throw light on the intention of Mrs. Farrar as to what interest in the other lot she conveyed. An inventory made by Mrs. Farrar's administrator, long after the execution of the deeds now under discussion, and after she had died, could not have any force in construing the deed made by her to her sister.

Judgment affirmed. All the Justices concur.

(132 Ga. 513)

GODLEY et al. v. BARNES.

(Supreme Court of Georgia. April 19, 1909.)

1. ADVERSE POSSESSION (§ 116*) — INSTRUCTIONS.

Where both parties to an action of ejectment claimed to have title by prescription, the plaintiffs asserting a possession under color of title for 7 years, and defendants setting up adverse possession for 20 years, it was error prejudicial to the plaintiffs to charge that, if they were in possession for 7 years or more, that would give them a good prescriptive title, "unless prior to that time there was another good

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

title outstanding against them." This was calculated to lead the jury to believe that adverse possession for 7 years under color of title would not avail against the holder of a prior outstanding title.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

2. EVIDENCE (§ 273*) — ADVERSE POSSESSION (§ 85*)—JUDGMENT (§§ 707, 708*)—DECLARATIONS CHARACTERIZING POSSESSION AS ADVERSE.

Where a defendant in ejectment claimed to have prescriptive title by virtue of 20 years' adverse possession of the land in dispute by himself and those under whom he held, if he showed possession of the land in one under whom he claimed, it was competent to show acts or declarations on the part of such person characterizing his possession as adverse; and for that purpose it was admissible to prove that, while in possession, he brought suit in assumption against a person who had boxed for turpentine pine trees on the land, though a stranger to the title of the plaintiff in ejectment. But the record of such a suit would not be admissible as showing a conclusive adjudication of title, or as proving the truth of the facts alleged by the plaintiff therein, nor would the mere fact of the rendition of a judgment in such a case be relevant, nor would it be a part of the assertion or claim of title made by the plaintiff in such suit.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 273;* Adverse Possession, Dec. Dig. § 85;* Judgment, Dec. Dig. §§ 707, 708.*]

3. EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITINGS—PLEADINGS.

If the declaration in the former suit was otherwise admissible, as being in the nature of an assertion or act characterizing the possession of the plaintiff therein as adverse, and if the description of the land in such declaration was general in character, but might have been applicable to the land in controversy in the ejectment case, it was competent to show by parol that the trees claimed to have been boxed were located on the land involved in the ejectment suit, in the nature of applying a declaration or assertion to its subject-matter by showing the circumstances in connection with which it was made.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 460.*]

4. OTHER QUESTIONS OF EVIDENCE NOT CONSIDERED.

As the evidence on the next trial may not be the same, other questions dependent upon the evidence will not be dealt with.

5. APPEAL AND ERROR (§ 343*)—RECORD—SUPPORTING OMISSIONS.

As the judge who presided on the hearing of the motion for new trial, in the opinion filed by him in connection with overruling the motion, referred to the general charge, and it did not appear in the record, an order was passed by this court directing the clerk of the superior court to transmit the entire charge of the court. In accordance with this order a transcript of the charge has been forwarded by the clerk of the trial court; but it appears from the certificate thereto attached that it was written out by the official stenographer after the order was passed by this court, and was then agreed upon by counsel as being correct, and the clerk certified that the original charge of the court was either lost, mislaid, or had never been filed. Held, that such charge thus transmitted cannot be considered by this court. Only a record or portion thereof already existing when the case is brought to this court can be required to be thus transmitted. An addition cannot afterwards be made to the record and then sent to

this court. *Lyndon v. Ga. Ry. & Elec. Co.*, 129 Ga. 353, 362, 58 S. E. 1047.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 543.*]

6. APPEAL AND ERROR (§ 928*)—OPINION OF LOWER COURT—CONSTRUCTION.

The erroneous charge dealt with in the first headnote was positively certified to have been given. There was no qualification by the judge who presided at the trial and approved the grounds of the motion, and it does not affirmatively appear that the erroneous charge was subsequently qualified, so as to obviate or cure the error therein. The statement of the judge who presided on the hearing of the motion for new trial, in the opinion filed by him, that "the exceptions to the charge disappear before a reading of the charge in its entirety," was merely an expression of opinion, and not a certificate of any qualification or modification of the charge to which exception was taken. *Bryson v. Chisholm*, 56 Ga. 596.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3754; Dec. Dig. § 928.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Walter G. Chariton, Judge.

Ejectment by N. Godley and others against Moses Barnes. Judgment for defendant, and plaintiffs bring error. Reversed.

Osborne & Lawrence, for plaintiffs in error. J. R. Cain and William P. Hardee, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(132 Ga. 549)

GLAUSIER, WATSON & CO. v. BOSTON NAVAL STORES CO.

(Supreme Court of Georgia. May 12, 1909.)

PARTNERSHIP (§ 216*)—PLEADING AND PROOF—VARIANCE.

Where a partnership is sued for an alleged breach of contract of sale to it, and the plaintiff's proof develops that, if any sale was made, it was jointly to the partnership and to an individual not a member thereof, the variance between the allegata and probata is fatal.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 416; Dec. Dig. § 216.*]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by Glausier, Watson & Co. against the Boston Naval Stores Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

R. J. Bacon and J. H. Merrill, for plaintiffs in error. Bennet & Conyers and W. C. Snodgrass, for defendant in error.

EVANS, P. J. T. J. Glausier and C. I. Clifford, alleging themselves to be partners doing business under the firm name of Glausier, Watson & Co., brought suit against the Boston Naval Stores Company, a partnership alleged to consist of E. R. Whaley,

M. R. Mallette, and H. M. Myrick, and against the partners individually, to recover damages for a breach of contract of sale of a turpentine business. The plaintiffs were nonsuited, and they excepted.

It appeared from the plaintiffs' evidence that they operated a naval stores business at Inwood, Jackson county, Fla., and on November 9, 1905, executed to the parties therein named the following paper: "Jackson County, Florida. In consideration of the sum of seventeen thousand dollars (\$17,000.00), we, Glausier, Watson & Co., hereby lease, sell, and convey all our turpentine interest and holdings, including real estate, turpentine and timber leases, still and fixtures, live stock, wagons, harness, and everything now in use in conducting our business in said state and county; also commissary stock and store fixtures. We hereby acknowledge receipt of one hundred dollars (\$100) in cash in hand paid, and accept same as partial payment on above-mentioned property, from Boston Naval Stores Company, consisting of M. R. Mallette, E. R. Whaley, and H. M. Myrick, and L. F. Driver, to whom we have this day sold above-mentioned property. We, Glausier, Watson & Co., to give immediate possession. We agree to cancel all obligations against the business of Glausier, Watson & Co., and turn same over to Boston Naval Stores Company and L. F. Driver, free and unincumbered in any way, upon the payment of balance due on purchase price. We consider this a cash transaction, settlement to be made as soon as convenient to all parties mentioned. [Signed] Glausier, Watson & Co." Glausier signed the paper for the plaintiffs' firm and delivered it to Whaley, who gave Glausier a check for \$100, signed "Boston Naval Stores Co." Payment of the check was stopped by the drawers. On November 15th the vendee refused to proceed further with the sale, and the plaintiffs took charge of the property.

We will not attempt a summary of the plaintiffs' evidence, introduced for the purpose of identifying the subject-matter of the sale, showing acceptance of the property by the purchasers, and establishing the various elements of damages alleged to have been sustained. This becomes unnecessary, for the reason that, if we allow the fullest scope and effect to this evidence as contended by the plaintiffs, still, under the pleadings and evidence, a nonsuit was inevitable. The terms of the sale and the names of the purchasers are alleged to be contained in the written memorandum attached to the petition by amendment. According to this paper the plaintiffs contracted to sell their turpentine business to the "Boston Naval Stores Company, consisting of M. R. Mallette, E. R. Whaley, and H. M. Myrick, and L. F. Driver." In the plaintiffs' covenant to deliver the property to the purchasers free of incumbrance it is made clear that the purchasers

were the Boston Naval Stores Company and L. F. Driver. The memorandum of sale was in the possession of the defendants when the suit was filed, and was produced under notice, and introduced in evidence by the plaintiffs. When it was discovered, from the memorandum of sale signed by the plaintiffs, that the purchasers were the Boston Naval Stores Company and L. F. Driver, and there was a variance between the allegation of the petition, that the sale was to the Boston Naval Stores Company and the proof in this particular, the plaintiffs amended their petition. The amendment in substance was that the written contract is not in form as agreed upon; that L. F. Driver was no party to the purchase, but the same was made to the Boston Naval Stores Company, and that by the mutual mistake of the parties, and by the mistake of the scrivener, the name of L. F. Driver was inadvertently inserted; and the prayer was that Driver (who was declared to be a resident of the county where the suit was pending) be made a party and served with a copy of the petition and amendment, and that the contract be reformed by striking therefrom the name of Driver. The amendment was allowed, but no service was had upon Driver.

In the assignment of error upon the grant of the nonsuit, it is alleged that, when the motion for a nonsuit was made by the defendants, the plaintiffs objected thereto on the grounds (a) that the case was proved as laid, and (b) that the plaintiffs, after amendment to reform the contract of sale was allowed, were entitled to an opportunity to serve L. F. Driver, and that the court overruled the objections and granted the nonsuit. If plaintiffs desired to serve L. F. Driver, application should have been made to continue or postpone the case for that purpose. It is not to be expected that a court will of its own motion continue a case because of an amendment which a plaintiff makes to his own pleading. On the motion for nonsuit the question was whether the cause of action as formulated in the petition was supported by the evidence. The plaintiffs in their petition averred the sale was made to the Boston Naval Stores Company, and the paper relied on in part to establish the contract of sale set forth a sale to the Boston Naval Stores Company and L. F. Driver. The plaintiffs realized their dilemma, and by amendment asked to reform the writing by striking therefrom the name of Driver. There was no proof offered to sustain the amendment, and the case stood as made in the petition before the amendment, wherein the plaintiffs alleged that they sold their turpentine plant to a partnership. Their proof shows that, if any sale was made, it was to a partnership and an individual. An allegation of a sale to A. is not proved by evidence of a sale to A. and B. *Howell v. Shands*, 35 Ga. 66; *Thompson v. Fenn*, 100 Ga. 234, 28 S. E. 39. This variance between

the allegata and probata justified the grant of the nonsuit.

Complaint is made in the bill of exceptions that the court erred in excluding certain evidence tending to show what property was covered by the written contract of sale which the plaintiffs gave to the defendants. If this evidence had been allowed, the aspect of the case would not have been changed, so far as concerned the variance between the petition and the proof to which we have just referred. Complaint is also made to the allowance of an amendment to the answer. As the plaintiffs were nonsuited because they failed to prove their case as laid, it is immaterial whether the amendment to the plea should have been allowed or rejected.

Judgment affirmed. All the Justices concur.

(132 Ga. 537)

MOSS v. DUNAVANT.

(Supreme Court of Georgia. April 17, 1909.
Rehearing Denied May 12, 1909.)

DIRECTION OF VERDICT.

Under the evidence a verdict for the defendant was demanded, and a direction of such verdict was proper.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Moses Wright, Judge.

Action between A. Y. Moss and H. J. Dunavant. From the judgment, Moss brings error. Affirmed.

H. B. Moss and J. E. Mozley, for plaintiff in error. E. F. Callaway and Dorsey, Brewster, Howell & Heyman, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(132 Ga. 552)

WATSON v. SOUTHERN RY. CO.

(Supreme Court of Georgia. May 12, 1909.)

1. CARRIERS (§ 381*)—EJECTION OF PASSENGERS—EVIDENCE.

The verdict in this case was demanded by the evidence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 381.*]

2. REVIEW ON APPEAL.

The judgment of the court below refusing a new trial being affirmed upon the ground that the evidence demanded a verdict in favor of the defendant, it is unnecessary to consider the other assignments of error.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by E. W. Watson against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff alleged that, being a passenger holding a ticket entitling him to transportation, he was wrongfully and tortiously ejected

from a passenger train of the defendant company by the conductor. After the evidence was closed for both sides, and before the court began the charge to the jury, the plaintiff offered an amendment to his petition, which the court refused to allow. The jury returned a verdict for the defendant. The plaintiff's motion for a new trial was overruled. He excepted to each of the rulings just stated. For the other facts, see the opinion of the court.

H. W. Dent and W. R. Hammond, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

BECK, J. In the petition as originally filed it is alleged, in substance, that the plaintiff boarded the Birmingham train at night with a ticket authorizing him to travel from Atlanta to Birmingham; that he took his seat in a passenger coach of the train, and after it had proceeded a short distance from the terminal station the conductor of the train came to petitioner, and without asking him for his fare or his ticket, or giving him an opportunity to produce his ticket, caught him roughly by the arm and told him that he had to get off the train; and, summoning the porter to assist him, he violently and forcibly dragged petitioner to the door of the car, then out on the platform, and shoved and kicked him off of the train, without any provocation whatever on the part of petitioner. Plaintiff averred that he was behaving himself properly, and that there was no reason why he should have been treated in the manner described. In the declaration it is averred that plaintiff was mortified and humiliated, and other elements of damage were alleged. The case proceeded to trial, and on the trial the plaintiff testified that he went into the car and went to sleep, and the next thing he knew they were putting him off the train. Petitioner asked them what they meant by it, and before he could realize what they were doing he struck the ground. He does not remember what the conductor said to him until after he had been put off the train. He testified that the conductor did not ask him for his ticket, or for anything. In the amendment, which was disallowed, the plaintiff averred that the defendant failed in his duty to him as a passenger, in that he was in a weak physical condition by reason of loss of sleep, and was exhausted; that he was sound asleep when the conductor came along to take up his ticket; that he was also under the influence of drugs and medicine taken because of his sickness; that the conductor aroused him suddenly, or attempted to do so, and, before petitioner was fully aroused, and before he was at himself, or knew what he was doing, "hustled" him off the train without giving him an opportunity, after he became con-

E. Harris, her heirs and assigns, all the right, title, interest, claim, or demand which the said Fannie F. Farrar has or may have had in and to an undivided one-fourth interest in the lot described in it. In a later clause inserted in the deed it was recited that she conveyed a one-fourth interest to her sister and had a one-fourth interest left. It is admitted that the recitals that she obtained a one-half interest by inheritance were erroneous. In fact, she had no more than a fourth interest.

It is evident that in the division she intended to convey something to her sister in consideration of the conveyance which the sister made to her concurrently with her deed. As she had only a fourth interest, it must follow, either that she conveyed the one-fourth interest to her sister, and had nothing left, or else that she conveyed nothing to her sister, and had a fourth interest left. Under one construction of the deed, she made a division with her sister, receiving a conveyance from the latter as to other property, and conveying to the sister her interest in this property. Under the other construction, in making deeds to effectuate a division of property with her sister, she received a deed and conveyed nothing in return. It is hardly conceivable that such was the intention of the parties, and that they meant that the conveyance of Mrs. Farrar should in effect say that she conveyed her one-fourth interest in the lot to her sister Josephine, but at the same time retained it in herself. The deed, so construed, would be a somewhat elaborate method of conveying nothing. Having but the interest in the lot above stated, Mrs. Farrar could not both convey it and keep it. If the two clauses of her deed were construed so as to have that meaning, they would be utterly inconsistent, and the former would prevail. Civ. Code 1895, § 3607. If by error of the scrivener, or otherwise, it was supposed that she had another one-fourth interest in the lot besides that which she conveyed, such a recital would not destroy the conveyance of the interest which she really had, and thus render the deed wholly ineffective. One can no more convey all of the estate which he owns in a lot, and yet retain some of it, than he can perform that other proverbially impossible feat of eating his cake and still having it left.

3. It was urged that Owens claimed under Josephine Harris, and in his chain of title was the deed from Mrs. Farrar, which recited that she retained an undivided one-fourth interest in the property, and that he was thereby estopped. It was admitted on the trial that the recitals in the deeds made by Mrs. Farrar to her sister, and by the latter to her, purporting to set out how they acquired title, were not true. Those re-

citals furnished the only indication that Mrs. Farrar ever had more than a one-fourth interest in the lot. Lewman, who is making the contention, is a judgment creditor of Mrs. Farrar, not a party in estate with her. See *Equitable Loan & Security Co. v. Lewman*, 124 Ga. 198, 52 S. E. 599, 3 L. R. A. (N. S.) 879. The deed from Mrs. Farrar to her sister conveyed the one-fourth interest in the lot which the maker owned, and there was no error on the part of the trial judge in so holding, and directing a verdict.

4, 5. Counsel for the plaintiff offered evidence to show that a deed dated June 27, 1888, and recorded in 1902, was made by Mariah L., Josephine, and Matilda Harris as grantors, and Robert M. Farrar as grantee, purporting to convey the interest of the grantors in the property adjoining that in controversy, recited to be a four-fifths undivided interest therein. Testimony of Farrar was also offered, indicating that he knew nothing of the deed made to him until 1900, when he went to Texas, and his sister-in-law delivered a lot of papers to him, among which he found it; that he did not know where she obtained it or anything about it; and that he and his wife lived on the lot, and Mrs. Harris lived with them for several years, as did also his sister-in-law. On objection this evidence was excluded. There was also offered a copy of an inventory made by the administrator of Mrs. Farrar in 1903, in which was returned by him a one-fourth interest in this property. This was also excluded on objection. These rulings were correct. The evidence in regard to the deed made to Farrar in 1888, and which he swore without contradiction he discovered in 1900, after the making of the deeds between his wife and her sister, would not serve to throw light on the intention of Mrs. Farrar as to what interest in the other lot she conveyed. An inventory made by Mrs. Farrar's administrator, long after the execution of the deeds now under discussion, and after she had died, could not have any force in construing the deed made by her to her sister.

Judgment affirmed. All the Justices concur.

(132 Ga. 513)

GODLEY et al. v. BARNES.

(Supreme Court of Georgia. April 19, 1909.)

1. ADVERSE POSSESSION (§ 116*) — INSTRUCTIONS.

Where both parties to an action of ejectment claimed to have title by prescription, the plaintiffs asserting a possession under color of title for 7 years, and defendants setting up adverse possession for 20 years, it was error prejudicial to the plaintiffs to charge that, if they were in possession for 7 years or more, that would give them a good prescriptive title, "unless prior to that time there was another good

title outstanding against them." This was calculated to lead the jury to believe that adverse possession for 7 years under color of title would not avail against the holder of a prior outstanding title.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

2. EVIDENCE (§ 273*) — ADVERSE POSSESSION (§ 85*)—JUDGMENT (§§ 707, 708*)—DECLARATIONS CHARACTERIZING POSSESSION AS ADVERSE.

Where a defendant in ejectment claimed to have prescriptive title by virtue of 20 years' adverse possession of the land in dispute by himself and those under whom he held, if he showed possession of the land in one under whom he claimed, it was competent to show acts or declarations on the part of such person characterizing his possession as adverse; and for that purpose it was admissible to prove that, while in possession, he brought suit in assumption against a person who had boxed for turpentine pine trees on the land, though a stranger to the title of the plaintiff in ejectment. But the record of such a suit would not be admissible as showing a conclusive adjudication of title, or as proving the truth of the facts alleged by the plaintiff therein, nor would the mere fact of the rendition of a judgment in such a case be relevant, nor would it be a part of the assertion or claim of title made by the plaintiff in such suit.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 273;* Adverse Possession, Dec. Dig. § 85;* Judgment, Dec. Dig. §§ 707, 708.*]

3. EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITINGS—PLEADINGS.

If the declaration in the former suit was otherwise admissible as being in the nature of an assertion or act characterizing the possession of the plaintiff therein as adverse, and if the description of the land in such declaration was general in character, but might have been applicable to the land in controversy in the ejectment case, it was competent to show by parol that the trees claimed to have been boxed were located on the land involved in the ejectment suit, in the nature of applying a declaration or assertion to its subject-matter by showing the circumstances in connection with which it was made.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 460.*]

4. OTHER QUESTIONS OF EVIDENCE NOT CONSIDERED.

As the evidence on the next trial may not be the same, other questions dependent upon the evidence will not be dealt with.

5. APPEAL AND ERROR (§ 543*)—RECORD—SUPPLYING OMISSIONS.

As the judge who presided on the hearing of the motion for new trial, in the opinion filed by him in connection with overruling the motion, referred to the general charge, and it did not appear in the record, an order was passed by this court directing the clerk of the superior court to transmit the entire charge of the court. In accordance with this order a transcript of the charge has been forwarded by the clerk of the trial court; but it appears from the certificate thereto attached that it was written out by the official stenographer after the order was passed by this court, and was then agreed upon by counsel as being correct, and the clerk certified that the original charge of the court was either lost, mislaid, or had never been filed. Held, that such charge thus transmitted cannot be considered by this court. Only a record or portion thereof already existing when the case is brought to this court can be required to be thus transmitted. An addition cannot afterwards be made to the record and then sent to

this court. *Lyndon v. Ga. Ry. & Elec. Co.*, 129 Ga. 353, 362, 58 S. E. 1047.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 543.*]

6. APPEAL AND ERROR (§ 928*)—OPINION OF LOWER COURT—CONSTRUCTION.

The erroneous charge dealt with in the first headnote was positively certified to have been given. There was no qualification by the judge who presided at the trial and approved the grounds of the motion, and it does not affirmatively appear that the erroneous charge was subsequently qualified, so as to obviate or cure the error therein. The statement of the judge who presided on the hearing of the motion for new trial, in the opinion filed by him, that "the exceptions to the charge disappear before a reading of the charge in its entirety," was merely an expression of opinion, and not a certificate of any qualification or modification of the charge to which exception was taken. *Bryson v. Chisholm*, 56 Ga. 596.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3754; Dec. Dig. § 928.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Walter G. Chariton, Judge.

Ejectment by N. Godley and others against Moses Barnes. Judgment for defendant, and plaintiffs bring error. Reversed.

Osborne & Lawrence, for plaintiffs in error. J. R. Cain and William P. Hardee, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(122 Ga. 549)

GLAUSIER, WATSON & CO. v. BOSTON NAVAL STORES CO.

(Supreme Court of Georgia. May 12, 1909.)

PARTNERSHIP (§ 216*)—PLEADING AND PROOF—VARIANCE.

Where a partnership is sued for an alleged breach of contract of sale to it, and the plaintiff's proof develops that, if any sale was made, it was jointly to the partnership and to an individual not a member thereof, the variance between the allegata and probata is fatal.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 416; Dec. Dig. § 216.*]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by Glausier, Watson & Co. against the Boston Naval Stores Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

R. J. Bacon and J. H. Merrill, for plaintiffs in error. Bennet & Conyers and W. C. Snodgrass, for defendant in error.

EVANS, P. J. T. J. Glausier and C. I. Clifford, alleging themselves to be partners doing business under the firm name of Glausier, Watson & Co., brought suit against the Boston Naval Stores Company, a partnership alleged to consist of E. R. Whaley,

M. R. Mallette, and H. M. Myrick, and against the partners individually, to recover damages for a breach of contract of sale of a turpentine business. The plaintiffs were nonsuited, and they excepted.

It appeared from the plaintiffs' evidence that they operated a naval stores business at Inwood, Jackson county, Fla., and on November 9, 1905, executed to the parties therein named the following paper: "Jackson County, Florida. In consideration of the sum of seventeen thousand dollars (\$17,000.00), we, Glausier, Watson & Co., hereby lease, sell, and convey all our turpentine interest and holdings, including real estate, turpentine and timber leases, still and fixtures, live stock, wagons, harness, and everything now in use in conducting our business in said state and county; also commissary stock and store fixtures. We hereby acknowledge receipt of one hundred dollars (\$100) in cash in hand paid, and accept same as partial payment on above-mentioned property, from Boston Naval Stores Company, consisting of M. R. Mallette, E. R. Whaley, and H. M. Myrick, and L. F. Driver, to whom we have this day sold above-mentioned property. We, Glausier, Watson & Co., to give immediate possession. We agree to cancel all obligations against the business of Glausier, Watson & Co., and turn same over to Boston Naval Stores Company and L. F. Driver, free and unincumbered in any way, upon the payment of balance due on purchase price. We consider this a cash transaction, settlement to be made as soon as convenient to all parties mentioned. [Signed] Glausier, Watson & Co." Glausier signed the paper for the plaintiffs' firm and delivered it to Whaley, who gave Glausier a check for \$100, signed "Boston Naval Stores Co." Payment of the check was stopped by the drawers. On November 15th the vendee refused to proceed further with the sale, and the plaintiffs took charge of the property.

We will not attempt a summary of the plaintiffs' evidence, introduced for the purpose of identifying the subject-matter of the sale, showing acceptance of the property by the purchasers, and establishing the various elements of damages alleged to have been sustained. This becomes unnecessary, for the reason that, if we allow the fullest scope and effect to this evidence as contended by the plaintiffs, still, under the pleadings and evidence, a nonsuit was inevitable. The terms of the sale and the names of the purchasers are alleged to be contained in the written memorandum attached to the petition by amendment. According to this paper the plaintiffs contracted to sell their turpentine business to the "Boston Naval Stores Company, consisting of M. R. Mallette, E. R. Whaley, and H. M. Myrick, and L. F. Driver." In the plaintiffs' covenant to deliver the property to the purchasers free of incumbrance it is made clear that the purchasers

were the Boston Naval Stores Company and L. F. Driver. The memorandum of sale was in the possession of the defendants when the suit was filed, and was produced under notice, and introduced in evidence by the plaintiffs. When it was discovered, from the memorandum of sale signed by the plaintiffs, that the purchasers were the Boston Naval Stores Company and L. F. Driver, and there was a variance between the allegation of the petition, that the sale was to the Boston Naval Stores Company and the proof in this particular, the plaintiffs amended their petition. The amendment in substance was that the written contract is not in form as agreed upon; that L. F. Driver was no party to the purchase, but the same was made to the Boston Naval Stores Company, and that by the mutual mistake of the parties, and by the mistake of the scrivener, the name of L. F. Driver was inadvertently inserted; and the prayer was that Driver (who was declared to be a resident of the county where the suit was pending) be made a party and served with a copy of the petition and amendment, and that the contract be reformed by striking therefrom the name of Driver. The amendment was allowed, but no service was had upon Driver.

In the assignment of error upon the grant of the nonsuit, it is alleged that, when the motion for a nonsuit was made by the defendants, the plaintiffs objected thereto on the grounds (a) that the case was proved as laid, and (b) that the plaintiffs, after amendment to reform the contract of sale was allowed, were entitled to an opportunity to serve L. F. Driver, and that the court overruled the objections and granted the nonsuit. If plaintiffs desired to serve L. F. Driver, application should have been made to continue or postpone the case for that purpose. It is not to be expected that a court will of its own motion continue a case because of an amendment which a plaintiff makes to his own pleading. On the motion for nonsuit the question was whether the cause of action as formulated in the petition was supported by the evidence. The plaintiffs in their petition averred the sale was made to the Boston Naval Stores Company, and the paper relied on in part to establish the contract of sale set forth a sale to the Boston Naval Stores Company and L. F. Driver. The plaintiffs realized their dilemma, and by amendment asked to reform the writing by striking therefrom the name of Driver. There was no proof offered to sustain the amendment, and the case stood as made in the petition before the amendment, wherein the plaintiffs alleged that they sold their turpentine plant to a partnership. Their proof shows that, if any sale was made, it was to a partnership and an individual. An allegation of a sale to A. is not proved by evidence of a sale to A. and B. *Howell v. Shands*, 35 Ga. 66; *Thompson v. Fenn*, 100 Ga. 234, 28 S. E. 39. This variance between

the allegata and probata justified the grant of the nonsuit.

Complaint is made in the bill of exceptions that the court erred in excluding certain evidence tending to show what property was covered by the written contract of sale which the plaintiffs gave to the defendants. If this evidence had been allowed, the aspect of the case would not have been changed, so far as concerned the variance between the petition and the proof to which we have just referred. Complaint is also made to the allowance of an amendment to the answer. As the plaintiffs were nonsuited because they failed to prove their case as laid, it is immaterial whether the amendment to the plea should have been allowed or rejected.

Judgment affirmed. All the Justices concur.

(132 Ga. 537)

MOSS v. DUNAVANT.

(Supreme Court of Georgia. April 17, 1909.
Rehearing Denied May 12, 1909.)

DIRECTION OF VERDICT.

Under the evidence a verdict for the defendant was demanded, and a direction of such verdict was proper.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Moses Wright, Judge.

Action between A. Y. Moss and H. J. Dunavant. From the judgment, Moss brings error. Affirmed.

H. B. Moss and J. E. Mozley, for plaintiff in error. E. F. Callaway and Dorsey, Brewster, Howell & Heyman, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(132 Ga. 552)

WATSON v. SOUTHERN RY. CO.

(Supreme Court of Georgia. May 12, 1909.)

1. CARRIERS (§ 381*)—EJECTION OF PASSENGERS—EVIDENCE.

The verdict in this case was demanded by the evidence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 381.*]

2. REVIEW ON APPEAL.

The judgment of the court below refusing a new trial being affirmed upon the ground that the evidence demanded a verdict in favor of the defendant, it is unnecessary to consider the other assignments of error.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by E. W. Watson against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff alleged that, being a passenger holding a ticket entitling him to transportation, he was wrongfully and tortiously ejected

from a passenger train of the defendant company by the conductor. After the evidence was closed for both sides, and before the court began the charge to the jury, the plaintiff offered an amendment to his petition, which the court refused to allow. The jury returned a verdict for the defendant. The plaintiff's motion for a new trial was overruled. He excepted to each of the rulings just stated. For the other facts, see the opinion of the court.

H. W. Dent and W. R. Hammond, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

BECK, J. In the petition as originally filed it is alleged, in substance, that the plaintiff boarded the Birmingham train at night with a ticket authorizing him to travel from Atlanta to Birmingham; that he took his seat in a passenger coach of the train, and after it had proceeded a short distance from the terminal station the conductor of the train came to petitioner, and without asking him for his fare or his ticket, or giving him an opportunity to produce his ticket, caught him roughly by the arm and told him that he had to get off the train; and, summoning the porter to assist him, he violently and forcibly dragged petitioner to the door of the car, then out on the platform, and shoved and kicked him off of the train, without any provocation whatever on the part of petitioner. Plaintiff averred that he was behaving himself properly, and that there was no reason why he should have been treated in the manner described. In the declaration it is averred that plaintiff was mortified and humiliated, and other elements of damage were alleged. The case proceeded to trial, and on the trial the plaintiff testified that he went into the car and went to sleep, and the next thing he knew they were putting him off the train. Petitioner asked them what they meant by it, and before he could realize what they were doing he struck the ground. He does not remember what the conductor said to him until after he had been put off the train. He testified that the conductor did not ask him for his ticket, or for anything. In the amendment, which was disallowed, the plaintiff averred that the defendant failed in his duty to him as a passenger, in that he was in a weak physical condition by reason of loss of sleep, and was exhausted; that he was sound asleep when the conductor came along to take up his ticket; that he was also under the influence of drugs and medicine taken because of his sickness; that the conductor aroused him suddenly, or attempted to do so, and, before petitioner was fully aroused, and before he was at himself, or knew what he was doing, "hustled" him off the train without giving him an opportunity, after he became con-

scious of what was going on, to pay his fare or deliver his ticket; and that petitioner, in his weak and excited condition, was wholly unable to understand the situation and appreciate what was going on, and for this reason failed to tender his ticket, but "was hustled off" before he had time to do so. And in the second division of the amendment to the petition it is averred that the conductor, by the exercise of proper care, could and ought to have ascertained petitioner's condition, and ought to have waited on petitioner until he was fully aroused, and fully at himself, and was fully conscious of his surroundings, and that the conductor failed to exercise toward petitioner the degree of care required by law, and that if he had done so it would have been unnecessary to eject plaintiff from the train.

Conceding that the amendment was germane to the cause of action as originally stated in the petition, we do not think that its rejection is cause for a new trial, as, under the evidence in the case, a verdict for the defendant was demanded. It is to be remembered that this amendment was tendered after the evidence for both sides had been concluded. Its rejection did not deprive plaintiff of the right to introduce evidence in his favor. He had already introduced, under the allegations of the original petition, all of the evidence bearing upon the allegations in the amendment which he desired or was able to furnish. That the plaintiff was ejected from the train is undisputed, but his ejection was the result of provocation given by him and conduct upon his part that imperatively required the conductor, in the discharge of the duty which he owed to the railroad company and to other passengers in the car, to remove the plaintiff from the train. The evidence establishing the fact of the provocation given by the plaintiff, and of such gross misconduct on his part as necessitated his ejection, is not controverted in the testimony of the plaintiff himself. He testified that he was not in a condition to know what occurred between himself and the employees of the defendant company in charge of the train before he was carried to the door and platform of the coach in which he was riding. But the undisputed testimony of the conductor and five passengers shows that the conductor, before undertaking to eject the passenger, had courteously demanded his ticket, and that he patiently waited even longer than could have been expected of him under the circumstances as developed in the evidence which we find in the record.

The conductor testified: "I went to him and asked him for his ticket, and he told me he didn't have any ticket. I asked him where he was going, and he said he wasn't going anywhere. He was going to stay here. I said: 'Well, you must have a ticket somewhere. Feel in your pockets, and see if you haven't got a ticket.' He said: 'No; I

haven't got a ticket.' I said: 'Well, you will have to pay your fare then.' He said: 'No, I won't; pass me on by.' I said: 'No; I can't do that. You will have to give me a ticket or your fare, one.' He said: 'Well, I won't give you nothing.' I talked with him I reckon five minutes, begging him to give me his ticket, or tell me where he was going, or pay his fare, or something, and he cursed me for everything nearly. He said: 'God damn you, I am not going to give you nothing,' or something like. 'To hell with you. What in the hell is the matter with you?' There were some ladies on the seat behind him, and some more across the aisle, and I said: 'You will have to get off, if you won't give me your ticket or pay your fare. If you curse me in the presence of these ladies, I will have to put you off.' That's when he jumped up and said: 'What in the hell is the matter with you.' I pulled the bell cord first and stopped the train, and pulled him out in the aisle, and carried him out, and put him off. That was in the first-class coach. He was on the left-hand side, about the second or third seat. I saw a bottle. He tried to hit me with it. He got it out of his pocket. It looked like whisky. It looked red. I just pushed him along in front of me—caught him by the arm, and got him out in the aisle, and pushed him along. I did not strike him with feet or my hands, or use any abusive language to him. I treated him as nice as a man could. The train was stopped, and was standing still. I had the porter to get off on the ground, and handed his grip and overcoat to the porter, and I also had the porter to hold him to keep him from getting back on the train. * * * He did not seem unnatural, only in the way he talked. He did not appear as if anything was the matter with him. I can't say he was under the influence of liquor. I don't remember whether I smelled whisky on him or not. He didn't look like a sick man to me. He looked all right. I know I couldn't hardly do much with him, and I am pretty stout. He gave me all I wanted to get him off. He did not act like a drunk man. He wasn't feeble at all. He was a stout man. He tried to hit me all the way, from the time we started until we got him off. There was no occasion whatever for him to treat me that way. I did not say a thing out of the way to him, or to irritate him. I said to him: 'You will have to give me your ticket or pay your fare.' Every time I asked him for a ticket, he said he didn't have a ticket, and refused to pay his fare."

The testimony of the conductor is corroborated by that of several witnesses, who were passengers in the coach where the plaintiff was and from which he was ejected. One of these passengers, Mrs. Ulmer, testified: "When I went on the train, I told the conductor to wake me up when we got to Austell. When we got a little way out

of town, I thought I was near Austall. I heard a commotion in the train, and a gentleman using some pretty bad language, and the conductor was carrying him out. * * * I don't remember seeing him go out of the train. When I heard the commotion, I woke up. I just heard a few words pass as the conductor and the man was coming out. The other man was resisting against the conductor. The passenger was doing the cursing. * * * I don't know whether the man was drunk or not. I didn't see him take a drink. I was asleep when the conductor went to him, and didn't see him. I was not certain who was doing the cursing, but imagine the passenger was doing it."

Mrs. Roberts, who was a passenger, testified; "I remember the plaintiff on that train. He was asleep, and the conductor came, and woke him up, and asked him for a ticket, and he said he didn't have any, and refused to give it up. He [the conductor] told him: 'You must hunt your ticket up by the time I come through again.' He went on, took up the rest of the tickets, came back, and asked him for his ticket again; and he got mad, and said he wasn't going to give him any ticket, he didn't have any; and he drew a bottle out of his pocket. I thought it was a gun. He cursed, and the conductor stopped the train and put him off. Mr. Watson never gave him his ticket or paid his fare. He did the cursing. The conductor did not curse any, nor did he strike Mr. Watson in the coach. Nobody in there cursed, except Mr. Watson. * * * I don't remember what Mr. Watson said, if anything, to my husband. He did not say anything to him directly. He was just kinder throwing his arms, fighting like. * * * Mr. Watson impressed me as being drunk. He acted very unreasonably and foolishly. The conductor did not do or say anything to irritate him. He only asked him for his ticket. Mr. Watson just cursed and refused to pay his fare. I don't remember his words. I was right across the aisle from him."

R. E. McEver testified: "I had been losing right smart sleep up to that time, and I went to sleep when I went in that car. I left the ticket where the conductor could get it. * * * What woke me up was that argument about a ticket. The conductor asked a man, I suppose Mr. Watson, though I couldn't swear who it was, for a ticket; and he told him he didn't have a ticket. He asked him where he was going, and he said he wasn't going anywhere. * * * He told him he would put him off the train. He told him he would do no such thing. I don't remember the argument exactly, but words to that effect, and then he proceeded to put him off. There was some cursing done there by the passenger. * * * The man drew a bottle from his pocket, which looked like a pint bottle. * * * He made a motion like he was going to hit him [the conductor]. But I don't think he tried very hard to hit

him. The man was drunk. * * * The conductor made the remark: 'I will put you off.' He said: 'You won't do no such a God damn thing.'"

G. D. Roberts, sworn by the defendant, gave testimony corroborating the conductor and the other witnesses who had testified for the defendant, showing that the conductor was patient, courteous, and reasonable, and that he only ejected the plaintiff from the train when it became his imperative duty to do so. There is other testimony in the case, corroborative of the witnesses for the defendant whom we have named above; but it is unnecessary to set out more of the evidence. No circumstance is testified to, either by the plaintiff himself or any of the witnesses, which would have authorized the jury to have found that it was the duty of the conductor to have waited longer before ejecting the plaintiff, after the grossly improper conduct of which he had been guilty.

All the evidence indicates that the passenger was drunk and boisterous; and if it be true, as he now insists, that he was afflicted with some malady which, together with the medicines and drugs which he had taken, caused him to be in the condition in which he was on the night in question, then his malady and the drugs which he had taken produced in him a condition which, tested by all the objective symptoms, was so exactly similar to the condition, mentally and physically, of an intoxicated man, that the conductor of the train could not possibly distinguish between the passenger's conduct and that of a man who had been drinking intoxicants to excess. The conductor's duty, under circumstances like these which we have detailed above, is thus defined in the opinion written by Mr. Justice Lumpkin, in the case of Hillman v. Railroad Company, 126 Ga. 814, 56 S. E. 68: "A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence, injury, or outrage and humiliation by third persons. This protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by the law, and his failure to afford it, when he has knowledge that there is occasion for his interference, will subject the company to liability in damages." In 2 Hutchinson on Carriers, p. 1122, it is said: "The passenger, from the time he enters his vehicle, has the right to claim the protection of the carrier from the insults and violence of others, whether entering it as a passenger or not; and the law exacts from him the prompt employment of all means at his command to protect the passengers against such outrages, either by quelling the disturbance or by the expulsion of those engaged in it, if necessary. In such an emergency, the duty of the carrier is said to be the same as that which he is under in other respects, to do all that can be done to insure the safety of the passengers." In

the case of *Vinton v. Railroad Company*, 11 Allen (Mass.) 304, 87 Am. Dec. 714, it was said: "The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance, or repress acts of violence or breaches of decorum, after they have been committed, and the mischief of annoyance and disturbance have been done. Indeed, if the rule laid down at the trial be correct, then it would follow that passengers in public vehicles must be subjected to a certain amount or degree of discomfort or insult from evil-disposed persons before the right to expel them would accrue to a carrier or his servant. There would be no authority to restrain or prevent profaneness, indecency, or other breaches of decorum in speech or behavior, until it had continued long enough to become manifest to the eyes or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its practical value." See, also, the case of *Korn v. Railway Company*, 125 Fed. 897, 62 C. C. A. 417, 63 L. R. A. 872; and 4 *Elliott on Railroads*, § 1837, and cases cited.

While, under the circumstances and facts shown by the evidence in the record, the conductor had the right and was under the duty to eject the plaintiff from the train, it was also his duty to observe due care and diligence to avoid inflicting upon him any personal injury, and not to use violence or unnecessary force in removing him from the train, as well as to see that the ejected passenger was not placed and left in an unsafe or dangerous locality; and we assume, inasmuch as there is no complaint as to the charge of the court upon this branch of the case, that the law relative thereto was properly stated to the jury by the court in his instructions to them.

Having held that the evidence in the case demanded a verdict in favor of the defendant, it is unnecessary to deal with the specific assignments of error upon the refusal of the court to give in charge certain instructions contained in written requests. *Kelly & Jones Co. v. Moore*, 128 Ga. 683, 58 S. E. 181.

Judgment affirmed. All the Justices concur.

(132 Ga. 490)

YOUNG v. GERMANIA SAVINGS BANK.
(Supreme Court of Georgia. April 19, 1909.)

1. EXECUTION (§ 80*)—DIRECTION TO PROPER OFFICERS—STATUTORY PROVISIONS.

The act of 1871 (Acts 1871-72, pp. 57, 59) provided that all executions issued from the city court of Atlanta shall be directed "to the sheriff, or his deputy, of the city court of Atlanta,

and all and singular the sheriffs, or their deputies, of the state of Georgia, and may be levied on all the property of the defendants throughout the state; but the sheriff, or his deputy, of said city court may levy all such executions on property within any part of the county of Fulton." It also provided that "the clerk and sheriff, and their deputies, of the superior court of Fulton county shall be ex officio clerk, sheriff, and deputies of the city court of Atlanta." Where an execution was issued from that court "to all and singular the sheriffs of the state and their lawful deputies," and was levied on certain land in Fulton county by the deputy sheriff of that county, there was no error in refusing to dismiss the levy for want of proper direction. *Buchanan v. Sterling*, 63 Ga. 227; *Cheney v. Beall*, 69 Ga. 533; *Byars v. Curry*, 75 Ga. 515.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 176; Dec. Dig. § 80.*]

2. EXECUTION (§ 93*)—SIGNING.

Where such an execution, issued from the city court of Atlanta, was signed "Arnold Broyles, Clerk," the court properly refused to dismiss a levy of such execution, on motion of a claimant of the property, on the ground that it did not appear to be officially signed by the clerk of the superior court and ex officio clerk of the city court. The word "clerk," construed in connection with the recitals in the execution to the effect that it issued upon a judgment rendered in the city court of Atlanta, for which this court will take judicial cognizance that the law provides a clerk, imports that the paper was signed officially, and not by Arnold Broyles in a private capacity.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 188; Dec. Dig. § 93.*]

3. EXECUTION (§ 144*)—LEVY—SETTING ASIDE—GROUNDS.

That two entries of levy on the same piece of real estate appeared on the execution furnished no reason for dismissing the second levy, on motion of the claimant of the property, on the ground that the first levy was not accounted for.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 371; Dec. Dig. § 144.*]

4. EXECUTION (§ 144*)—LEVY—SETTING ASIDE—GROUNDS.

Where an execution issued from the city court of Atlanta commanded a levy and sale to be made of the goods and chattels, lands, and tenements generally of the defendant, and especially of a certain described lot of land, to realize the amount of the judgment, this furnished no reason for dismissing a levy on such land, on the motion of a person who had interposed a claim thereto, on the ground that there was no authority of law for the city court to issue a *fi. fa.* as a special lien on particular property.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 371; Dec. Dig. § 144.*]

5. APPEAL AND ERROR (§ 708*)—REVIEW—SCOPE—QUESTIONS ARISING AFTER JUDGMENT.

A ground of a motion to dismiss a levy, "because the alleged *fi. fa.* does not follow the judgment on which it is predicated, and does not follow the petition," cannot be considered by this court, where no specification is made as to the variance claimed to exist, and neither the judgment nor the petition is before this court, and it is not shown that they were placed before the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2948; Dec. Dig. § 708.*]

6. EXECUTION (§ 144*)—LEVY—SETTING ASIDE—GROUNDS.

Where an execution issued from the city court of Atlanta, and directed as recited in the first headnote, was levied on land in Fulton county, which was described in the execution, the fact that the entry of levy was signed "J. M. Goldsmith, Deputy Sheriff," was not a sufficient reason for dismissing the levy on the ground that the signature did not indicate of what court or county the levying officer was deputy sheriff. *Prima facie* he would be presumed to be deputy sheriff in the jurisdiction in which he acted. *Connolly v. Atlantic Contracting Co.*, 120 Ga. 213, 47 S. E. 575; *Rucker v. Tabor*, 126 Ga. 132, 54 S. E. 959.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 371; Dec. Dig. § 144.*]

7. EXECUTION (§ 144*)—LEVY—SETTING ASIDE—GROUNDS.

The levy on the land not being open to any other ground of attack urged against it, the statement in the entry, "a deed having been filed and recorded for purpose of levy and sale as required by law," would not furnish ground for dismissing the entire levy, on motion of a claimant of the land.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 371; Dec. Dig. § 144.*]

8. EXECUTION (§ 140*)—ENTRY OF LEVY—DESCRIPTION OF PREMISES—SUFFICIENCY.

An entry of levy on land contained the following description of the property: "Land lot 81 of the 14th district of Fulton county, Georgia, and known as lot B, in block 4, in the Wallace & Seago subdivision of the Means property, said lot B fronting forty-five (45) feet, more or less, on the east side of State street, and extending back east, same width as front, one hundred (100) feet, more or less, bounded south by an alley, by lot C, north by lot A, and west by State street, and being about two hundred (200) feet north of Macedonia Baptist Church place." *Held*, that such levy was not subject to be dismissed on the ground that the description of the property was not sufficient to identify or locate any particular property, and was too uncertain, vague, and indefinite. *Broach v. O'Neal*, 94 Ga. 474, 20 S. E. 113.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 334-337; Dec. Dig. § 140.*]

9. EXECUTION (§ 144*)—LEVY—SETTING ASIDE—GROUNDS.

Where an entry of levy on real estate recited that the "defendant in *fi. fa.* is in possession," it was proper to overrule a ground of a motion to dismiss the levy "because claimant denies the statement, to wit, 'defendant in *fi. fa.* is in possession,' and claimant says that she was in possession before the date of the alleged judgment, before the date of the alleged *fi. fa.*, and before the date of the alleged levies, and is in possession of that property now, and she has been so in possession of that property for more than 20 years, and she also says that she has had a deed to it for many years, and it is her property."

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 371; Dec. Dig. § 144.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Jennie Young and the Germania Savings Bank. From the judgment, Jennie Young brings error. **Affirmed.**

Robt. E. Rodgers, for plaintiff in error.
Westmoreland Bros., for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 503)

AUGUSTA FACTORY v. MENTE & CO.
(Supreme Court of Georgia. April 19, 1909.)

1. SALES (§ 58*)—CONTRACT—WHAT CONSTITUTES—STATEMENTS APPEARING ON LETTER HEADS.

Where a written contract between a factory company and a purchaser of cloth provided in express terms that the former should deliver to the latter at a distant city 200,000 yards of cloth of a kind described and at prices stated, and that 50,000 yards should be delivered weekly, commencing on a specified date, such contract as to the time of delivery was not modified or changed by the fact that on letter heads used in the correspondence between the parties through which the contract was made was certain printed matter, including, among other things, a statement that "all agreements are contingent upon strikes, accidents, and other delays beyond our control."

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 58.*]

2. CONTRACTS (§ 211*)—SALES (§ 81*)—TIME OF THE ESSENCE—CONTRACT TO DELIVER COTTON GOODS.

While time is not generally of the essence of a contract, it may become so by express stipulation or by reasonable construction. In this case the presiding judge did not err in holding that time was of the essence of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 938-943; Dec. Dig. § 211; * *Sales*, Dec. Dig. § 81.*]

3. SALES (§ 81*)—CONTRACT—TIME FOR PERFORMANCE—REASONABLE TIME.

Where a written contract of the character indicated in the first headnote was made, and the vendor failed to deliver the goods within the time specified therein, if time were not originally of the essence of the contract, the vendee could, by notice to the vendor, fix a reasonable time for delivery, and call upon the vendor to perform within such time. The time thus set, if reasonable, would become essential; and, upon failure to make delivery within it, the vendee could treat such failure as a breach, and hold the vendor for damages accruing therefrom.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 217-223, 356; Dec. Dig. § 81.*]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; W. F. Eve, Judge.

Action by Mente & Co. against the Augusta Factory. Judgment for plaintiffs, and defendant brings error. **Affirmed.**

Mente & Co. brought suit against the Augusta Factory to recover damages for a breach of contract, alleging that the defendant had contracted to sell them certain cotton goods of two described characters, to be delivered at the rate of 25,000 yards of each, weekly, commencing February 1, 1906, at certain stipulated prices; that it had failed to comply with its contract; and that at the time of the breach the market price at

the point of delivery was higher than the price specified in the contract, making a difference of \$512.50, for which amount the suit was brought. The defendant denied liability. By consent the case was submitted to the presiding judge, to pass upon both the law and the facts, without a jury. The evidence was, in brief, as follows:

It was admitted by the defendant that the goods which it undertook to manufacture and deliver to the plaintiffs at New Orleans, to wit, 200,000 yards, commencing February 1, 1906, and to be delivered at the rate of 50,000 yards per week, were not delivered in that time, and that no part of them had been delivered up to March 9, 1906, the day that the plaintiffs went into the market and purchased other goods to take the place of those which the defendant had failed to deliver. It was also admitted that the difference between the contract price of the goods which defendant was to deliver and the market price of the same kind of goods in New Orleans at the time when plaintiffs claimed the goods should have been delivered was \$512. The following correspondence between the parties was introduced in evidence:

Letter from defendant's president to its agent in New Orleans, dated November 5, 1905, containing the following: "Replying to yours of the 2d, would say, we enter up order Mente & Co., No. 152, for 100,000 yards 36" 6.50 40x40 at 3 $\frac{1}{4}$ c., and 100,000 yards 36" 40x40 6.00 at 4c., 25,000 yards weekly of each, commencing Feb. 1st, delivered in New Orleans, less 5% 30 days. We do not discount our bills any further than we sell. We had just as soon wait the 30 days for the money as not. You can give this letter to Mente & Co., and say to them to write us an acknowledgment of same. That will be all the contract we require." (It was alleged in the petition and admitted in the answer that the plaintiffs duly acknowledged this letter, thus completing the contract for the goods at the prices named.)

Letter from plaintiffs to defendant, dated February 28, 1906, containing the following: "Referring to our contract placed with you through Mr. Kaiser for 200,000 yards 36" sheeting, we beg to advise that Mr. Kaiser has this day shown us your letter of the 23d. We appreciate your condition, but at the same time you must appreciate ours. These goods were not bought from you to be sold in cloth, as dry goods people do, but were sold manufactured into bags for the sugar refinery. They have not bothered us so far for deliveries, hence have not pressed you for same; but, as you readily understand, they run night and day, and are compelled to have the goods, and we must positively insist upon you getting the goods forward without any further delay. We have given you one month latitude in regard to these goods, and cannot wait for them any longer. They must be shipped without delay."

The reply to this letter was as follows: "Augusta, Ga., Feb. 28, 1906. Mente & Co., New Orleans, La.—Dear Sirs: Replying to yours of 26th, we are going to start to work on your goods either the latter part of this or the first of next week, and will do the very best we can to make deliveries as rapidly as possible. Rest assured that we are just as anxious to make deliveries as you are to get them, and we are going to do everything in the world we can to get the goods to you. We hope soon to get the labor trouble (with which we have been so much annoyed) settled, and also that the health of our operatives will improve by that time. If you see Kaiser, tell him that we have written you, as he has written us a very urgent letter in your behalf."

Letter from plaintiffs to defendant, dated March 2, 1906, containing the following: "We have your letter of Feb. 28th, and beg to state that contents of same are somewhat indefinite. The purchase we made from you of these goods was 50,000 yards weekly, beginning Feb. 1st, and these 200,000 yards should now be delivered. While we granted you an extension of shipment until next week, it must be understood thoroughly that we cannot be limited to 50,000 yards per week, but that you must deliver us at least 100,000 yards of these next week, and 100,000 yards the following week, in order that we can comply with our contract here; otherwise, we will be compelled to buy material to substitute the best we can, charging you the difference. The reason for this is simply that the trade here has been as patient with us as they possibly can, and are now insisting that deliveries be made."

A telegram from plaintiffs to defendant, dated March 9, 1906, as follows: "Cannot wait longer must make immediate delivery can buy spot goods one eighth cent additional your expense answer"—and a telegram from defendant to plaintiffs on the same day, containing the following: "Read red lines on our letter heads before purchasing any goods for our account as written you we will commence delivering goods next week."

A letter on the same day from plaintiffs to defendant, containing the following: "We have your telegram to-day, and beg to state that we have seen and noticed the memorandum printed in red ink on your letter head, which, as manufacturers ourselves, we fully understand and know the importance of. But in this connection beg to state that you have never given us any notice that you would be or were prevented from fulfilling this contract for reasons given in this notice. On March 2d we wrote you that it would be agreeable to us to extend shipment a week from that date, which would bring it into March 9th, which is this week, provided you would deliver at least 100,000 yards in this week and 100,000 yards next week. You have not complied with this request, notwith-

standing the fact that we have tried to make it clear that these goods were sold to the refinery here, who must have them for bags for shipment of their product, and it is not material that is put on the shelf and jobbed. Your letters have not even given us the slightest information as to what you would definitely ship next week."

A letter from the defendant to plaintiffs of same date, containing the following: "Your telegram received this morning, and in reply we wire you, as per inclosed confirmation, to read the red lines in our letter heads as to output, quotations, contracts, etc. Our brokers have no instructions to sell goods otherwise than as those lines plainly state; and every letter we have written you, in fact, the letter where we confirmed sale, has these lines on it. As written you, we expected to commence shipping you goods this week. We started on them, but found they were running a little light, and not wanting to deliver you light weight goods, preferring to wait until we could deliver you what we sold, we did not ship. Upon receipt of this letter, if you want us to continue the contract, say so, and we will proceed to ship you the goods; otherwise, we will not. We leave the matter entirely to you. Of course, we will ship the goods as soon as we can make them. Our position has been explained fully to you. We have been very scarce of hands, are still, and there is a great deal of sickness among them. We have left no stone unturned to get hands, and this at a considerable loss to us. We await your letter before making any shipment. We notice your letter heads are similar to ours."

Also a letter from plaintiffs to defendant, dated March 13th, reciting facts which they contended made a breach of contract on the part of the defendant, and insisting on their right to damages.

The letter head used by the defendant in its correspondence with the plaintiffs contained the following words printed in red ink: "Quotations subject to change without notice. All agreements are contingent upon strikes, accidents, and other delays beyond our control. Purchaser to take run out of looms, whether quantity is more or less than contract, and must accept what seconds are made at $\frac{1}{4}$ c. allowance from price of firsts."

The letter head of plaintiffs, employed in writing letters to defendant, contained the following printed in red ink: "All contracts taken subject to strikes of work people, fire, loss of goods at sea, or other accidents beyond our control. All quotations subject to change without notice, to market fluctuations, and to goods being unsold. Our responsibility for safe arrival of shipment ceases when we receive a clear receipt from a transportation line."

The paymaster of the defendant testified that, at the time when the contract with the

plaintiffs was made, the defendant was short in number of operatives; that unsuccessful efforts were made to get help; that a considerable part of the machinery remained idle; that the total number of spindles in the factory was 30,048, and that the number of those that were idle at different times from January 6th to March 3d, covering the period of dealings with the plaintiffs, ranged from 2,620 to 9,275; and that an epidemic of measles and mumps among the operatives caused the stoppage of the spindles. There was some other testimony as to the capacity of the mill.

The presiding judge entered judgment for the plaintiffs, and refused a new trial. The defendant excepted.

Jos. B. & Bryan Cumming, for plaintiff in error. William H. Fleming, for defendants in error.

ATKINSON, J. One ground of the motion for new trial complained that the court erred in holding and finding, in effect, that the contract of sale was not modified, as to the time expressed in it for its completion, by the following words in red lines on the heads of the letters by which the contract was made: "All agreements are contingent upon strikes, accidents, and other delays beyond our control." If a contract in writing is plain and clear and unambiguous in its terms, it is not subject to modification by a statement in a letter head, printed at the top of the paper, which is not incorporated into the contract and is inconsistent with it. Even where a printed form of contract is used, but terms are written into it which are at variance with the printed matter, the writing will control. As stated in Civ. Code 1895, § 3675, par. 6: "Where a contract is partly printed and partly written, the latter part is entitled to most consideration." The expression "latter part," as here used, means the written part. If printed matter which forms a part of the contract, then, must yield to written terms inconsistent with the words printed, a fortiori a mere printed statement in a letter head, which does not form an integral part of the contract at all, cannot override or modify distinct terms of the contract with which it conflicts.

In *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872, a contract was made for the delivery of certain bundles of sheet iron at specified times and prices. The vendors failed to deliver at the times agreed upon. The vendees at a later date bought other iron, for which they were compelled to pay a higher price, and brought suit for damages against the vendors. The contract was made by letters passing between the parties. At the top of the letter heads of the vendors were the printed words: "All sales subject to strikes and accidents." It was held: "Printed matter in a letter head forms no part of the written letter on

the sheet, and will not qualify an absolute contract which results from an acceptance of an offer by such letter. * * * If a party contracts conditionally to sell and deliver, at a specified time, goods to be made in his mill, the breakage of his mill will not excuse performance or bar a suit for damages." Mr. Justice Baker, in delivering the opinion, said: "The mere fact that appellants wrote their acceptance on a blank form for letters, at the top of which were printed the words, 'All sales subject to strikes and accidents,' no more made those a part of the contract than they made the other words there printed—'Summers Bros. & Co., Manufacturers of Box-Annealed Commoned and Refined Sheet-Iron'—a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter heads would not have the effect of preventing appellants from entering into an unconditional contract of sale."

In the present case the defendants wrote to their broker in New Orleans, authorizing him to sell 200,000 yards of sheeting, of two kinds described, to be delivered "25,000 yards weekly of each, commencing Feb. 1st, delivery in New Orleans." He was instructed to give defendant's letter to the plaintiffs, and say to them that they might write an acknowledgment, and that would be all the contract defendant required. It was alleged by the plaintiffs and admitted by the defendant that the former did duly acknowledge the letter, and thus complete the contract for the goods at the prices named. This closed a distinct and unambiguous contract. It fixed the time and place of delivery. It needed no aid from circumstances to construe it or arrive at its meaning in those respects. Neither was there any question of bringing home notice of some fact by means of printed statements. A positive statement that goods sold shall be delivered at a time specified in the written contract is not in harmony with a statement that "all agreements are contingent upon strikes, accidents, and other delays beyond our control." One declares definitely that delivery shall be at a time mentioned; the other, that delivery shall not necessarily be at a definite time, but shall be contingent, not only upon strikes, but also upon accidents and other delays beyond the control of the vendor. The written agreement was specific; the printed notice declared that the time of delivery might be contingent and indefinite. This is not construction. It is modification. If the written statement of the time of delivery is to be made subject to modification by other writing or printing, at least the modifying statement should be embodied or referred to in the contract itself, and not be made to depend upon mere printed matter forming part of a letter head.

Sturm v. Boker, 150 U. S. 312, 326, 14 Sup. Ct. 99, 37 L. Ed. 1093.

2. Another ground of the motion for a new trial alleged that the court erred in holding, in effect, and rendering a judgment accordingly, that the express time for the completion of a contract was of the essence of the contract; it being contended that the evidence showed that the defendant had not abandoned the contract, but was preparing to carry it out in a reasonable time when the plaintiffs withdrew from it. To this contention we cannot assent. Where a contract for the sale of personal property states a time when delivery is to be made, it is matter of construction as to whether the time for delivery is of the essence of the contract, so that damages may be recovered for a failure to comply therewith. If the contract is clear and without ambiguity, latent or patent, the construction is for the court. In proper cases, where there is a question of fact involved, it is for the jury. Civ. Code 1895, §§ 3675 (1, 8), 3672. In this case the judge acted both as judge and jury. Did he err in deciding that time was of the essence of this contract? The contract was for the sale of 200,000 yards of cotton goods by a factory to purchasers in a distant city. It was specified that 50,000 yards should be delivered each week, commencing February 1st, at stated prices, with payment at 30 days, or 5 per cent. discount for cash. It might well be inferred that it was important to a purchaser of such a quantity of cloth to have it arrive as specified, both in order to prepare for its reception and storage or use and to provide for payments in the time and manner stated, and that this was in contemplation of the parties. It might make a very material difference whether a merchant should receive and be prepared to handle 50,000 yards of cloth, ordered, perhaps, for some special purpose, each week, and commencing at a specified date, or whether he should have 200,000 yards of the cloth delivered to him in one bulk a month or more thereafter, or in installments commencing some six weeks after the proper time and delivered according as the vendor found himself able to meet the contract. It may also be that a merchant desires, during the season when certain goods are salable, to have them ready for delivery to his customers, or that he may have contracts to make delivery. If such were the case, it would ill suit his purpose to have goods suitable to or salable during a certain season only, and ordered to be delivered in installments at fixed times during that season, delivered to him in a single lump or shipment at a much later period or after the entire season was over.

If recourse is had in the case before us to the correspondence between the parties, the possible injury from extended delay which has thus been hypothetically stated would

apparently have resulted to the plaintiffs. In one of their letters to the defendant it was said that these goods were not bought from the defendant to be sold in cloth, as dry goods people do, but were sold manufactured into bags for a sugar refinery, and that, as the refinery operated night and day, it was compelled to have the goods; and in another letter they stated to the defendant that the latter had not complied with their request to make the shipments, although the plaintiffs had tried to make it clear to the defendant that these goods were sold to the refinery at the place of delivery, and that the latter were obliged to have them for bags for shipment of their product, and that it was not material to be put on the shelf and sold in lots. See, in this connection, *Savannah Ice Co. v. American Refrigerator Co.*, 110 Ga. 142, 35 S. E. 280; *Branch v. Palmer*, 65 Ga. 210; *Henderson Elevator Co. v. North Ga. Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Gude & Walker v. Bailey Co.*, 4 Ga. App. 226, 61 S. E. 135; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415. The cases in which contracts for purchases of real estate have been held not to be forfeited because of failure to pay the purchase price at the date named therefor, in the absence of anything in the contract making time of the essence thereof, and where the payment of interest has been held, under the circumstances of different cases, to be a sufficient compensation for the failure to pay on the exact date when due, are in no way in conflict with what is here ruled. "Time is not generally of the essence of a contract; but, by express stipulation or reasonable construction, it may become so." Civ. Code, § 3675 (8). But under the facts in this case the judge did not err in finding that time was of the essence of the contract involved. The statement in the opinion of Mr. Justice Gray in *Norrington v. Wright*, *supra*, that "in the contracts of merchants time is of the essence," was not laid down as an absolute rule, regardless of what the contract itself might show the intention of the parties to be. This clearly appears from the headnote, in which it is stated that: "In a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

3. If it were not clear that time was originally of the essence of the contract, nevertheless the judge was authorized to find that the vendee from time to time urged compliance, and finally fixed a time, after that specified in the contract, within which they insist-

ed that delivery of the goods should be made, stating the necessity therefor, and that, if delivery should not be made within that time, they would be compelled to buy material in lieu of that which the vendor had contracted to deliver. If time was not of the essence originally, still the vendor did not have the right indefinitely to postpone compliance, and when the vendees, after a considerable delay, fixed a definite time in advance within which delivery would have to be made, and notified the vendor of that fact, if the time set was reasonable, it was incumbent on the vendor to meet such reasonable demand; and, if it failed to do so, the vendees were authorized to treat such failure as a breach of the contract. In *Parker v. Tharold*, 16 Beav. 59, Sir John Romilly, Master of the Rolls, said (on page 71): "It is, I consider, the undoubted law of this court that, although time was not originally an essential part of the contract, still that either party may, by a proper notice, bind the other to complete within a reasonable time to be specified in such notice; and if the party receiving such notice do not complete within the time so specified, equity will not enforce a specific performance of the contract, but leave the parties to their remedies and their liabilities at law." See, also, *Ellis v. Bryant*, 120 Ga. 890, 894, 48 S. E. 352, and authorities cited in note to *Johnson v. Evans* (Md.) 50 Am. Dec. 678, 679, and in note to *Jones v. Robbins*, 50 Am. Dec. 600.

The judge, in passing on both law and facts, could well have found that the time so fixed was reasonable, and that the failure of the vendor to make delivery was a breach. By the terms of the original contract delivery was to commence on February 1st, and 50,000 yards of the cloth were to be delivered each week. No delivery was made. On February 26th the vendees urged compliance, stating the necessity for promptness. On February 28th the vendor replied, somewhat vaguely, that "we are going to start to work on your goods either the latter part of this or the first of next week, and will do the best we can to make deliveries as rapidly as possible," also referring to the anxiety of the vendor to make deliveries and the hope that labor trouble and sickness of operatives would then have ceased to interfere with the work. On March 2d the vendees replied, stating the time which the contract specified for delivery, and stating that, while they had granted to the vendor an extension until the next week, it must be thoroughly understood that they must receive at least 100,000 yards of the cloth the next week and 100,000 yards the following week in order to comply with their contract, and insisting that the vendor must ship accordingly. Still no shipments were made, the vendor merely replying, in effect, on March 6th, that they were going to start to work on the goods "this week," and would make a shipment the next week, and then continue to ship "as fast as we can." On March 9th the vendees gave notice by tele-

gram that they could not wait longer, but immediate delivery must be made. To this the vendor replied in a telegram, calling attention to the red lines on its letter heads, and stating that it would commence delivering goods "next week." The evidence showed that the mills had 36,048 spindles, and that at no time were more than 9,275 of them stopped. Other evidence was also introduced, tending to show what the producing capacity of the mill was each week. Under all the evidence there was no error in deciding that the defendant had committed a breach of its contract, and that the plaintiffs were entitled to recover.

Judgment affirmed. All the Justices concurred.

(132 Ga. 520)

FLETCHER v. BLUTHENTHAL & BICKERT.

(Supreme Court of Georgia. April 21, 1909.)

1. EXECUTION (§ 166*)—ESTOPPEL (§ 68*)—AFFIDAVIT OF ILLEGALITY—SUFFICIENCY—ESTOPPEL BY CLAIM IN JUDICIAL PROCEEDING.

Where a case was tried in a county court, and an appeal entered therein to the superior court, an order afterwards establishing, in the superior court, copies of the petition and appeal bond, reciting the contents of the judgment appealed from, was a judgment that the papers were in the superior court and were lost, and that the copies established were correct copies; and after verdict and judgment in the superior court the latter judgment could not be attacked by affidavit of illegality on the ground that in fact the papers were never transmitted from the county court to the superior court. This is especially true where the defendant, on the hearing of the illegality, proposed and took an order, in the superior court, establishing a copy of his plea in the case, thus estopping himself from denying that there was such a plea of file in that court.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 486; Dec. Dig. § 166; Estoppel, Cent. Dig. §§ 185-169; Dec. Dig. § 68.*]

2. AFFIDAVIT OF ILLEGALITY.

Such of the other grounds as were appropriate to be set up in an affidavit of illegality were, under the pleadings and evidence, without merit. A verdict in favor of the illegality would have been unauthorized, and, regardless of any errors occurring on the trial, the overruling of the motion for a new trial was proper.

(Syllabus by the Court.)

Error from Superior Court, Erwin County; U. V. Whipple, Judge.

Action by Bluthenthal & Bickert against Fletcher & Co. Judgment for plaintiff. On leave of execution, Joe Fletcher filed a plea of illegality. Judgment for plaintiffs in execution, and defendant brings error. Affirmed.

McDonald & Quincey, for plaintiff in error. L. Kennedy, for defendants in error.

HOLDEN, J. The plaintiff in error filed an affidavit of illegality to an execution levied upon his property, and upon the trial

of the issues made thereby a verdict was rendered against him, and to an order of the court overruling his motion for a new trial he excepted. Among other allegations in the illegality appear the following: The defendants in error brought suit on an open account, in the county court, against Fletcher & Co., alleged to have been composed of the plaintiff in error and J. P. Mauldin. Fletcher filed a plea, alleging that at the time the account was made the partnership between him and Mauldin had been dissolved, and that the defendants in error had given notice of this fact before the contraction of the account sued on. Upon the trial of the case in the county court, judgment was rendered only against the defendant Mauldin, whereupon the defendants in error appealed the case to the superior court, wherein judgment was rendered against both Fletcher and Mauldin. Fletcher contends that the execution issued upon such judgment is proceeding illegally against him, for several reasons, set out in the illegality. The main ground upon which it appears that Fletcher relied upon the trial of the illegality case was that contained in the amendment to his illegality, as follows: "That said papers were never entered in the superior court, and that at the time said papers were established and judgment given said case had not been sent up to said superior court by the judge of said county court." Fletcher contends that this amendment makes the issue upon which he should prevail; that the verdict and judgment were rendered against him in the superior court, when at the time of the rendition thereof no papers connected with the case had been transmitted from the county court to the superior court; and, if any papers were transmitted before such judgment and verdict were rendered, all of them were not thus transmitted, which was necessary before a valid verdict and judgment could be rendered against him.

The evidence is undisputed that copies of the declaration in the suit, and of the appeal bond, reciting the contents of the judgment appealed from, were established in the superior court before the verdict and judgment were therein rendered. The proceedings establishing these copies were regular on their face, and, when duly established by order of the court, they, apparently at least, had all the force and effect of originals until the order establishing them was set aside. The established copies of the petition and appeal bond, on their face, put the case apparently in the superior court regularly for trial, and verdict and judgment rendered after copies of the petition and appeal bond were established could not be attacked by affidavit of illegality. Fletcher could not, by affidavit of illegality, attack the judgment, regular on its face, by going behind it and showing that the orders estab-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

lishing copies of the petition and appeal bond were improperly granted, on the ground that the original petition and appeal bond were never transmitted to the superior court. The established copies of the petition and appeal bond alone were sufficient on their face to authorize a verdict and judgment; but the defendant Fletcher, after the original affidavit of illegality was filed, and before filing his amendment thereto, had, on his motion, procured the superior court to establish a copy of the plea which he filed in the county court. The superior court would not have had the right to establish a copy of the plea if it had never been transmitted to the superior court from the county court, and, after having a copy of the plea established in the superior court on his own motion, the defendant would be estopped from denying that the plea was transmitted from the county court to the superior court, especially in view of the statement in his affidavit of illegality that the verdict was "indefinite, for the reason it failed to find for or against the special plea of misjoinder filed by this defendant." This statement is an admission that there was such a plea on file in the superior court before the verdict and judgment was rendered, and Fletcher would, in the face of this admission, be estopped from denying that there was. The affidavit admits that the papers were established.

In view of the facts above named, appearing on the trial of the case, the defendant had no right by affidavit of illegality to attack the judgment, regular on its face, by showing that the papers in the case had never been transmitted from the county court to the superior court when the verdict and judgment were rendered. There was no want of jurisdiction apparent upon the face of the judgment, or any other part of the record. On the contrary, everything appearing showed jurisdiction of the superior court to render the judgment. See *Harbig v. Freund*, 69 Ga. 180, and authorities therein cited.

2. Such of the other grounds as were appropriate to be set up in an affidavit of illegality were, under the pleadings and evidence, without merit, a verdict in favor of the illegality would have been unauthorized, and, regardless of any errors occurring on the trial, the overruling of the motion for a new trial was proper.

Judgment affirmed. All the Justices concur, except BECK, J., absent.

(132 Ga. 469)

SWIFT v. SWIFT et al.

(Supreme Court of Georgia. April 17, 1909.)

WILLS (§ 741*)—ACTIONS—PETITION—SUFFICIENCY.

The allegations of the petition were not sufficient to withstand the force of the demurrer

thereto, interposed by the defendants and sustained by the court.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 741.*]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; J. H. Martin, Judge.

Action by Charles J. Swift against Edward W. Swift and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Charles J. Swift brought an action against Edward W. Swift and James P. Kyle to recover damages which he alleged he had sustained at their hands. The substance of the petition was as follows: On or about January 26, 1897, George P. Swift died in the city of Columbus, Ga., leaving a will, with three codicils thereunto annexed, and leaving surviving him his children, Helen W. Murphy, Charles J. Swift, the petitioner, Elizabeth Shorter, Addie B. Kyle, and Edward W. Swift. By the terms of the will and codicils Edward W. Swift and James P. Kyle, the husband of Addie B. Kyle, were nominated and appointed executors, without bonds. The will was duly probated in both common and solemn form, and the executors entered upon the discharge of their duties thereunder, and have been executors up to the time of filing this petition. By the terms of the will and codicils the executors were not required to file a sworn inventory and appraisement of the estate, but were required to make a list or inventory of the property comprising the estate, for their own guidance and convenience, and for the information of the legatees. They have never filed any sworn inventory and appraisement. The will and codicils provided, among other things, that the residue of the estate, mentioned in the fourth item, be given absolutely and without limitation to petitioner and the other surviving children mentioned in the will, including Edward W. Swift, and be equally divided among them, share and share alike. Said residue included seven designated lots of land in Thomas county, Ga., of about 250 acres each, aggregating 2,095½ acres. At the time of the death of his father, and for a number of years prior thereto, petitioner was a resident of San Francisco, Cal. Several weeks after his father's death petitioner arrived at Columbus, Ga., and during his visit there in 1897 he sought information from the executors of what the residue of the estate consisted. To his inquiries concerning said Thomas county lands, as to their nature, character, and value, he being under the impression that they were valuable pine timber lands, he was told by the executors that, while these lands formerly constituted a tract of pine timber land, they had been "so despoiled and vandalized of the timber that they had lost their value and

character as timber land, which information created the impression in the mind of the petitioner that the tract had become a barren, sandy waste, * * * with no value attaching thereto * * * on account of the pine and other timber that had at one time been on them." The executors and defendants well knew that petitioner had never seen these lands, and until July, 1899, and for several years thereafter, he knew nothing of the value and character of such lands, except through the information that he got from the defendants as executors, and they well knew that he relied upon them for such information, and that he had trusted, relied upon, and believed their representations as to the character and value of such lands. Until some months after defendants took charge of said estate, they made no list of the property of the estate that he ever saw, and on or about June, 1898, "petitioner saw wherein the said defendants, as executors, gave the valuation to said Thomas county lands of \$2 per acre, and only mentioned them as 'lands' and as 'uncultivated,' which continued the impression and belief in the mind of petitioner that they had become practically worthless as timber lands. * * * In pursuance of an overture for settlement between petitioner, on the one hand, and the said defendants, as executors as aforesaid, and the said Edward W. Swift, Elizabeth M. Shorter, and Addie B. Kyle, as legatees as aforesaid, * * * Edward W. Swift represented, for the purpose of said settlement, that he had the sanction and authority of his sisters last aforesaid, together with James P. Kyle, representing his wife, and on or about the 1st of July, 1899, petitioner agreed that if the executors would furnish him a full, correct, and complete list of all property of said estate, together with its true, full, and correct character and value, he would submit his terms for a settlement, [and] in the afternoon of that day, in pursuance of such understanding, he examined the list, with the values and character of the property contained therein, and which had been given to him by said defendants as a true, full, and correct valuation and character and nature of all the property." Defendants, as executors, were familiar with the character and value of all the property of the estate, and petitioner was not, and especially of the Thomas county lands, and for information concerning the same petitioner relied upon the defendants as executors. "The one item of property which petitioner knew nothing about, except through information furnished him by the said defendants, was the said Thomas county lands." In listing these lands at only \$2 per acre, "and having previously represented to petitioner that they had lost their character and value as pine timber lands, and describing them as 'lands' and 'uncultivated,' when their real nature and character were those of virgin pine timber lands, the

said defendants knowingly and intentionally thereby misled, deceived, and misrepresented to petitioner both the value and character of said lands. At the time of said settlement these lands were reasonably worth \$15 per acre, being the finest and most valuable large tract of virgin pine timber lands in southwest Georgia. * * * As a part of said settlement, petitioner sold his one-fifth interest in said Thomas county lands to Edward W. Swift, Elizabeth M. Shorter, and Addie B. Kyle at the rate of \$2 per acre." After such settlement and until the latter part of July, 1904, petitioner was out of the state of Georgia a great deal of the time. On or about July 25, 1904, he met a resident of Thomasville, Ga., who told him of certain lands belonging to the Swift estate, of Columbus, Ga., which, he said, were "one of the largest and most valuable bodies of virgin pine timber land in Georgia." It was not until after about the 20th of July, 1904, that petitioner had any knowledge, or entertained any suspicion, that the said lands were otherwise in value and character than they had been represented to him by the defendants. Defendants, at the time of the settlement referred to, well knew that these lands were worth a great deal more than \$2 per acre, that they had not been denuded of timber to the extent of decreasing their value, "and, with intent to deceive and defraud petitioner, they willfully and deceitfully concealed from petitioner the real value and character of said lands, and * * * knowingly misrepresented to [him] the true value and character of said lands, for the purpose of inducing [him] to part with his title to said lands." He, having confidence and faith in the defendants "and the list of values which they furnished him, * * * relied on [their] good faith and representations, * * * and he was thereby induced to and did part with his title in a one-fifth undivided interest in said lands for the sum of \$2 per acre, to his injury and damage," etc.

The petition was demurred to, both generally and specially. Among the grounds of special demurrer were the following: (3) "It appearing that the specified lands constituted only a portion of the alleged residue to be equally divided, it is not averred in what constituted the balance of the residue to be equally divided as directed, nor does it appear that the entire residue was not equally divided by the will among those entitled thereto." (6) "It appears that the alleged sale by plaintiff at the price complained of was negotiated and made as a part and in consideration of an equal division and distribution of all the items of the residue, and it does not appear what the other items were, or what of them plaintiff received; nor does it appear that such settlement and distribution as a whole, including said land transaction, was not fair and equitable to the plaintiff; nor does it appear that plaintiff

taking into account the alleged low price for the land, did not get in the settlement of the entire residue his just and equal share thereof." (7) "It appearing that said land transaction was only a part of a consummated settlement of the residue, the plaintiff has not nor does he propose to rescind the entire settlement, nor restore the original status, which it appears would be necessary in order for an equitable and just distribution of said residue, if such distribution has not already been made." (8) "It appears that the alleged settlement * * * was fully consummated, and that plaintiff received thereunder sundry large benefits and properties, which he does not restore or offer to restore to defendants, or any one of them, nor does he restore the status as at that state of said settlement, and that, without such restoration or offer thereof, the plaintiff is not entitled in law or equity to rescind or disturb the particular portion or portions of said settlement attacked." The demurrers were sustained, and the petition dismissed, whereupon the plaintiff excepted.

J. L. Willis and Charles J. Swift, for plaintiff in error. Goetchius & Chappell, for defendants in error.

FISH, C. J. (after stating the facts as above). It will be seen that the plaintiff's complaint is that he, as one of the residuary legatees under the will of his father, made a settlement with three of the other residuary legatees, and that he, as a part of said settlement, sold his undivided one-fifth interest in certain Thomas county lands, forming a part of the residue of the testator's estate, to them for much less than such one-fifth interest was really worth, and that he was induced to do this by certain representations of the defendants, who were executors of the will, as to the character and value of these lands, made in response to his inquiries upon the subject, and by the valuation placed upon these lands in a list of the property of the estate furnished him by the executors, which representations and valuation he alleges were false and fraudulent, and made for the purpose of misleading, deceiving, and defrauding him. He appears, from the allegations of his petition, to have made the settlement in which he claims to have been defrauded with his brother, Edward W. Swift, and his sisters, Elizabeth M. Shorter and Addie B. Kyle; his other sister, Helen W. Murphy, not being a party thereto. How he could effect a settlement as to his interest in the residuum of his father's estate with only three of the other residuary legatees, when there were five residuary legatees equally interested in the property forming such residuum, it is hard to understand. Of course, he might have sold his interest as a residuary legatee to the three other residuary legatees who participated with him in the settlement, or to any one of them;

but, according to his petition, he did not do this, but entered into a settlement with three of the other residuary legatees and the executors, "and as a part of said settlement * * * sold his one-fifth interest in said Thomas county lands." But no point appears to have been made on this peculiarity of his petition.

It will be observed, from the allegations of the petition, that the alleged misrepresentations as to the character and value of these lands, other than the mere valuation placed upon them in the list of the property of the estate furnished to the plaintiff for his inspection at the time he offered to submit his terms for a settlement with the other residuary legatees, were made by the defendants in the early part of 1897, more than two years before he had even so much as indicated to them any desire, purpose, or intention to have a settlement with the other residuary legatees, and when, so far as his petition shows, there was no intention on his part to obtain his distributive share of the residuum of his father's estate through a settlement with his colegatees. So the allegations that the defendants in 1897 willfully and fraudulently misrepresented to the plaintiff the character and value of these Thomas county lands for the purpose of inducing him to part with his interest therein for a sum much less than the real value of such interest, were not well pleaded; the facts alleged not being sufficient to sustain such a conclusion. The same may be said with reference to the vague and hazy allegation that the plaintiff in June, 1898, "saw wherein the said defendants as executors gave valuations to the said Thomas county lands of \$2 per acre, and only mentioned them as 'lands' and as 'uncultivated.'" Besides, if this can be taken to refer to a list, or written statement, of the properties of the estate and the respective valuations of the same, made by the executors, there is nothing whatever to show that this list or statement was prepared or intended merely for the inspection of the plaintiff; but the inference is strong that it was a list or statement prepared by the executors for their own guidance and convenience and the information of all persons interested in the estate. So far as the petition shows, the only false or misleading information which the defendants gave to the plaintiff after they knew, or had any reason to believe, that he desired information upon which to base a proposition for a settlement with the other residuary legatees, was the mere valuation of \$2 per acre placed upon the Thomas county lands in question in the list of the property of the estate which they furnished to him in July, 1899, which valuation, it appears from the petition, had been placed by the executors upon these lands, and which list the petition indicates had been prepared long before they knew that he contemplated making such a settlement. Moreover, the petition does not

allege that at the time the defendants furnished this list to the plaintiff they knew, or had any reason to believe, that he contemplated selling his interest in these lands to his legatees, or to any one else.

But, waiving all these criticisms of the petition, and others which might be made thereon, and taking it for granted that the defendants did willfully and fraudulently deceive him as to the value of these Thomas county lands, for the purpose of inducing him, in a settlement with the other residuary legatees, to part with his interest therein at a price much less than its true worth, still the petition is fatally defective, in that it fails to show that the plaintiff really suffered any loss or damage in the settlement. The petition fails to disclose what the terms of the settlement were, what other properties besides these Thomas county lands were involved therein, how such other properties respectively were valued, whether they were all estimated in the settlement at their true values, or like these Thomas county lands, were estimated at much less than they were really worth, or which, if any of them, were overestimated, and which were underestimated; and it fails to show that the aggregate value of the property which the plaintiff received in the settlement was not equal to the aggregate value of that which was received by each of the other legatees. He seeks to segregate and separate "a part of said settlement" which he had with the other legatees, and to recover damages because, if this particular portion of the settlement is isolated and considered entirely apart from the rest of the same, it appears that he was worsted in the settlement, when, for aught that appears in the petition, it may be that in other parts of the settlement the advantage was all on his side, and that the general result of the same was reasonably fair and just to all the parties interested therein, or, perhaps, that in the aggregate value of the properties which he received as his portion of the residuum of the estate he really received more than the value of his distributive share thereof. The other properties involved in the settlement, or some of them, at least, might have been as much undervalued in the list which the defendants furnished to the plaintiff, and in the settlement which he made with the three other legatees, as were these Thomas county lands; and the other legatees concerned in the settlement might have conveyed to the plaintiff their interests in property of the estate upon a valuation which was such as to counterbalance the undervaluation of his interest in these lands, or even at a valuation which was such as to more than compensate him for any loss

which he might otherwise have sustained in consequence of the undervaluation of his interest in the lands in question. He seeks to turn the light on only one isolated portion of the transaction, leaving the rest in darkness. He ought to have turned the light on the whole, so that it could be seen whether he really suffered any loss in the settlement between himself and these other residuary legatees, in consequence of his reliance on the valuation which the defendants, as executors, had placed upon these Thomas county lands.

It is somewhat significant that he does not seek to set aside the settlement, which he alleges he had with three of his legatees, on account of the fraud which he alleges was practiced upon him by one of them in person and by the agent who acted for the others in the transaction, and to have a new and fair division and distribution of the property between the residuary legatees. But he holds onto all the property which he received in the settlement, and seeks to recover of the defendants damages because in one isolated item of such settlement, separated and considered entirely apart from the other matters involved therein, he appears to have got the worst of the bargain. So far as his petition shows, he might have got the best of the bargain in the transaction considered as a whole. It seems obvious that it cannot be ascertained whether he was really injured and damaged by the mere undervaluation which he alleges was placed by the executors upon the Thomas county lands unless and until there is a full disclosure as to the other properties involved in the settlement, the nature, character, and real value of each item thereof, and the valuation placed upon it in the settlement, and how it was disposed of therein. A fatal defect in his petition, therefore, is that it does not show that he really sustained any loss by reason of the alleged false and fraudulent undervaluation of these lands. A mere general allegation that he was injured and damaged in a specified sum is a mere conclusion of his own, as he does not allege all the facts which it is necessary to consider in order to determine whether this is true or not.

This general averment as to damages sustained by him might, perhaps, be sufficient, in the absence of a special demurrer calling for more specific information as to the facts upon which it was based, but will not do when attacked by the grounds of special demurrer set forth in the statement of facts. The trial court committed no error in sustaining these grounds.

Judgment affirmed. All the Justices concur.

(132 Ga. 537)

ATLANTA TERRA COTTA CO. v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. April 19, 1909.
Rehearing Denied May 12, 1909.)

1. EMINENT DOMAIN (§§ 198, 238, 255, 274*)—PROCEDURE—AUTHORITY OF ASSESSORS—REMEDY OF LANDOWNER—APPEAL FROM AWARD.

In condemnation proceedings under the statute regulating the exercise of the right of eminent domain by a railroad company, the assessors can only determine the amount of compensation to be paid, and cannot pass upon the legal power of the company to institute such proceedings, or determine whether or not the quantity of land sought to be taken is necessary for public purposes. The remedy of the landowner is to apply to a court of equity to enjoin the condemnation proceedings, if they are unauthorized, or to enjoin the condemnation of such land as is not necessary for such public purpose.

(a) On appeal from the award of assessors appointed in pursuance of the statute in such proceedings, the issue cannot be broadened so as to raise the questions above indicated.

(b) Nor, after having appointed an assessor and entered into an arbitration and accepted money awarded to him by the assessors, will the landowner be heard for the first time, after verdict, on appeal, to complain that the evidence failed to show an effort by the condemnor to acquire the property from him by contract before commencement of the proceedings to condemn.

(c) Upon review of the decision in *Piedmont Cotton Mills v. Georgia Ry. & Electric Co.*, 131 Ga. 129, 62 S. E. 52, as to the points stated in the first division and subdivision "a" of this headnote, it is affirmed.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 614, 619, 666, 753, 765-768; Dec. Dig. §§ 198, 238, 255, 274.*]

2. EMINENT DOMAIN (§ 191*)—PROCEDURE—NOTICE—WAIVER OF OBJECTIONS.

Where a notice, which was served on a landowner as the basis for a proceeding to condemn land for a right of way of a railroad, under Civ. Code 1895, § 4637 et seq., recited that the property was "sought to be condemned for the purpose of building, maintaining, and operating thereon a railroad, side tracks, terminals, and necessary connections and turnouts," such a notice was not subject to special demurrer on the ground that "it does not appear thereby for which of the purposes specified in said proceedings said plaintiff seeks to condemn this defendant's property, whether for a right of way, or side track, or connections and turnouts," filed on the trial of an appeal entered by the company from an award of assessors in favor of the landowner, who had received the amount so awarded.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

3. TRIAL (§ 41*)—EXCLUSION OF WITNESSES—DISCRETION OF COURT.

On the trial of a case the court ordered the witnesses to be sequestered. Counsel for defendant, which was a corporation, requested that both its president and vice president should be allowed to remain in the courtroom to assist in the trial, stating that the president was manager of the company's office and business affairs and that the vice president was manager of its manufacturing plant, and that the presence of both was necessary to assist in the trial. The court inquired if both were to be used as witnesses, and, being answered in the affirmative, refused to grant the request, and required the defendant to elect which should remain; the other being excluded from the courtroom. *Held*,

that there is nothing in the record to show an abuse of discretion on the part of the presiding judge in such ruling.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 101-105; Dec. Dig. § 41.*]

4. EMINENT DOMAIN (§ 262*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

While it may have been unnecessary for the court to charge the jury on the subject of the right of the condemnor to exercise the power of eminent domain, the charge on that subject was harmless to the defendant.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 686; Dec. Dig. § 262.*]

5. EMINENT DOMAIN (§§ 93, 149*)—DAMAGES—INSTRUCTION.

On the trial of an appeal from the award of assessors in a proceeding to condemn a right of way for a railroad, it was error to charge that, "if the injury be small or the mitigating circumstances be strong, nominal damages only are given," and that, "if the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer."

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. §§ 93, 149.*]

6. EMINENT DOMAIN (§ 321*)—DURATION OF RIGHTS.

It was inaccurate, on the trial of an appeal in such a proceeding, for the presiding judge to inform the jury that use and occupation for railroad purposes passes to the condemning party "for the duration of its charter, in this case conceded to be 101 years."

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 321.*]

7. EMINENT DOMAIN (§ 131*)—MEASURE OF DAMAGES.

Where land was sought to be condemned for a right of way of a railroad, on the trial on an appeal to the superior court from the award of assessors as to the property sought to be taken, the measure of recovery was the fair market value. If it contained valuable clay deposits, that was a proper subject for consideration in determining such value; but there would not be a recovery both for the value of the land and for the clay in it as two separate items.

(a) There was no error in refusing to charge that "the defendant is entitled to recover from the Georgia Railway & Electric Company the fair market value of the property taken, the land and also the clay in the land, if there be any, as such value may appear from the sworn evidence in the case."

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 853; Dec. Dig. § 181.*]

8. REVIEW—INSTRUCTIONS.

Other assignments of error, relating to the charge of the court and rulings touching the admissibility of evidence, were not such as to require special reference or to necessitate a reversal. As a new trial will be ordered on other grounds, it is unnecessary to deal with the objection made to the form of the verdict.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Condemnation proceedings by the Georgia Railway & Electric Company against the Atlanta Terra Cotta Company. From the judgment, the Terra Cotta Company brings error. Reversed.

The Georgia Railway & Electric Company commenced proceedings under Civ. Code 1895,

§ 4657 et seq., to condemn a right of way through a tract of land belonging to the Atlanta Terra Cotta Company. The condemnor gave notice to the landowner, assessors were appointed by each, and a third selected. They awarded as the value of the land to be taken the sum of \$4,500, and that there were no consequential damages and no consequential benefits to the property of the landowner which was not taken. An appeal was taken by the condemnor. On the trial in the superior court counsel for the appellee moved to dismiss the case, on the grounds that the condemnor had not been authorized and empowered by law to exercise the right of eminent domain, that it had no right to condemn or take the land described in the proceedings, and that it did not appear that it was necessary to do so for any of the purposes specified. The motion was overruled. The notice given by the condemnor contained this clause: "You are hereby notified that whereas, you and the Georgia Railway & Electric Company cannot agree upon compensation for the property hereinafter sought to be condemned for the purpose of building, maintaining, and operating thereon a railroad, side tracks, terminals, and necessary connections and turnouts in the following described property owned by you," etc. The appellee demurred to the proceedings, "because it does not appear thereby for which of the objects specified in said proceedings said plaintiff seeks to condemn this defendant's property, whether for a right of way, or side tracks, or connections and turnouts." The demurrer was overruled, and exceptions pendente lite were filed. The jury found the following verdict: "We, the jury, find for the Atlanta Terra Cotta Company against the Georgia Railway & Electric Company the sum of \$1,100." The condemnor having paid, and the defendant having received, the \$4,500 which had been awarded by the assessors, the judge entered judgment reciting this fact, and that the jury had found \$1,100, and thereupon adjudging that the Georgia Railway & Electric Company recover of the Atlanta Terra Cotta Company the difference, amounting to \$3,400, with interest. The Atlanta Terra Cotta Company moved for a new trial, which was refused, and it excepted.

H. L. Culberson, Owens Johnson, and Spencer R. Atkinson, for plaintiff in error. Rosser & Brandon and Walter T. Colquitt, for defendant in error.

ATKINSON, J. 1. The motion to dismiss the proceedings on appeal complained that under the law the Georgia Railway & Electric Company had no authority to exercise the power of eminent domain, or right to condemn and take the land in question, and that there was no necessity for taking such land, and these questions were also argued under certain grounds of the motion for a

new trial. In different states of the Union the method of exercising the right of eminent domain is not uniform, and the issues which can be made in such proceedings in the several states may differ. In this state it has been held that, in condemnation proceedings under the statute, the assessors can only determine the amount of compensation to be paid, and cannot pass upon the legal power of a railroad company to institute such proceedings, or determine whether or not the quantity of land sought to be taken is necessary for public purposes. The owner of such land has the right to have a court of equity intervene and enjoin the condemnation of such land as is not necessary for such purpose. *Piedmont Cotton Mills v. Ga. Ry. & Elec. Co.*, 131 Ga. 129, 62 S. E. 52, and cases therein cited. On appeal from the award of the assessors to a trial by a jury, the issue cannot be broadened, so as to raise the questions here sought to be made; but the trial is still as to the amount to be awarded to the landowner under the proceedings. *Civ. Code 1895, § 4678*. We have been asked to review and modify the decision in the case cited above, on the ruling mentioned; but, on review as to the point mentioned, we decline to modify it. This being so, the application to review that case on the question of the power of a street and suburban railroad company to condemn land need not be considered; the point not being one which can be raised in this case.

It was argued on one side that no charter or amendment to a charter was introduced in evidence, authorizing the condemning company to exercise the right of eminent domain, or to construct and operate a line of railway at the place where the condemnation was sought to be made, and that the courts will not take judicial cognizance of what may be contained in petitions or applications filed by persons desiring charters or amendments to charters in the office of the Secretary of State, but only of the powers conferred upon them by the general laws of the state when it has been made to appear that a charter has been granted. On the other hand, it was argued that under the decision in *Atlanta & West Point R. Co. v. Atlanta, B. & Atlantic R. Co.*, 124 Ga. 125, 52 S. E. 320, judicial cognizance will be taken of the charter granted to a railroad company by the Secretary of State. The ruling which has been above made as to the remedy by injunction renders it unnecessary to discuss the question here raised further than to say that, while some of the language in the decision cited, in 124 Ga. 125, 52 S. E. 320, may have stated the ruling somewhat broadly, that case arose under an application to the equitable power of the superior court to enjoin a company from condemning land. The petition, which was filed on May 6, 1905, alleged that the defendant railroad company had no authority under the law to take the property of the plaintiff. It was also alleged

that the company seeking to condemn was a corporation under the laws of this state, "recently incorporated," and authorized to construct a railroad between certain named points. In the opinion reference was made to this allegation, and it was treated as fixing the fact that the charter was issued by the Secretary of State under the general law. As the law for the issuing of charters to railroads by the Secretary of State in the general form in which it now exists has been in force for a number of years past, the allegation in the pleadings of the other party that the condemning company had been "recently incorporated" practically conceded that it had been chartered by the Secretary of State. So that the question as to whether or how far statements or recitals in petitions and applications filed with the Secretary of State should be taken judicial cognizance of by the courts was not then finally determined, nor is it necessary to do so now in a case arising only on an appeal from the award of assessors.

It was also argued that the statute requires an antecedent effort to agree with a property owner before beginning condemnation proceedings, and that no such effort was proved on the appeal trial. If, under the statutory form of procedure to condemn land in this state, the point mentioned can be raised and tried, there was no traverse of the statement in the notice—no plea or objection at any time till after verdict. Such an effort to agree can be waived by the property owner, and in this case it was waived. The owner went into the assessment, apparently without objection, received the amount of the award, and held it, entering no appeal. He went through the trial on appeal with no effort to raise any such issue, and he is in no position to do so on the ground that the verdict determining the amount to be paid should be set aside for want of proof on that subject.

2. A special demurrer was filed to the notice given by the condemnor to the landowner. The statement in the notice was that the property was "sought to be condemned for the purpose of building, maintaining, and operating thereon a railroad, side tracks, terminals, and necessary connections and turnouts." The objection raised by the demurrer was "because it does not appear thereby for which of the purposes specified in said proceedings said plaintiff seeks to condemn this defendant's property, whether for a right of way, or side track, or connections and turnouts." The demurrer does not specifically refer to the expression "terminals." A notice which forms the basis of condemnation proceedings should put the landowner on notice of the purpose for which it is proposed to take and use a portion of the land sought to be condemned. A mere statement that a company desired to condemn the land, without more, or a general statement that it was desired for pub-

lic purposes, would not put him on notice as to the purpose, or the peculiar use or uses to which the land was to be applied, nor would it be sufficient to show that in fact the purpose was a public one. But the law does not require needless particularity and detail, such as is called for by this special demurrer. It objects that it does not appear whether the property is for a right of way, or side track, or connections and turnouts; but all of these are parts of the railroad, and a right of way is essential, whether a main line, a side track, a connection, or a turnout is to be laid upon it. Besides, this landowner entered into the assessment without objection, appointed an appraiser to take part in having an award made, and received the amount thus awarded. While, under the statute, it may be compelled to return a portion of the money if the jury should find less than the assessors awarded (Civ. Code 1895, § 4680), it was apparently satisfied with the award, and entered no appeal, and it can hardly be said that it had no sufficient notice of the purpose for which the assessment was had.

3. On motion of the condemnor the witnesses were ordered to be excluded from the courtroom when not testifying. The defendant's counsel requested that its president and vice president be allowed to remain in the courtroom to assist in the trial, stating that the president was manager of the company's office and business affairs, and that the vice president was manager of its manufacturing plant, and that it was necessary to have both present to assist in the trial of the case. The court inquired if both would be used as witnesses, and, being informed that they would, refused to grant the request, and required the defendant to elect which should remain; the other being sent out of the courtroom. A ground of the motion for a new trial complains of this ruling. This was a matter which rested to a considerable extent in the sound discretion of the presiding judge, and there is nothing in the case to indicate that he abused his discretion.

4. While it may have been unnecessary for the court to charge the jury on the subject of the right of the company to exercise the power of eminent domain, the rulings already made, showing that the defendant could not introduce that issue into the present case, make such a charge harmless to the defendant.

5. The court gave to the jury the following charges: "Damages are given as compensation for an injury done, or, in other words, for the property taken, or damaged, and generally this is the rule where the injury is of such a character as can be estimated in money. If the injury be small, or the mitigating circumstances be strong, nominal damages only are given." "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circum-

stances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer." These charges embodied legal propositions relevant to the suit for a tort, but not to the determination of the amount to be awarded for the exercise of the power of eminent domain. If land is lawfully condemned for the right of way of a railroad, such condemnation and the taking and lawful use of the right of way under it do not constitute a tort. The measure of damages or the amount to be awarded to the landowner in such a case as this includes two elements: First, the value of the property taken or used (or the direct damage done); second, the consequential damages to the property not taken. As against the value of the property taken, there can be no reduction on account of any consequential benefit which may arise from the construction or operation of the railroad by the corporation, if any. If there be consequential damages to the property not taken, from them should be deducted the consequential benefits, if any, to be derived by the owner from the operation of the franchise by the railroad company, or by the carrying on of the business of the company, provided the consequential benefits assessed shall in no case exceed the consequential damages assessed. Civ. Code 1895, § 4675. The doctrines of mitigating circumstances, nominal damages, and imaginary or possible results of a tortious act have no application to such a case.

Where it is claimed that consequential damages will result to that part of the property which is not taken, of course, such damages must not be merely imaginary or possible; but it must be made to appear to the jury that they will naturally arise as a consequence of the exercise of the right of eminent domain, or the operation of the franchise, or the carrying on of the business. But this is a different thing from submitting a case of the character of the present one to the jury with instructions appropriate to an action for a tort; and, while the presiding judge elsewhere in his charge referred to the value of the land taken and consequential damages, we cannot say that no injury was done by reason of the charges referred to above. The jury found a verdict for a single amount, considerably less than that which had been awarded by the assessors. They did not mention separately the value of the land and consequential damages, and we cannot say with certainty whether the amount found by them was intended to include any consequential damages or not. But certain it is that, where the question of finding consequential damages was involved, references to mitigating circumstances and the finding of nominal damages were calculated to lead the jury to infer that they might reduce the damages which otherwise would be found because of such mitigating circumstances. What they might deem mitigating circum-

stances in a condemnation proceeding, which would lessen the consequential damages that the landowner would be entitled to recover, we do not know. Perhaps they might have considered that because a street and suburban railroad might be quite convenient to people living in the suburb, or because it might be difficult for the railroad company to obtain another route that would serve it as well, or because the defendant had a considerable amount of land, or because of a number of things which might be suggested, there existed circumstances which the jury could find were mitigating in character, so as to lessen the right of the landowner to recover; and the reference to nominal damages and to tortious conduct, when the lawful exercise of the right of eminent domain is not tortious conduct, whereby the jury might have inferred that because there was no tort there should be little or no recovery, was such material error as necessitates a new trial.

6. The court charged as follows: "Upon the condemnation and payment of damages, where the condemning corporation shall become vested with such interest in the property taken as may be necessary to enable the corporation to exercise its franchise or conduct its business, whenever the corporation shall cease to use the property taken for the conducting of its business, said property shall revert to the person from whom taken, or his heirs; that is to say, gentlemen of the jury, that in condemnation proceedings, such as you are now considering, the actual fee, the absolute ownership of the land, does not go to the condemning railroad company, but its use and occupation for railroad purposes passes to it for the duration of its charter, in this case conceded to be 101 years." This was not a strictly accurate statement of the law. The railroad company might renew its charter without forfeiting its previously acquired rights of way, or it might have a successor or assignee, who would be entitled to continue the use for railroad purposes. The right acquired would not necessarily and absolutely terminate with the life of the present charter. Whether this inaccuracy might have required a new trial, were there no other error, need not be decided; but, as a new trial is granted on other grounds, it will doubtless be avoided in charging again.

7. It was contended that the court erred in refusing a request to give the following in charge: "The defendant is entitled to recover from the Georgia Railway & Electric Company the fair market value of the property taken, the land and also the clay in the land, if there be any, as such value may appear from the sworn evidence in the case." There was no error in refusing this request. So far as the land taken was concerned, the fair market value was the measure. In determining such value the clay which formed a part of the land was a legitimate subject for con-

sideration by the jury. Land containing valuable clay deposits may be of greater market value than if it did not do so. But the land and the clay in the land constitute one subject, and there cannot be a recovery both for the land as such and also for the clay in the land. Both are to be considered in determining the value of the land, but there should not be a recovery for each as a separate subject-matter. The charge of the court to which exception is taken in the fifteenth ground of the motion for new trial was in substantial accord with what has been said, except that it informed the jury that if they believed from the evidence that there were clay deposits on the land they might consider that in making up their estimate of the value of the land. It would have been more accurate to have informed them that, if they believed from the evidence that there were valuable clay deposits upon the land, they should take that fact into consideration in estimating the value of the land.

8. There were several grounds of the motion for a new trial, some of which related to rulings upon the admission of evidence, and some to the charge of the court; but under the evidence, and in the light of the entire charge, they furnish no ground for a reversal.

Complaint was also made that the verdict was contrary to law, on the ground that it was against the "Georgia Railway Company," there being no such party to the suit. There were only two parties to the suit, the Atlanta Terra Cotta Company and the Georgia Railway & Electric Company. As a new trial will be granted on the other grounds, we do not deem it necessary to say more concerning this objection to the verdict than that the next will likely be more formal.

Judgment reversed. All the Justices concur.

(6 Ga. App. 139)

W. P. HARPER & CO. v. GINNERS' MUT. INS. CO. (No. 1,475.)

(Court of Appeals of Georgia. May 4, 1909.)

INSURANCE (§ 145*)—RENEWAL CONTRACT—COMPLETION.

Where an insurance company makes a proposal by letter to renew a policy of insurance on terms and conditions stated in the letter, and the insured retains the policy, but makes no reply to the letter, and does not pay the premium, or indicate in any manner an acceptance of the policy, until after the happening of a fire several months after the proposed insurance, there is no completed contract of insurance. There must be some act of acceptance, binding on the party accepting, as well as on the party proposing, to make a contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 145.*]

(Syllabus by the Court.)

Error from City Court of Washington; S. H. Hardeman, Judge

Action by W. P. Harper & Co. against the Ginnners' Mutual Insurance Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

F. H. Colley and Wm. Wynne, for plaintiffs, in error. Cobb & Erwin and R. C. Norman, for defendant in error.

HILL, C. J. Harper & Co. sued the Ginnners' Mutual Insurance Company on a policy of insurance covering their cotton gin. The insurance company made three defenses: (1) That there was no complete contract of insurance; (2) that, if there was a complete contract of insurance, it had lapsed by failure to pay the premium; and (3) that, if the contract of insurance had been completed, it was avoided and forfeited by the operation of the gin at night in violation of its terms and conditions. At the conclusion of the evidence the court directed a verdict for the defendant, and this is the error assigned.

Was there, under the facts, a complete contract of insurance? The facts show that the insurance company had issued to Harper & Co. a policy of insurance covering this cotton gin, which expired on September 22, 1907. Just before the expiration of this policy the secretary of the insurance company, without any knowledge or intimation that Harper & Co. desired the policy renewed, voluntarily wrote a renewal policy covering the same property, and on August 13, 1907, mailed this renewal policy to Harper & Co., accompanied by the following letter (omitting immaterial parts): "Inclosed find policy No. 964 covering \$2,250 upon your ginning outfit. * * * For some reason unknown to us, you allowed your old policy to lapse on our 15 per cent. call. We have, however, taken the liberty of renewing the same from the date upon which it would have expired, had it been kept in force, namely, September 22. Attached to this policy you will find our regular form 25 per cent. dividend note and receipt for policy. Kindly sign and return to us, together with your check for \$88.59, same being 75 per cent. premium due and payable upon delivery of policy." This letter was duly received by Harper & Co., but its receipt was not acknowledged, and the requests as to signing the premium note and receipt for policy and sending check for \$88.59, being the 75 per cent. premium due and payable upon delivery of policy, were entirely ignored. Thereafter, on September 26, 1907, the secretary of the insurance company wrote Harper & Co. the following letter (omitting immaterial parts): "We mailed you some weeks ago policy covering your ginning outfit, and as yet we have received no reply from you. Our records show that the premium under this policy is \$118.13. After deducting the amount of dividend, the balance due is \$88.60. We wish to

say that we are endeavoring to close up all open accounts, and, if you are not in a position to pay this premium, we will be glad to carry same for you 30 or 60 days from date of policy, without interest. * * * If you wish your matter continued, kindly advise us, and we will furnish you with blank note; otherwise, we will thank you for remittance covering the 75 per cent. of premium as above indicated. Trusting that this may be satisfactory, and awaiting your reply, we are," etc. Harper & Co. admitted receiving the foregoing letter, and admitted that they made no reply, but had absolutely ignored it. On the evening of October 17, 1907, about dark, the ginhouse described in the policy was destroyed by fire. Proofs of loss were duly furnished, and, the company refusing to pay the policy for the reasons above stated, this suit was brought.

The secretary of the company testified that, having received no response from either one of the two letters above quoted, prior to the day of the fire, he marked upon the insurance company's policy register, at the place where this policy had been registered, the words "Not taken" in red ink; and the record was introduced in evidence and showed this entry. Harper admitted that he had never, up to the time of the trial, paid or tendered any premium to the insurance company. He did not testify that he had accepted the policy, or had intended to accept the policy, and pay for it; but he insisted that the contract of insurance was complete because of the following facts: That his first policy with the company had been taken out at the solicitation of Quinn, an agent of the company, and that some time prior to the expiration of this policy this agent had come to his place of business and solicited a renewal of the policy, and he agreed with him to take the renewal policy provided he was given 30 or 60 days to pay the premium, and the agent agreed to this. The insurance company had received no notice of this agreement between Harper and Quinn and both Quinn and the secretary of the company testified that Quinn had no authority to write policies, or to give time for the payment of premiums. Two witnesses, neighbors of Harper, testified that Harper told them that he had no insurance on his gin. To one of these witnesses he made the statement during the fire, and to the other witness he made the statement the morning after the fire.

The insurance company contended that the sending of the renewal policy to Harper & Co. by its secretary was simply a proposal to effect a contract of insurance upon the terms stated in the letter of August 13, 1907, inclosing the policy, and that, as Harper & Co. had not acknowledged receipt of the policy or complied with the terms set forth in the latter, the policy was not accepted, and no contract of insurance was consummated. Section 3637 of the Civil Code of

1895, which is a codification of simple, elementary principles of law, reads as follows: "To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject-matter upon which it can operate." "While a contract can be made by correspondence through the mail, or by telegram, the offer of the seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort. There must be a mutual assent of the parties, and they must assent to the same thing in the same sense." *Robinson v. Weller*, 81 Ga. 705, 8 S. E. 449; *Stix v. Roulston*, 88 Ga. 748, 15 S. E. 826; *Harris v. Lumber Co.*, 97 Ga. 465, 25 S. E. 519; *Larned v. Wentworth*, 114 Ga. 209, 39 S. E. 855. "The acceptance of a proposal of insurance must be evidenced by some act that binds the party accepting. A mental resolution, that can be changed, is not sufficient. Any appropriate act, which accepts the terms as they were intended to be accepted, so as to bind the insurer, is sufficient to show the concurrence of the parties, the meeting of minds." *Cooley's Briefs on the Law of Insurance*, 421. "Where the proposal to insure comes from the insurer, he must be notified of the acceptance of the offer by the insured." *Id.* 423, 424, 432.

The application of these elementary principles of law to the facts of this case, we think, clearly demonstrates that there was no complete contract between the insured and the insurer. It is admitted by Harper & Co. that there was no actual acceptance by them of the contract of insurance, and no compliance with any of the terms contained in the letter inclosing the policy, which would give evidence of such acceptance and make effective the contract of insurance. The mere statement which Harper made to the soliciting agent, Quinn, that he would renew the policy upon terms as to the payment of premiums, although this agent stated that the terms would be satisfactory to the company, was not binding upon the company, and certainly did not bind Harper & Co. to take the policy. This soliciting agent had no authority to issue policies, or change the conditions as to the payment of premiums, and Harper & Co. could have changed their minds and have refused to accept the policy when tendered to them. Besides, the evidence shows that this agreement, made between the soliciting agent and Harper, was never communicated to the insurance company, and therefore was never assented to by it. The secretary of the company, who alone was authorized to make contracts of insurance, testified that he had received no communication from Quinn in reference to renewing Harper & Co.'s policy, that he had no intimation that a renewal was desired, and that the send-

ing of the policy by him to Harper & Co. was upon his own initiative, and simply an offer on his part, representing the insurance company, to effect a contract of insurance upon the terms stated in his letter inclosing the policy.

Conceding that the statement of Harper as to his agreement with Quinn, the soliciting agent, was true, yet, when he received the letter from the company itself, inclosing the renewal policy, the contents of this letter clearly put him on notice that the insurance company rejected any application for the policy on the terms proposed by him to Quinn, and constituted a counter proposal by the company to make a contract of insurance only upon the terms stated in the letter. Any impression or understanding that Harper & Co. had, arising from the interview with Quinn, that time was to be given for payment of premiums, was completely removed by the positive statement contained in the letter of the secretary of the insurance company, demanding an immediate payment of the premium then due. It was the duty of Harper & Co., therefore, to assent to the terms of the contract, if they expected to receive any protection thereby. Their failure to assent to the terms of the contract as proposed by the company, their failure to pay the premium, and their conduct in absolutely ignoring the matter, show conclusively that their minds did not assent to the contract as proposed by the company, and that, therefore, there was no complete contract of insurance in existence between them when the fire occurred. Not only does their failure to act show that they did not intend to make the contract, but the statement by Harper, at the time of the fire, and immediately after the fire, that he had no insurance, is strong corroboration of the other facts showing that there was no contract consummated. It was too late, several months after the proposal of insurance had been made by the insurance company to Harper & Co., which they had completely ignored, and after the property covered by the alleged insurance policy had been destroyed by fire, for them to assent to the terms upon which the contract of insurance had been proposed.

Judgment affirmed.

(6 Ga. App. 131)

MASON v. HAMBY & TOOMER. (No. 1,438.)
(Court of Appeals of Georgia. May 4, 1909.)

1. CONVICTS (§ 12*)—CONTRACTS FOR LABOR—CUSTODY OF CONVICTS.

By the convict leases made by the prison commission under the act of December 21, 1897 (Acts 1897, p. 76), and the amendment thereto approved August 17, 1903 (Acts 1903, p. 66), the state did not deliver the physical custody of the convicts into the hands of the lessees. Only the labor of the convicts was contracted for. The state itself had full control and man-

agement of the convicts, and appointed all the wardens, guards, etc., who had charge of the men employed in the work of the lessees. Subleases on similar terms were permitted, when approved by the prison commission.

[Ed. Note.—For other cases, see *Convicts*, Dec. Dig. § 12.*]

2. CONVICTS (§ 10*)—CONTRACTS FOR LABOR—LIABILITY OF LESSEES FOR INJURY.

Lessees of convicts, under the acts mentioned above, were not, by virtue of their mere relation as such, liable to a convict for injuries inflicted upon him by the wrongful act of a guard or "boss," or by the negligence of a sublessee or of one of his employes.

[Ed. Note.—For other cases, see *Convicts*, Dec. Dig. § 10.*]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Frank Mason, by next friend, against Hamby & Toomer. Judgment for defendants, and plaintiff brings error. Affirmed.

Mason brought suit against Hamby & Toomer, alleging that in 1906 he was a felony convict and was assigned to the defendants, who were lessees from the state of felony convicts; that he was subleased to the Southern Steel Company, and on May 24, 1907, was being worked in the plant of that company in Bartow county; that a "boss," alleged to have been an employe of that company, negligently and wrongfully ordered him into a dangerous position, described in the petition, and caused him to be hurt. The plaintiff seeks to hold the defendants liable for the injuries he received, on the ground that they were the original lessees from the state, and were responsible for the wrong and negligence of the sublessees. The court below sustained a general demurrer and the plaintiff excepts.

Lawson Lamar and Edgar Latham, for plaintiff in error. Candler, Thomson & Hirsch, for defendants in error.

POWELL, J. (after stating the facts as above). 1. Not since 1897 has the state of Georgia delivered the physical custody of any of its felony convicts into the hands of any private person or corporation. By the act of December 21, 1897 (Acts 1897, p. 76), and the amendment thereto of August 17, 1903 (Acts 1903, p. 66), the prison commission was authorized to lease the labor of certain of the convicts to private persons; but the state itself, through the commission, was to retain the full control and management of the men so employed. The lessees were to furnish the prescribed buildings, clothing, food, etc.; but the prison commission was to appoint all wardens, guards, physicians, and other persons in charge of the men. The prison commission prescribed rules and regulations as to all matters relating to the care of the convicts, and it

was the duty of the wardens and other officers to see that these rules were observed. Since the lessees were to furnish suitable buildings, clothing, food, etc., regulations upon these subjects were prescribed, and the lessees gave bond for the fulfillment of their duty in this respect. It was provided that the original lessees might sublet, with the consent of the prison commission, and in this event the wardens, guards, etc., caused the convicts to be worked for the sublessees, instead of the original lessees; but this in no wise varied or discharged the obligation created by the bond taken from the original lessees, and fixing the contractual duty on them of seeing that the necessary buildings, clothing, food, etc., were provided, and that the regulations, so far as applicable to them, were carried out. *Hamby v. Georgia Iron Co.*, 127 Ga. 792, 797, 56 S. E. 1033. Under the act of 1908 neither the persons nor the labor of convicts are now leased to any one; but this case arose under the old law.

2. By section 4940 of the Civil Code of 1895, "an action for a tort must, in general, be brought * * * against the party committing the injury, either by himself, his servant or agent in his employment." No act of commission on the part of the defendants, or of any of them or of any employé of them, is alleged in the present action. The negligent situation was created by fault of the Southern Steel Company. The wrongful command that the plaintiff should go into this unsafe place was given by the "boss," who is alleged to have been an employé, not of the defendants, but of the steel company. No wrongful act of omission is alleged against the defendants, unless there was resting in them and in favor of the convict an absolute duty of protection. We know of no law creating such duty, and there is no allegation that it was otherwise created. It was plainly contemplated by the law which allowed these leases and subleases, and which placed the entire management and control of the convicts and the duty of protecting their welfare in the hands of the prison commission, that the state should have such an interest in protecting the men from undue hardship or danger as to give the prison commission the right to annul a sublease, or even the original lease itself, if necessary to effectuate this purpose, and to hold the bond of the original lessees liable for any breach of the regulations, even though committed while the men were working for a sublessee. *Hamby v. Georgia Iron Co.*, supra.

However, the primary duty of protecting the convicts was upon the state itself, and we find nothing in the law which charged the original lessees with liability for torts committed by the wardens, guards, or "bosses," or by the sublessees, or by out-

siders, upon these unfortunate human beings. It is most manifest that the Legislature intended that the lessees should have no control over the persons of the convicts. They had a prima facie right to designate the work to be done; but the state's own officers were there to care for the men in the doing of it. Of course, we do not mean to say that the proprietors of mills, mines, or other places into which the convicts might have been sent to work would not be liable to the convicts, just as they would to any other human being, and perhaps even in a greater degree than they would be to free persons, for any failure in ordinary care as to the keeping of the instrumentalities, place of work, etc., in reasonably safe condition. But if any one is liable to the plaintiff in this case it is the "boss" who gave the wrongful command, or the Southern Steel Company, or both, and not the defendants.

Judgment affirmed.

(6 Ga. App. 137)

SAVANNAH ELECTRIC CO. v. ELARBEE.
(No. 1,470.)

(Court of Appeals of Georgia. May 4, 1909.)

1. APPEAL AND ERROR (§ 1002*)—CONFLICTING EVIDENCE—REVIEW.

On the facts the jury could have found for either plaintiff or defendant, and the verdict on that issue ends the controversy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. STREET RAILROADS (§ 85*)—RIGHTS AND DUTIES OF TRAVELER.

A street railway company has only an equal right with the traveling public to the use of the street in which its track is laid. In using the highway at a public crossing, the law gives to the traveler on the highway the same right to cross the track that it gives to the car to cross the highway, and imposes upon both the same duty of exercising reasonable care and prudence to avoid injuries.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

3. TRIAL (§ 250*)—INSTRUCTIONS—ISSUES.

Trial courts are required to submit to juries only issues made by the pleadings and evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 582-586; Dec. Dig. § 250.*]

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by A. B. Elarbee against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Osborne & Lawrence, for plaintiff in error. Garrard & Meldrim, for defendant in error.

HILL, C. J. Elarbee sued the Savannah Electric Company to recover damages for personal injuries received by him from a

collision between his wagon and a street car at a public street crossing. The only issue made by the pleadings and evidence was one of crimination and recrimination. The plaintiff charged and proved negligence on the part of the motorman in the manner in which he approached the crossing. The defendant denied the negligence attributed to the motorman, and charged and proved that the plaintiff's own negligence was the sole cause of his injuries. The jury might have found a verdict either way; but in the exercise of their exclusive legal function on issues of fact they decided the conflict in the evidence in favor of the plaintiff, and their decision must stand, unless in some material respect the court contributed to it by an error of law. Two errors of law are complained of.

1. On the subject of the relative rights of street cars and other vehicles to the use of the public streets, the court instructed the jury as follows: "One driving a wagon or vehicle, and a street car company, have equal rights on the streets. Neither one or the other has any superior right to the other. Each must use them in such manner as to preserve the rights of the other within the limit of the exercise of ordinary care." The defendant says this instruction was error, "because the street car company has the right of way over pedestrians and drivers of wagons. The charge was confusing to the jury." According to our view of the law the instruction correctly defined the relative rights of street cars and drivers of other vehicles to the use of the street. A street railway company has only an equal right with the traveling public to the use of the street where its track is laid. Of course, when a vehicle meets a car on the track at a public crossing, the driver of the vehicle should give to the car precedence in crossing, for the car can only run on the track; but this does not preclude the driver of the vehicle from his equal right to use the street. He is not required to abandon his right to cross the track at the crossing in order to avoid possible injuries that may result to him from the carelessness of the railway company. Both company and traveler have the same right to use the street at the crossing, and both are required to exercise ordinary care and diligence to avoid injuries. What would amount to this degree of care might in some cases differ, when applied to the company and to the traveler. The jury are to make the application in each case according to the particular facts.

The Supreme Court in *Macon Ry. & Light Co. v. Barnes*, 121 Ga. 445, 49 S. E. 283, clearly settles the law on the point under discussion: "A street railway company has no superior right to the use of the public highway in which its cars are operated over

the rights of other users of the highway, except that, from the necessity of the case, the latter, at places other than crossings, must give the company's cars the right to pass when occasion requires. In other respects, the rights of street railway companies, in using public highways with their cars, are precisely like the rights of others who use the highways with other vehicles." This decision goes to the extent of holding that the necessity of the case above adverted to by us does not apply at public crossings. The expression of the Supreme Court in the case of *Savannah Ry. Co. v. Beasley*, 94 Ga. 142, 21 S. E. 285, relied upon by the attorney for plaintiff in error, that "the cars of the railway company had the superior right of way," appears to be "obiter," according to the opinion of Justice Fish in the case just cited. *Macon Ry. & Light Co. v. Barnes*, 121 Ga. 447, 49 S. E. 282. See, also, *Cordray v. Savannah Electric Co.*, 5 Ga. App. 625, 63 S. E. 710.

2. The second special exception alleges error because the court did not charge on the theory of unavoidable accident, "there being evidence from which the jury might find that the injury was caused without fault upon the part of either plaintiff or defendant." We have carefully searched the brief of evidence, and we can find no circumstance suggesting an accident. The only issue made by the pleadings was one of negligence, and all the evidence in the case was pertinent alone to that issue. The trial judge is required to submit to the jury only the issues made by both pleadings and evidence. He is not required to present an issue purely academic and imaginary.

Judgment affirmed.

(6 Ga. App. 134)

L. CAMPBELL & CO. v. MION BROS.
(No. 1468.)

(Court of Appeals of Georgia. May 4, 1909.)

1. FRAUDS, STATUTE OF (§ 84*) — SALE OF GOODS—WORK AND LABOR.

A contract for the improvement of realty is not within the statute of frauds, although it involves the furnishing by the contractor of materials in excess of the sum of \$50.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 135; Dec. Dig. § 84.*]

2. CONTRACTS (§ 353*)—EXISTENCE OF CONTRACT—INSTRUCTIONS.

Where a contract not within the statute of frauds is the subject-matter of the suit, and the defendant admits that he made the agreement according to the terms asserted by the plaintiff, but insists that it was to have been in writing, the court may, without error, instruct the jury that the fact of the making of the contract was not in issue.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1830; Dec. Dig. § 353.*]

3. DAMAGES (§ 120*) — MEASURE—BREACH OF CONTRACT.

Where one employs another to furnish the labor and material and to do the work neces-

sary to the improvement of real estate, but renounces the contract prior to the time when the contractor has incurred any expense toward the performance of it, the recovery for the breach of the contract is limited to the difference between the contract price and what it would have cost the contractor in labor and materials to have performed it. But, if the contract is not broken until after the contractor has gone to expense toward its performance, the net loss incurred by him on account of the amount so expended should be added to the difference between the contract price and what it would have cost him to perform the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 291; Dec. Dig. § 120.*]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mion Bros. against L. Campbell & Co. Judgment for plaintiffs, and defendants bring error. Affirmed.

Campbell & Co. employed Mion Bros. to furnish the materials for and lay a ceramic mosaic tile floor in a building on Whitehall street in Atlanta at a price of \$363.82. Mion Bros. ordered the tiling, which was of a peculiar pattern having no general market value, at a cost of \$166.46, including the freight paid thereon; but, when they came with the material to the building in order to do the work, Campbell & Co. refused to allow them to do it. Mion Bros. thereupon brought suit against Campbell & Co. for damages resulting from the breach of the contract. Pending the trial it developed that, subsequently to the institution of the suit, the plaintiffs sold the tiling for \$95. The jury found for the plaintiffs \$100, and to the overruling of a motion for a new trial the defendants except. Further facts necessary to an understanding of the case will be stated in the opinion.

Maddox & Sims, for plaintiffs in error. Moore & Pomeroy and W. A. Hood, for defendants in error.

POWELL, J. (after stating the facts as above). 1. The first insistence is that the contract was void, because not in writing, and therefore within the inhibition of the statute of frauds. A contract for the doing of a designated piece of work is not within the statute of frauds, although it involves the furnishing of materials which themselves may be classed as goods, wares, and merchandise in an amount exceeding \$50, unless the real intention of the parties is that the transaction should in substance be a sale of the materials, and that the doing of the work and labor should be merely incidental. *Cason v. Cheely*, 6 Ga. 554.

2. Exception is taken to the fact that the judge charged the jury: "On the trial it is not disputed by the defendants but that they entered into a contract mentioned in the petition. It is not on the trial a dis-

puted issue as to whether the contract was made or not. The defendant in his evidence on the trial admits that the contract was made." Upon an inspection of the brief of the evidence we find that the defendant who testified did not deny making a contract such as claimed by the plaintiffs; his insistence being that the plaintiffs were to bring him a written contract embodying its terms, which had not been brought or signed. The agreement was complete, however, and the writing would have only been evidence. This would have been true, even if the agreement had been within the statute of frauds. *Capital City Brick Co. v. Atlanta Coal & Ice Co.*, 5 Ga. App. 436, 63 S. E. 562.

There are certain other assignments of error upon the charge of the court; but they are not well taken. They will not be reported, as they present no question of general importance or interest.

3. It is insisted that the proof did not authorize the amount of the verdict rendered. It was shown on the trial that the contract price for the work was \$363.82; that the tiling and the freight on it cost the plaintiffs \$166.46, and that the cost of laying the tile would have been \$80; that the plaintiffs had received from the resale of the tiling the sum of \$95. By an ingenious method of calculation counsel for the plaintiffs in error attempt to show that the plaintiffs' loss under this state of facts was only \$22.36. The process of calculation suggested is as follows: By adding together the cost of the tile and the freight and the sum which the labor would have cost (making a total of \$246.46), and by subtracting this from the contract price the result is \$117.36—the profit which the plaintiffs would have earned if the contract had been executed according to its terms. By deducting from this \$117.36 the \$95 for which the tile was resold, the result obtained is \$22.36, which, it is argued, represents the plaintiffs' actual loss.

In this calculation counsel are guilty of bad mathematics. Taking the figures given above as true, it will be seen that, if the plaintiffs had completed the contract according to its terms, it would have cost them \$246.46, and that then they would have been entitled to receive from the defendants the sum of \$363.82. If the defendants had renounced the contract before the plaintiffs went to any expense toward its performance, they would have been primarily liable for the contract price, but would have been entitled to compel the plaintiffs to credit them with the amounts saved by reason of being relieved from performance; that is to say, the plaintiffs' recovery in that event would have been limited to \$363.82, less the \$246.46. But the defendants did not break or renounce the contract at that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time, nor until after the plaintiffs had gone to the expense of procuring the tiling, which, on account of its peculiar pattern, was not worth in the market what it cost to have it made. The defendants, therefore, were entitled to have the contract price of \$363.82 reduced only by the amount which the plaintiffs saved on the item of labor (\$80) and the amount which was received for the tiling on a resale thereof (\$95). Therefore any verdict up to the amount of \$188.82 (the difference between \$363.82 and \$175) would have been authorized.

Judgment affirmed.

(6 Ga. App. 121)

BAKER v. HOOKS. (No. 1,342.)

(Court of Appeals of Georgia. May 4, 1909.)

1. BANKRUPTCY (§ 421*)—DISCHARGE—"PROVABLE DEBT."

A discharge in bankruptcy may be a good defense against all debts of the bankrupt which were provable at the time of the adjudication in bankruptcy; but the probability that one who has retained title to a horse, which has been sold by the purchaser by a third person under a warranty of title, will retake such horse, and that thereby a breach of the warranty will result, is not a "provable debt" within the meaning of the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 421.*]

For other definitions, see Words and Phrases, vol. 6, p. 5746.]

2. SALES (§ 430*)—WARRANTY OF TITLE—DEFENSES.

One who warrants title is not relieved from his warranty by the suggestion of an ineffectual means of retaining possession against an impending attack and an offer to pay attorney's fees to present a worthless defense thereto.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 430.*]

3. SALES (§ 441*)—BREACH OF WARRANTY OF TITLE—ACTIONS—EVIDENCE—SUFFICIENCY.

No error of law is assigned. The evidence authorized the verdict, and no reason appears why a new trial should have been granted.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 441.*]

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by C. C. Hooks against W. A. Baker. Judgment for plaintiff, and defendant brings error. Affirmed.

Ira S. Chappell, for plaintiff in error. W. C. Davis and J. S. Adams, for defendant in error.

RUSSELL, J. Baker bought a horse from Smith to which Smith retained the title. This horse Baker swapped to Hooks for a certain roan horse. Baker filed an application in bankruptcy, and the horse he obtained from Hooks was taken possession of by the trustee in bankruptcy and sold as Baker's property. After Baker was adjudicated a bankrupt, Smith, by trover, recovered from

Hooks the horse which had been sold to him by Baker, and Hooks thereupon brought suit against Baker and recovered \$105 upon an alleged breach of warranty. Baker denied that he had warranted the title of the horse to Hooks; but the jury found in favor of Hooks' contention that Baker had warranted the title. Three reasons why a new trial should have been granted are urged by the plaintiff in error: First, that the evidence does not authorize the verdict rendered in favor of Hooks; second, that Smith ratified Baker's action in substituting one horse for the other; third, that if there was a breach of warranty of title it was a provable debt, and was discharged in bankruptcy.

1. We will consider these contentions in inverse order. Then is the finding against Baker unauthorized by reason of the fact that he has been adjudicated a bankrupt? There can be no question that Baker's discharge, which appears in the record, would be a good defense as against all provable debts; and for this reason it is insisted that the breach of warranty, if any existed, should relate back to the original transaction, which antedated Baker's discharge, and even his petition in bankruptcy. However, was Hooks' claim upon the breach of warranty ever a provable debt until Smith succeeded by trover in depriving Hooks of the horse? We think not, and for this reason we are of the opinion that the breach of warranty cannot relate back to the original transaction, because it only had its birth after it was ascertained by Smith's assertion of his title that the warranty had failed. Till then it was a mere contingent liability, and not a provable debt. If Smith had not recovered the horse by trover, and taken it from Hooks' possession, there would have been no breach of warranty; and who could have said, at the time that Baker was adjudicated a bankrupt, that Smith would assert his title to the horse which he had retained? It is true that Smith could do so; but it was not certain that he would do so, and until he had done so, and Hooks had thus lost possession of the horse, there could certainly be no provable debt. The breach of the warranty having arisen after the adjudication in bankruptcy, the plea of bankruptcy presented no defense, and was properly overruled in the verdict of the jury.

2. One who retains title to a given piece of personal property may release his claim of title, and may ratify the act of another in substituting one piece of property for another. In the latter event, however, no substitution can result, except upon the consent of all parties at interest. But, even if it were possible for Smith to have consented for Baker to substitute a horse which was not included or mentioned in the note in which the title was reserved (and this would not be possible), nevertheless the contention

of the plaintiff in error that Smith was estopped from setting up title to the horse sold by Baker to Hooks, because he bought the substituted horse at the bankrupt sale, and that therefore Hooks had a good defense to the trover brought by Smith, is not sustained by the evidence, nor is Smith a party to this proceeding.

A contention of plaintiff in error is that Baker notified Hooks that Smith had agreed to the substitution of the horse obtained from Hooks by Baker for the horse sold by Smith to Baker; that he had bid in the horse scheduled by Baker in his application for bankruptcy, and this presented a good defense to Smith's action of trover; and that, inasmuch as Hooks failed to make any defense in the trover proceeding, he is estopped from asserting any claim upon the breach of warranty. Aside from the point, to which we have alluded, that Smith is not a party to the present action, the contention of the plaintiff in error was adjudged adversely to him by the jury, and the finding of the jury is supported by the positive testimony of Smith, who testified that he never released his claim of title to the horse he had sold to Baker, and when he bought the horse which Baker had obtained from Hooks at the sale of Baker's bankrupt estate he did so merely as an ordinary buyer seeking a bargain, without any claim of title in the horse, and paid the purchase price of his bid.

3. The jury might have returned a verdict in favor of the plaintiff in error; but the verdict in favor of the defendant in error is amply supported by the evidence, and no reason appears why the trial judge should have granted a new trial overruling the finding of the jury upon issuable facts. Baker testified, it is true, that he made no warranty of title to Hooks; but Hooks testified that he did. This is the turning point in the case, because it is uncontested that Smith had the title to the bay horse which Baker traded to Hooks, and that after Baker was adjudicated a bankrupt Smith recovered this horse from Hooks by trover. Hooks testified that Baker did not tell him that Smith held title to the horse. Baker testified that he did. This difference is immaterial, as, although Hooks was charged with constructive notice of the reservation of title, which was recorded, there is no reason why Baker could not still have warranted the title and have protected Hooks against loss by settling Smith's claim. The fact that Baker told Smith to defend the suit which Smith brought against him for the horse, and promised to pay the attorney's fees, is of no importance in the case, because, under Smith's testimony, he never having ratified Baker's sale of the horse, and never having claimed any interest in the animal which Baker received in lieu thereof, the defense suggested by Baker would have been fruit-

less, and the effect of the jury's finding was so to declare.

Judgment affirmed.

(6 Ga. App. 164)

DANIEL v. STATE. (No. 1,797.)

(Court of Appeals of Georgia. May, 4, 1909.)

1. REVIEW OF EVIDENCE.

The evidence authorized the verdict.

2. CRIMINAL LAW (§ 1156*) — NEW TRIAL — CUMULATIVE EVIDENCE.

While a trial judge has the discretion to grant a new trial because of newly discovered evidence which is cumulative in its nature, yet his discretion in refusing to do so will not ordinarily be reversed. Especially is this true where the alleged newly discovered evidence bears upon its face indicia which tend so to discredit it that on another trial the result would probably not be changed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

3. CRIMINAL LAW (§ 913*) — FORM OF SENTENCE — GROUNDS FOR NEW TRIAL.

Matters relating to the form or substance of the sentence cannot legally be made grounds for a new trial. If the sentence is for any reason erroneous, the error can be corrected only by direct exception.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 913.*]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; Z. A. Littlejohn, Judge.

A. B. Daniel was convicted of crime, and brings error. Affirmed.

Henry C. Cameron, for plaintiff in error.
Geo. C. Palmer, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(6 Ga. App. 112)

HOLLOWAY v. MACON GASLIGHT & WATER CO. (No. 1,113.)

(Court of Appeals of Georgia. May 4, 1909.)

AFFIRMANCE ON APPEAL.

The Supreme Court having held, in answer to a question certified by this court, that the petition was subject to general demurrer, the judgment of the trial court is affirmed.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by J. D. Holloway against the Macon Gaslight & Water Company. Judgment for plaintiff, and defendant brings error. Certified to the Supreme Court (64 S. E. 330), and questions answered. Judgment affirmed.

T. J. Cochran and Hall & Hall, for plaintiff in error. N. E. & W. A. Harris, for defendant in error.

POWELL, J. Affirmed.

(6 Ga. App. 180)

RICE v. STATE. (No. 1,783.)

(Court of Appeals of Georgia. May 4, 1909.)

1. LARCENY (§ 15*)—TAKING—BAILMENT.

Where it is shown, upon the trial of a defendant upon an accusation for simple larceny, that he borrowed from the prosecutor the article of personalty charged in the accusation for a mere temporary purpose of his own, and took it without the prosecutor's consent, and carried it away to another state, and the testimony is such as to justify the inference that the borrowing and the carrying away were with intent to steal, the conviction is lawful.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 39-42; Dec. Dig. § 15.*]

2. LARCENY (§ 15*)—LARCENY AFTER TRUST.

In cases of larceny after trust delegated, under section 191 of the Penal Code of 1895, it must appear that there was a bailment of the article converted or stolen, and that the delivery of the property to the defendant was for some purpose in which the bailor, or some person other than the defendant, had an interest and a benefit. A mere temporary loan of the property, without hire or other benefit to the person loaning, is not such a fiduciary bailment as would make the conversion or stealing of the property larceny after trust, as distinguished from simple larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 39-42; Dec. Dig. § 15.*]

(Syllabus by the Court.)

3. LARCENY (§ 15*)—CONVERSION BY "BAILEE."

The word "bailee," used in its broad sense, includes every person to whom the possession of personal property is delivered by another; but, as used in Pen. Code 1895, § 191, which provides that any factor, commission merchant, warehousekeeper, etc., or any other bailee, who shall fraudulently convert anything of value intrusted to him, shall be guilty of a felony, it is necessary that the character of the relation be a more fiduciary one than that arising from a mere loan for the benefit of the borrower.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 39-42; Dec. Dig. § 15.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 672.]

Russell, J., dissenting.

Error from City Court of Blakely; W. A. Jordan, Judge.

Corrie Rice was convicted of larceny, and brings error. Affirmed.

P. G. Thompson and James & Thompson, for plaintiff in error. Walter G. Park, Sol., for the State.

POWELL, J. 1. The defendant, a woman, borrowed a pistol from the prosecutor, stating that her husband had gone away from home and left her alone. The prosecutor loaned her the pistol, that she might use it, for three or four days. In about two days after she borrowed the pistol the woman went to Alabama, and carried the pistol away with her, and never offered to return it, nor made any explanation of her conduct. Some months later she was arrested in Alabama and brought back upon a requisition. She was accused and convicted of simple larceny. She presents the

point in this court that, if there was any larceny, it was larceny after trust delegated, and not simple larceny. "If, with intent to steal, one borrows or hires a horse or carriage, as he pretends, to ride, or obtains the loan of any other chattel, * * * his offense, notwithstanding this consent of the owner, is larceny." 2 Bishop's New Criminal Law (8th Ed.) § 813. The intent to steal is inferable from the defendant's conduct in the present case.

2. The real question is: Was the offense simple larceny, or was it larceny after trust delegated, under section 191 of the Penal Code of 1895? That section provides: "If any factor, commission merchant, warehouse keeper, wharfinger, wagoner, stage driver, or common carrier on land or water, or any other bailee," shall fraudulently convert anything of value intrusted to him, he shall be guilty of a felony. In *Sanders v. State*, 86 Ga. 718, 12 S. E. 1058, it is said that the words "other bailee," found in this section, are equivalent to the words "other like bailee." This statement, however, was characterized as obiter, and not binding, in the case of *Cody v. State*, 100 Ga. 109, 28 S. E. 106; and it is there said that the words "other bailee" were intended to include any person with whom money or other thing of value might be intrusted or deposited. A similar criticism was made upon the *Sanders Case* in *Weaver v. Carter*, 101 Ga. 213, 28 S. E. 869, and in *Belt v. State*, 103 Ga. 15, 29 S. E. 451. While the word "bailee," in its broad sense, may be construed to include every person to whom the possession of personal property is delivered by another, yet from a careful reading of the *Cody Case* and the *Belt Case*, supra, it will be seen that a bailment more fiduciary in its character than that of a mere loan for the sole benefit of the borrower is necessary to fulfill the legislative intention in the employment of the word. In *Cunnegin v. State*, 118 Ga. 125, 44 S. E. 846, the prosecutor voluntarily delivered the stolen article to the defendant, who carried it away and disposed of it, fraudulently intending to steal it, and the court sustained the conviction of simple larceny, saying that "the element of trust of the character which enters into all cases of larceny after trust was absent." This case cites *Finkelstein v. State*, 105 Ga. 618, 31 S. E. 589, in which it is shown, in the course of the argument, that while the words "other bailee," used in section 191 of the Penal Code, were not so restricted in meaning as was indicated in the obiter in the *Sanders Case*, supra, yet that under that section there must be a "delegated trust." See, also, in this connection, *Harris v. State*, 81 Ga. 758, 7 S. E. 689, 12 Am. St. Rep. 355.

Our conclusion is that, before a prosecution will lie under section 191 of the Penal

Code, it must appear that the property was delegated to the defendant upon some trust or purpose in which the person delivering the article, or some person other than the defendant himself, has an interest or benefit, and that the mere delivery of the chattel to the defendant as a temporary loan, without hire and for the benefit of the defendant only, does not create such a bailment as is contemplated by that section.

Judgment affirmed.

RUSSELL, J., dissents.

(6 Ga. App. 144)

GELDERS v. MATHEWS. (No. 1,483.)
(Court of Appeals of Georgia. May 4, 1909.)

CHATTEL MORTGAGES (§ 283*)—AFFIDAVIT OF ILLEGALITY—BOND—AMENDMENT.

A replevy bond, given on filing an affidavit of illegality by the defendant in a mortgage *fi. fa.* issued to subject personal property, contained conditions varying from those prescribed by the statute, to wit: The bond was conditioned for the delivery of the property at the time and place of sale, and was made payable to the levying officer, when, according to the statute, it should have been conditioned for the return of the property when called for by the levying officer, and should have been made payable to the plaintiff in *fi. fa.* Held, that the bond was amendable in both respects before final judgment, so as to make it conform to the requirements of the statute.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 283.*]

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Isadore Gelders filed an affidavit of illegality to the levy of a mortgage *fi. fa.* on personal property by Thomas Mathewz. The affidavit was dismissed, and Gelders brings error. Reversed.

Ryman & Wall, for plaintiff in error. E. Wall, for defendant in error.

HILL, C. J. This was an affidavit of illegality to the levy of a mortgage *fi. fa.* upon personal property. The bond filed with the affidavit varied from the replevy bond required in such cases by section 2766 of the Civil Code of 1895 in the following particulars: First, the condition of the bond was for the delivery of the property levied upon at the time and place of sale, instead of "for the return of the property when called for by the levying officer"; second, the

levying officer was made the obligee in the bond, instead of the plaintiff in *fi. fa.* Because of the variance in the above particulars a motion was made to dismiss the affidavit of illegality. To meet this motion plaintiff in illegality offered to amend the bond so as to make it conform in the particulars mentioned to the terms of the statute. The court refused to allow the amendment and dismissed the affidavit of illegality.

1. While the terms and conditions of the bond in the particulars mentioned are not in accordance with the requirements of the statute in such cases, these defects were clearly amendable, as the motion to amend was offered before any judgment of the court on the motion to dismiss the illegality. The Supreme Court, construing section 3505 of the Code of 1882, now section 5123 of the Civil Code of 1895, distinctly holds that a bond given on filing an affidavit of illegality by the defendant in a mortgage *fi. fa.* issued to subject personal property falls under the terms of this section, and that such bond is amendable. *Lytle v. De Vaughn*, 81 Ga. 228, 7 S. E. 281. What is here held is certainly applicable to the variance from the statute in the condition of the bond first alluded to.

2. We think this holding is also applicable to the second variance mentioned. But, even if the bond was not amendable by making a change as to the obligee therein mentioned, it was accepted by the levying officer and the papers returned into court. While, strictly speaking, it is not in this respect a statutory bond, it was a good common-law bond, and suit could have been brought on it in the name of the sheriff for the use of plaintiff in *fi. fa.* *Wall v. Mount*, 121 Ga. 831, 49 S. E. 778; *Stroud v. Hancock*, 116 Ga. 332, 42 S. E. 496.

It is insisted by the plaintiff in error that the amendments in question could not have been properly made without the consent of the surety in the bond. We do not think this objection well founded. The defects indicated by the amendment in the terms of the bond in no wise affected the risk of the surety, or increased his liability. Besides, the surety signed the bond with the knowledge of the law that it was amendable in these respects under the statute, and the statute also provides that new security may be given after an amendment, if necessary. Judgment reversed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(150 N. C. 559)

PIERSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. May 5, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 38*)—DELIVERY OF MESSAGE—DELAY—NEGLIGENCE.

Where a message was filed with the telegraph company as a night message on Saturday at 8 p. m., and was not delivered till nearly 10 a. m. Monday, though under the rules of the company it should have been delivered by 8 a. m. Sunday, and the addressee resided within 200 yards of the telegraph office, the company was guilty of gross negligence.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.*]

2. TELEGRAPHS AND TELEPHONES (§ 73*)—DELIVERY OF MESSAGE—DELAY—INJURY TO PLAINTIFF—QUESTION FOR JURY.

In an action for delay in delivering a telegram announcing the probable death of a niece of the addressee, evidence held to present a question for the jury whether the addressee would have arrived in time for the funeral if the message had been properly delivered.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

3. TELEGRAPHS AND TELEPHONES (§ 38*)—DELIVERY OF MESSAGE—NOTICE OF CHARACTER OF MESSAGE.

A telegram, stating that a person is dying, puts the telegraph company on notice of its importance to the sendee and that it is sent for his benefit.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. § 38.*]

4. TELEGRAPHS AND TELEPHONES (§ 73*)—DELIVERY OF MESSAGE—DELAY—ACTIONS—QUESTION FOR JURY.

Evidence that a child concerning whose death a message was sent to plaintiff was his niece, with whom he had lived and to whom he was much attached, presented a case for the jury as to whether he suffered any mental anguish from inability to attend her funeral by reason of delay in delivery of the message.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

Appeal from Superior Court, Caldwell County; Ward, Judge.

Action by R. H. Pierson against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. No error.

Civil action for damages arising from delay in delivering a telegram to plaintiff, as follows: "Statesville, N. C., Oct. 13, 1906. R. H. Pierson, Lenoir N. C. Come to Statesville at once Hamp's child dying. J. H. Holden." These issues were submitted: (1) Was the defendant guilty of negligence in respect to the transmission and delivery of the telegram to the plaintiff, R. H. Pierson? Ans. Yes. (2) If so, was the plaintiff, R. H. Pierson, injured thereby? Ans. Yes. (3) What damages, if any, has the plaintiff sus-

tained? Ans. \$300." From the judgment rendered defendant appealed.

Avery & Avery and Geo. H. Fearons, for appellant. W. C. Newland, Thos. Newland, and Lawrence Wakefield, for appellee.

BROWN, J. The message was filed with defendant company as a night message for transmission on Saturday, October 13, 1906, at 8 p. m. It was delivered to the plaintiff on Monday morning between 9 and 10 o'clock. That this is gross negligence is not open to discussion. Assuming that it was filed and accepted as a night message, under the rules of the company it should have been delivered next morning about 8 o'clock according to the testimony of defendant's operator. It was not received at Lenoir until 9:42 a. m. Sunday, and when received at Lenoir it was addressed to the care of Jim Better, instead of Jim Booth; but there is no evidence that plaintiff is chargeable with that error. There is no evidence of any effort being made Sunday morning to find plaintiff or Jim Better in Lenoir, although the former resided within 200 yards of the telegraph office. We think his honor did not err in directing the jury that, if they believed the evidence, to answer first issue "yes." The real defense of the defendant is based upon the theory that, if the telegram had been delivered on Sunday morning, according to contract, the plaintiff could not have reached Statesville in time to attend the funeral, and that therefore the plaintiff has failed to show that defendant's negligence was the proximate cause of the injury. It is plain that there was no train leaving Lenoir on Sunday morning which he could have taken, as the only Sunday train left at 5 a. m.; but plaintiff testifies he would have gone to Statesville Sunday morning had he received the message, and that he could have gotten there for the funeral by driving to Hickory. The possibility of such an achievement was contested by defendant, but we think his honor properly submitted the question to the jury when he told them "that the plaintiff must show to your satisfaction that he could have gone to Statesville before the funeral." Upon this contention his honor fairly submitted to the consideration of the jury the evidence and facts relied on by defendant as well as plaintiff.

It is further contended that there is no evidence that the plaintiff suffered any mental anguish. The character of the message put defendant upon notice of its importance to the sendee, and that it was sent for his benefit. The testimony shows that the dying child was plaintiff's niece, with whom he had lived in his brother's house, and that he was much attached to her. It is true that plaintiff does not use as strong language in endeavoring to portray his grief as is some-

times employed; but facts sometimes speak louder than words, and both together made out a case sufficiently strong to be submitted to the jury.

No error.

(150 N. C. 575)

GARRISON v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 5, 1909.)

1. CARRIERS (§ 20*)—REGULATIONS—PENALTIES—DEFENSES.

When a carrier shows the existence of conditions for which it is not responsible, preventing the discharge of its duty to receive goods for shipment, it will not be held liable for the penalty imposed by Revisal 1905, § 2631, for failure to receive and ship goods.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

2. STATUTES (§ 174*)—CONSTRUCTION—GENERAL RULES.

The court will not attribute to the Legislature the intention to punish the failure to do an impossible thing.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 254; Dec. Dig. § 174.*]

3. CARRIERS (§ 20*)—REGULATION—PENALTIES—TENDER OF GOODS.

To entitle a shipper to the penalty imposed by Revisal 1905, § 2631, for a carrier's failure to receive freight for shipment, it must be tendered at a regular depot and during business hours.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

4. CARRIERS (§ 20*)—REGULATION—PENALTIES—"REFUSAL TO RECEIVE SHIPMENT."

Where a shipper was permitted to place lumber on a car, but the carrier refused to receive it for shipment, or to issue a bill of lading for it, this was a "refusal to receive" it, within Revisal 1905, § 2631, imposing a penalty for such refusal.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

5. CARRIERS (§ 20*)—REGULATION—PENALTIES—EXCUSE OF CARRIER.

That the consignee of freight failed to unload cars consigned to him, creating a congestion of traffic at the point of destination, was not a sufficient excuse for the carrier's refusal to receive and issue a bill of lading for an additional shipment to relieve the carrier from liability for the penalty imposed by Revisal 1905, § 2631, for refusal to receive freight for shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

6. CARRIERS (§ 21*)—REGULATION—DISCRIMINATION.

At common law and under Revisal 1905, § 3749, it is an indictable offense for a common carrier to unjustly discriminate between members of the public.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 21.*]

7. CARRIERS (§ 20*)—REGULATION—PENALTIES—"TENDER AND REFUSAL OF FREIGHT."

Where a shipper placed lumber on a car with the carrier's consent and demanded a bill of lading, which was refused, and went to the agent of the carrier two or three times and asked if he had shipped the car load, and he said he had not, and plaintiff refused to unload the car, there was a tender and refusal to ship on each day from the time the goods were

placed in the car until they were finally shipped, within Revisal 1905, § 2631, imposing a penalty of \$50 for each day a carrier refuses to receive freight.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

8. STATUTES (§ 241*)—CONSTRUCTION—PENAL STATUTES.

While penal statutes are to be construed strictly against the party against whom they are enforced, they are not to be construed so as to make them of no effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

9. COMMERCE (§ 61*)—MEANS OF REGULATION—CARRIERS—PENALTIES.

Revisal 1905, § 2631, imposing a penalty for a carrier's refusal to receive freight for shipment, as applied to a shipment between points within the state, and in the absence of specific action by Congress or the Interstate Commerce Commission, is not invalid as a regulation of interstate commerce, though it may indirectly affect interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81, 84; Dec. Dig. § 61.*]

10. COMMERCE (§ 61*)—MEANS OF REGULATION—CARRIERS—PENALTIES.

That Revisal 1905, § 2631, may in certain cases affect interstate shipments, does not invalidate the statute, but merely gives an additional excuse to the carrier for nonperformance.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 61.*]

11. CARRIERS (§ 20*)—REGULATION—PENALTIES—POWER TO IMPOSE.

The state has power to impose penalties upon carriers for failure to discharge public duties, provided they are not so enormous that the carrier is prevented from resorting to the courts to determine the validity of the statute.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

12. CARRIERS (§ 2*)—REGULATION—PENALTIES.

Revisal 1905, § 2631, imposing a penalty of \$50 for each day's failure to receive freight for shipment, is not invalid as imposing a penalty which would prevent the carrier from resorting to the courts to determine the validity of the statute.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 2.*]

Appeal from Superior Court, Buncombe County; Gulon, Judge.

Action by W. A. B. Garrison against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. No error.

This action is instituted for the recovery of the penalty imposed by section 2631. Revisal 1905, for failure to receive a car load of lumber tendered defendant by plaintiff at Black Mountain Station to be shipped to W. H. Westall at Asheville; both points being within this state. The facts, as stated in defendant's brief, are: Plaintiff had contracted to sell lumber f. o. b. cars at Black Mountain to Westall at Asheville. Plaintiff hauled the lumber to Black Mountain, loaded it on cars furnished by defendant June 7, 1906, and demanded a bill of lading, which defendant's agent declined to give to him upon the ground that an embargo had been

placed upon shipments of lumber consigned to W. H. Westall and English & Co. at Asheville on account of accumulation of business for them at that point. When the embargo against Westall was placed, there were many loaded cars on defendant's yard at Asheville for him which he could not or would not handle, and this, with other conditions, created a congested condition of the Asheville yards and caused the embargo to be placed upon shipments to him. There was evidence tending to show: That the defendant's yards and tracks at Asheville were congested by an unusual number of cars of freight which were left unloaded. That on May 30, 1906, defendant's superintendent issued the following notice to "All Agents, Asheville Division: Until further notice, place embargo on all shipments of lumber consigned to W. H. Westall and English & Co. at Asheville, N. C., account accumulation of business for these people at Asheville." On June 16th the embargo against Westall was canceled. There was evidence tending to show: That, before and during the time of the embargo, defendant had on its yard and tracks at Asheville for Westall some 18 or 20 cars of lumber—had more than could be placed on his tracks for unloading, and they occupied other tracks. That they congested the yard and occupied cars that defendant required to move other freight on the line. The traffic in the summer of 1906 was one-third heavier than ever before. Plaintiff testified that he made several demands upon defendant's agent for a bill of lading, each of which were refused until June 20, 1906, when he gave him the bill and shipped the car. The only issue submitted to the jury was directed to the number of days which defendant refused to receive the car load of lumber. Under instructions of his honor the jury found a delay of "nine days deducting two Sundays." His honor rendered judgment for the penalty of \$50 a day, imposed by the statute, amounting to \$450. Defendant excepted and appealed, assigning errors set out in the opinion.

W. B. Rodman, Moore & Rollins, and R. G. Lucas, for appellant. Craig, Martin & Winston, for appellee.

CONNOR, J. The exceptions to the rulings of his honor are not very clearly stated in the record, but in the well-considered brief of defendant's counsel the questions argued before us are thus formulated: (1) Was the defendant entitled to have its reasons and excuses for not issuing the bill of lading, on demand, considered by the jury? (2) Can the plaintiff recover a penalty for each day of delay to ship without showing a daily renewal of the tender? (3) Is the statute (Revisal 1905, § 2631) void: (a) As a regulation of interstate commerce in conflict with article 1, § 8, cl. 3, of the Constitution; (b) as being in conflict with the fourteenth amendment to the federal Constitution?

In discussing the first question we are uncertain whether his honor was of the opinion that the statute imposed upon the defendant an absolute duty to receive plaintiff's lumber for shipment to Westall, and that no defense was open to it other than "the act of God or the public enemy," or whether, taking all of the evidence as true, it failed to show such a condition as excused the defendant from receiving the lumber for shipment to Westall. Having received the testimony, over plaintiff's objection, it would seem that his honor was of the opinion that no valid defense was established. As the construction of the statute has, in this and other appeals, been pressed upon our consideration, we think it well to discuss and decide it. Section 2631 provides that transportation companies "whose duty it is to receive freight for shipment" shall, for refusing to receive all freight "whenever tendered" to its agent, etc., forfeit and pay a penalty of \$50 for each day it refuses to receive said freight, together with actual damages sustained. The freight must be tendered at a regular depot and within business hours. *Alsop v. Express Co.*, 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271. It is well settled that, when statutes give new and additional remedies for the enforcement of rights and duties given or imposed by the common law, unless a contrary intention is manifested, the courts will not assume that the Legislature intended to enlarge or modify the common-law right or duty. This we think is illustrated by the decisions of this court.

In *Branch v. Railroad*, 77 N. C. 347, the first case in which a statute imposing a penalty upon a common carrier came before the court, it was insisted by the defendant that, although the language of the statute was imperative and contained no exonerating or excusing exceptions, it was open to the defendant to show that conditions existed which excused it from performance of the duty and liability for the penalty. The statute (Acts 1874-75, p. 322, c. 240; Code 1883, § 1967) imposed a penalty of \$25 a day for "permitting freight to remain unshipped for more than five days unless otherwise agreed." Mr. Justice Rodman, in an able opinion, held that: "The act does not supersede or alter the duty or liability of the company at common law. The penalty in the case provided for is superadded. The act merely enforces an admitted duty." He further says that it was not necessary to decide whether "any excuse, short of the act of God or the king's enemies, would suffice," because "the excuse offered was insufficient." He proceeded, however, to discuss the reasons assigned for not discharging the duty, and concludes that the conditions which were shown "were brought about by its own acts in inducing large shipments from points beyond its southern terminus." The defendant was an intrastate road.

In *Keeter v. Railroad*, 86 N. C. 346, de-

defendant showed that there was an accumulation of cars at its depot at Halifax, N. C. The court, without discussing the question, said that the excuse was insufficient, citing Branch's Case, *supra*. It did not appear how the conditions at Halifax were brought about. The court disposed of the question by saying that "it was the duty of defendant to provide cars for the transportation of all the freight delivered." This language indicated the opinion that the duty was absolute, and that no excuse could be heard to avoid the recovery of the penalty, when it was not discharged.

At the next term *Whitehead v. Railroad*, 87 N. C. 255, was before the court. The conditions urged by defendant as an excuse for failing to ship within five days were found by the superior court and set out upon the record. Plaintiff relied upon the language used in Keeter's Case, *supra*. Ashe, J., who wrote the opinion in this case, said: "It may be well to observe that the court did not go into the discussion of that question," because the delay did not go beyond five days. The learned and always candid justice said: "The court could not have intended to hold that there could be no excuse, when it was citing Branch's Case with approval, in which it is conceded that excuses may be admitted." After discussing the facts found by the judge, he concludes: "The delay in making the shipment, then, it seems, has not been caused by any act of negligence or default on the part of the defendant, but resulted from the concurrence of circumstances entirely beyond its control." Smith, C. J., in a concurring opinion, after citing authorities holding that exonerating conditions may be shown, says: "This seems to me a just view of the carrier's liability at common law; and the statute, as this court declares in the case cited, does not enlarge or extend the obligation, but merely provides an additional method of enforcing it." Justice Ruffin dissented from the conclusion reached in regard to the sufficiency of the conditions shown, to excuse defendant from discharging the duty, but concurred that the statute created no new duty, and that conditions could be shown in excuse. He said that the effect of the statute was not to enlarge a common-law duty, but "is intended simply to enforce an admitted duty." In regard to the conditions which would, in his opinion, be held sufficient to excuse the carrier, he says: "Nothing short of that diligence which would acquit the defendant of his common-law duty and liability should be allowed to exonerate it from the penalty prescribed by the statute."

We conclude from these decisions, sustained by reason, that when the carrier shows the existence of conditions, for which it is not responsible, preventing or rendering impossible the discharge of the duty, it will

not be liable for the penalty. The principle which commends itself to us as just is thus stated by Judge Ashe: "When the facts show that, by force of circumstances for which it was in no way responsible, the carrier was disabled from performing the duty imposed by the statute, it would be unjust to punish it for failing to comply with its requirements." Keeping this principle in view, the validity of the claim for excuse or exoneration must depend very largely upon the facts in each case as they are presented. While the policy of the legislation which has for its object the enforcement of the performance of the duty to the public by transportation companies should be sustained, the statutes should be so construed and enforced as to advance the remedy and suppress the evil without, at the same time, becoming harsh, unjust, and oppressive. When a new and additional duty is imposed by the statute, we can see no reason why the same principle should not prevail. It is an elementary rule in the construction of statutes that the court will not attribute to the Legislature the intention to punish the failure to do an impossible thing. "No text imposing obligations is understood to demand impossible things." *Walker v. Railroad*, 137 N. C. 163, 49 S. E. 84; *Stone v. Railroad*, 144 N. C. 226, 56 S. E. 932. "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endangered." *Margate Pier Co. v. Hannam*, 3 Barn. & Ald. 266. The court should enforce the legislative will, as expressed in the statute, remembering "the letter killeth while the spirit giveth life."

The validity of statutes enacted for the purpose of compelling common carriers to discharge their duty to the public, by the imposition of penalties, has been in some instances, successfully attacked by reason of harsh and literal construction given them by the court. This is illustrated by the case of *Houston, etc., R. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, strongly urged upon our attention in this and other cases. The statute of Texas, upon which that decision is based, required the carrier, upon demand, to furnish cars. No excuse was named in the statute other "than strikes or other public calamities." The Texas court held that the duty was imperative, and no other excuse than that named in the statute could be heard for failure to comply with the demand for cars. The validity of the statute was called into question upon a writ of error from the Supreme Court of the United States. It was insisted that the statute violated the commerce clause of the Constitution, as is contended by defendant in this case. Justice Brown said: "An absolute requirement that a railroad shall furnish a certain number of cars on a specified day regardless of every consideration, ex-

cept strikes and other public calamities, transcends the police powers of the state and amounts to a burden upon interstate commerce." In *Texas, etc., R. R. v. Loving*, 98 S. W. 451, the Court of Civil Appeals held that the duty imposed by the statute was imperative. This court has never so held. The principle announced in *Branch's Case*, supra, and approved in the other cases cited, has never been called into question. In *Stone's Case*, supra, we said: "We should be slow to find in the language of a statute the imposition of a penalty for the omission to perform a duty, the standard of which is fixed by the law, which did not, either in terms or by necessary intendment, except from its operation causes which a high degree of foresight and precaution could not anticipate or prevent." In *Alsop v. Express Co.*, 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271, it was held, in an able and well-sustained opinion by Mr. Justice Avery, that Acts 1879, p. 840, c. 182 (Revisal 1905, § 2631), enlarged the common-law duty of common carriers to receive all freight tendered them for shipment by requiring them to do so "whenever tendered." In other words, the statute prescribes what is the reasonable time within which they must perform the duty—receive the freight. It must be tendered at a regular depot and during business hours. *Alsop's Case*, supra. While, both at common law and with the superadded duty imposed by the statute, the carrier must receive the freight whenever tendered, yet, upon the authority of the cases cited, if it is shown that by reason of controlling conditions for which the carrier is not responsible, such as the destruction by fire of warehouses, wharfs, platforms, tracks, etc., before a reasonable time to rebuild has elapsed or the unexpected tendering of an extraordinary quantity of freight at a depot and probably other unforeseen causes, the duty cannot be performed, it would not be liable for the penalty.

It is not practicable, in the discussion of this appeal, to do more than apply these general principles to the facts in the case. This brings us to a consideration of the defense offered by defendant as an excuse for not receiving plaintiff's freight. Do they establish, or tend to establish, any valid, legal excuse? While plaintiff was permitted to place the lumber on the car at Black Mountain, it is conceded that defendant refused to receive it for shipment or to issue a bill of lading for it. This was a refusal to receive. *Twitty v. Railroad*, 141 N. C. 355, 53 S. E. 957. It is not suggested that any conditions existed at Black Mountain which prevented defendant from receiving for shipment all freight tendered, or that it did not have the necessary cars for the purpose of transporting, or that the track was obstructed. For any and all other persons, except Westall and English & Co., the defendant was ready and able to perform its duty to receive

freight for shipment. It will be observed that the plaintiff had contracted to sell the lumber and deliver to Westall f. o. b. Hence the defendant, upon receipt of the lumber, would have owed no further duty to plaintiff. For any delay in transporting and delivering, within a reasonable time, as prescribed by the statute, defendant would have been liable to Westall. The defense, then, comes to this: Conditions at Asheville to which Westall contributed, by failing to unload and remove freight consigned to him, congested defendant's yards and tracks, kept cars "tied up," and prevented it from discharging its duty to other members of the public, who might demand its services.

We do not think that these conditions excused defendant from performing its duty to plaintiff at Black Mountain. If, on account of the conditions existing at Asheville, the cars could not be carried there and unloaded, the defendant should have provided reasonable facilities for caring for the freight at Black Mountain, until it could transport it. It will be observed that the duty to receive freight is confined to such as is "of the nature and kind received" by such carrier. This relieves the defendant from all unreasonable demands in respect to the character of freight which may be tendered. When it is remembered that, in addition to these protective provisions, the defense is open to the carrier that unforeseen, unexpected conditions not to be anticipated may be successfully urged as a defense, we do not perceive that any harsh or oppressive measure of duty is imposed upon the carrier. In the case of *Houston R. R. v. Mayes*, supra, so strongly urged upon our attention by counsel, Justice Brown says that there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, etc. We entirely concur with the learned judge, when he further says: "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise when, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel or pressure upon the road for transportation facilities may arise which good management and a desire to fulfill all its legal requirements cannot provide for." None of the conditions which are suggested are presented in this case, so far as receiving the freight is concerned. It was tendered at the proper place, at the proper time, was of the nature and kind which defendant shipped, the cars necessary for receiving were at the depot, and there was no obstruction of the track or shortage of motive power or labor. The only reason assigned was that Westall, by refusing to unload cars consigned to him at Asheville, contributed to the congestion of the yard and tracks at Asheville; in other words, defendant refused to

discharge its duty to plaintiff because Westall refused to discharge his duty to defendant at Asheville. We cannot think this a valid excuse. We do not intimate that defendant has any right to issue an embargo upon one or more of its customers or patrons and refuse to carry or receive any freight for him. To permit this to be done would empower the carrier to discriminate not only against him, but against other persons from dealing with him.

It is a fundamental principle of the common law, enforced by statutes and made indictable in this state, for a common carrier to unjustly discriminate between members of the public. Revisal 1905, § 3749. It must serve all alike under the same circumstances. The purpose of the law is the "prevention of unjust discrimination, or, to put the proposition affirmatively, to secure to every person constituting a part of the public an equal and impartial participation in the use of the facilities which the carrier is capable of affording and which it is its duty to afford." *Lumber Co. v. Railroad*, 141 N. C. 171, 53 S. E. 823, 6 L. R. A. (N. S.) 225. Mr. Justice Brewer, in *Mo. Pac. Ry. Co. v. Lumber Mills*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. —, says: "While no one is compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by mandamus or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Santa Fé track to industries located at Stratford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer, it was bound to treat all industries at Stratford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers." After further discussion the learned justice concludes: "Indeed all these questions are disposed of by one well-established proposition, and that is that a party engaging in the business of a common carrier is bound to treat all shippers alike and can be compelled to do so by mandamus or other proper writ." In no possible form can this fundamental truth be evaded. It is a "thing fixed" in the common law, enforced by both common-law and statutory remedies, its violation denounced as criminal and subjected to severe punishment. We cannot permit any departure from it, however persuasive the reasons assigned may be for doing so.

On the other hand, we do not wish to be understood as intimating that one or more patrons of a common carrier may, by refusing or failing to receive freight consigned to him, so monopolize the car tracks, etc.,

as to prevent or interfere with it in the discharge of its duty to the public. The statutes enacted for the enforcement of the duties of common carriers, imposing penalties, are not intended to simply penalize railroads, but to secure prompt, efficient service to all, and not a favored few. The patrons owe duties to carriers and to other patrons. Reasonable rules and regulations may be made either by the railroads or the Corporation Commission to enforce these relative rights and duties. The evidence shows that at a time when all of the railroads and the people were confronted with an unusual condition in regard to the transportation of freight, Westall permitted 18 or 20 cars loaded with lumber to stand upon the defendant's tracks at Asheville. How far this conduct would have been a valid defense to an action brought by him for penalties for failing to transport and deliver freight is not presented in this case. The Corporation Commission has made rules and imposed penalties for their enforcement in regard to unloading cars. If they are not sufficiently stringent, and the penalties are not sufficiently large to protect the roads and their patrons from congested yards and tracks, we have no doubt the commission will make them so. We cannot weaken the principles of the common law founded in wisdom and justified by experience, nor construe away the plain provisions of statutes to accomplish this end. If the enforcement of these statutes in some instances work hard results, the appeal must be made to the General Assembly for their modification. We cannot think it improper to express the hope that a clear recognition by those who manage railroads and by those who use them of their respective rights and duties will remove much of the friction which has resulted in the statutes enacted by our Legislature.

The defendant next urges that the penalty of \$50 for each day the said company refuses to receive said shipment can be recovered only when a tender is made on each day. We cannot concur in this view. The plaintiff hauled his lumber to the defendant's regular depot and, with its consent, placed it upon the car, demanding a bill of lading, which was refused. Plaintiff says that he went to the agent two or three times and asked if he had shipped it, and he said that he had not. He wanted plaintiff to unload the car, which he refused to do. The agent said that he was holding the car at plaintiff's expense. Plaintiff explains how, by reason of the refusal to ship the lumber, he was compelled to cancel other orders which he had accepted from Westall, was compelled to stop sawing, his only occupation, etc. To require the plaintiff to haul the lumber home and return it to the depot each day, or to go through the empty form of making a constructive tender, imposes either an unwarranted hardship, or savors of trifling with a

man's substantial rights. The plaintiff left the lumber on the car with a standing tender and demand that it be shipped. This was well understood by the defendant's agent when, on June 18, 1906, without any other reason than that the embargo was raised, he shipped it. It is not shown that conditions at Asheville had changed on that day. If plaintiff had removed his lumber on the refusal to ship—hailed it away—of course, he could claim only for the day when it was tendered; but he made his "tender good" each day and at all hours of the day. The statute would be of little value as a remedy for an existing evil if the narrow construction is given it as contended by defendant. The Legislature evidently intended to impose a penalty for each day upon which the freight was at the depot ready for shipment. If the freight tendered were bales of cotton, hogsheads of tobacco, or other heavy, bulky articles, it would be impracticable to haul and rehaul it to defendant's depot each day. While penal statutes are to be construed strictly as against the party against whom they are enforced, they are not to be so construed as to make them of no force and effect. Upon the defendant's evidence the tender was made on June 7th, and kept good until the lumber was shipped on June 18th. Each day's delay in shipping was "a refusal to ship" within the meaning of the statute.

Defendant contends that the statute is a regulation of interstate commerce and violates the Constitution of the United States. The proposition is founded upon the decision in *Houston R. R. Co. v. Mayes*, supra. In that case the demand was for cars to ship cattle beyond the state. Here the point from which the lumber was to be shipped and its destination were both within the state. Defendant's contention is that, while this is true, as it is an interstate road, engaged in interstate commerce, if it is compelled to receive all freight whenever tendered, it will be prevented from discharging its duty to its patrons engaged in interstate commerce. To state the contention in the words of defendant's brief: "The statute, if enforced, would interfere with interstate commerce, in that it would require the defendant under heavy penalties, excessive and unreasonable, to give preference to intrastate shipments." The contention is also made that "the statute in terms includes freight tendered for both interstate and intrastate shipments," and that this court has, in several cases, applied this and similar statutes to interstate shipments.

Passing the question whether, in the absence of any suggestion that to receive plaintiff's lumber when tendered, in the slightest degree interfered with the duty of defendant to its interstate business, it is in a position to raise the question in this appeal, we think it well to examine the contention and de-

cide it. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920. In *Mayes' Case* we find that, after holding that, as construed by the Supreme Court of Texas, the statute was imperative, making no allowance for defenses, it "transcended the police power of the state and amounted to a burden upon interstate commerce," the opinion concludes: "We think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate power of the Legislature." We hold that, upon well-settled rules of construction, proper allowance is made for the difficulties suggested by Judge Brown. In this case the statute is not applied to interstate commerce. The case of *Mo. Pac. Ry. v. Larrabee Mills*, supra, is instructive upon the question presented here. There, the mill company applied to the Supreme Court of Kansas for an alternative writ of mandamus compelling the railway company to make provisions for the transfer of cars between the lines of the Santa Fé company and the mill and elevators of the plaintiff. Mr. Justice Brewer thus states the contention involving the question presented in this appeal: "The Missouri Pacific and the Santa Fé Railroads are common carriers, engaged in interstate commerce and, as such, are subject to the control of Congress and therefore, in those respects, not amenable to the power of the state. It appears from the findings that about three-fifths of the flour of the mill company is shipped out of the state, while the other two-fifths are shipped to points within the state. In addition, the hauling of the empty cars from the Santa Fé track to the mill was, if commerce at all, commerce within the state. The roads are therefore engaged in both interstate commerce and that within the state. In the former they are subject to the regulation of Congress, in the latter to that of the state, and to enforce the proper relation between Congress and the state the full control of each over the commerce subject to its dominion must be preserved. How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the first section of the interstate commerce act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]): 'That the provisions of this act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one state, and not shipped to or from a foreign country, from or to any state or territory as aforesaid.'" The following language is quoted with approval from the opinion of Mr. Justice Brown in *Cleveland Ry. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868: "Few classes of cases have become more common of recent years than those wherein the police

power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employes, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good." A number of cases are cited in which state laws, such as those requiring engineers to be examined with respect to their ability to distinguish colors. *Railway v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, requiring telegraph companies to receive dispatches, to transmit and deliver them with due diligence as applied to messages outside the state. *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, forbidding running freight trains on Sunday. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1066, 41 L. Ed. 166, requiring railway companies to fix their rates annually for the transmission of passengers and freight, and to post a printed copy at stations. *Railway Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710, regulating the heating of passenger cars and directing guards and guard posts to be placed on bridges and trestles. *N. Y., N. H., etc., R. R. v. New York*, 185 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853, and others, in regard to which it is said: "In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce." Mr. Justice Hoke, in *Morris v. Express Co.*, 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983, has discussed the same question as it applies to section 2634, Revisal 1905, citing the same line of authorities. In that section the penalty is imposed for failing to adjust and pay a valid claim for damages sustained to goods shipped from another state. See, also, *Porter v. Railroad*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670.

Without extending this discussion further, we find in the decisions of the Supreme Court of the United States the principle uniformly announced and enforced that, "until specific action by Congress or the commission, the control of the state over these incidental matters remains undisturbed." It is not claimed that either Congress directly, or through the Interstate Commerce Commission, has enacted any statute or made any rule with which the statute conflicts or interferes. Of course, neither has any power, by statute or rule, to enforce the duty of carriers to receive or transport all interstate shipments. Hence it must follow that, if the state cannot do so because possibly its enforcement may indirectly affect interstate commerce, they may receive and trans-

port such freight at such times as suits their convenience or pleasure free from any control whatever. It would work a strange result if the state has lost so essential an element of her police power without surrendering it to the federal government; that it is not lodged in either government. It is not denied that the state must exercise the police power in subordination to the power which she has conferred upon the federal government to regulate interstate commerce, and all statutes are to be construed and applied in the light of this fact. The law in this respect, is thus stated by Justice Matthews in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508: "There are many cases where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws, or implied from the absence of legislation, such legislation on the part of the state, to the extent of that conflict, must be regarded as annulled. * * * A carrier exercising his calling within a particular state, although engaged in interstate commerce, is answerable according to the laws of the state for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts; or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another state, a right of action is given him by the local laws. In neither case would it be a defense that the law, giving him the right to redress, was void as being an unconstitutional regulation of commerce by the state. If it is competent for the state to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the state, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent, by anticipation, those wrongs and injuries which, after they have been inflicted, it is admitted the state has the power to redress and punish." *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Plumley v. Mass.* 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223. In *Louisville & N. R. R. v. Kentucky*, 161 U. S. 702, 16 Sup. Ct. 724, 40 L. Ed. 849, it is said: "It has never been supposed that the dominant power of Congress over interstate commerce took from the states the

power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." Discussing the same objection to a statute enacted by the Legislature in Ohio requiring a road engaged in interstate commerce to run three trains a day each way, and to stop at a certain class of stations, Justice Harlan, in an able and vigorous opinion, said: "We perceive, in the legislation of Ohio, no basis for the contention that the state has invaded the domain of national authority or impaired any right secured by the national Constitution. * * *

The state of Ohio, by the statute in question, has done nothing more than to so regulate the use of a public highway, established and maintained under its authority, as will reasonably promote the public convenience. It has not unreasonably obstructed freedom of commerce among the states. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it." *Calvert on Interstate Com.* 159.

It is said that we have held that the statute applies to interstate shipments. In *Bagg v. Railroad*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569, it was held that the statute of 1874-75 (section 1967, Code 1883) applied to an interstate shipment because it was in aid of commerce. The discussion by Mr. Justice Avery is full and satisfactory. *Currie's Case*, 135 N. C. 535, 47 S. E. 654, was decided upon the authority of *Bagg's Case*. *Walker's Case*, 137 N. C. 163, 49 S. E. 84, and *Twitty's Case*, 141 N. C. 355, 53 S. E. 957, were intrastate shipments. In *Harrell's Case*, 144 N. C. 532, 57 S. E. 383, the transportation was completed, and the action was for the recovery of the penalty for refusing to deliver freight. *Revisal* 1905, § 2633. In *Reid v. Railroad*, 149 N. C. 423, 63 S. E. 112, the shipment was beyond the limits of the state. We do not think that, in the light of the authorities, it is material whether the shipment is interstate or, as in this case, intrastate. We do not doubt that if in either case it was shown that the enforcement of the statute interfered with, or prevented, the carrier from discharging its duties in regard to interstate commerce, or meeting any demand imposed upon it by an act of Congress, or a rule of the Corporation Commission, such condition would constitute a valid defense to an action for the penalty imposed by the statute. This result does not invalidate the statute, but affects its enforcement by introducing an additional excuse for nonperformance. We do not understand how the enforcement of the statute gives preference to intrastate shipments. The construction which we have given it has the opposite result. What was said in *Branch's Case*, supra, applies only to an intrastate road which did not come under the control of Congress or its agencies. After an anxious con-

sideration of the very full briefs and the authorities cited, we are unable to concur with the defendant that the enforcement of the statute regulates or interferes with interstate commerce; nor do we see how, under the conditions existing at Asheville, N. C., the receipt for shipment of plaintiff's lumber at Black Mountain, N. C., could directly or indirectly affect its duty to the public as an interstate carrier.

But defendant urges that the statute is harsh and oppressive, takes its property without due process of law, and therefore violates the fourteenth amendment. The power of the state to impose penalties upon carriers for failure to discharge public duties is not denied. *Branch's Case*, supra; *Stone v. Railroad*, supra. The same contention was made in *Minn. & St. L. R. R. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769, to an action based upon a statute requiring railroads to maintain fences and for a failure to do so subjecting them, in case of litigation, to triple damages. The court said: "The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements, * * * and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards." Speaking for myself, I do not doubt that, under the constitutional prohibition against the imposition of excessive fines and cruel and unusual punishments, as well as the protective provisions of the state and federal Constitutions securing life and property against governmental invasion, except by the "law of the land," the court has the power, and in a clear case it would be its duty, to declare invalid a statute imposing penalties so enormous in amount and out of proportion to the gravity of the offense and its effect upon private and public interest, as to come within the inhibition of the Constitution. I could never assent to the proposition that, by legislative enactment, a person, either natural or corporate, could be destroyed, and its property taken by the imposition of excessive and unusual penalties, leaving no power of prevention in the judicial department of the government. I think that the correct limitation upon legislation of this character is stated by Mr. Justice Peckham in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. If the penalties are so enormous that the person upon whom they are imposed is prevented from resorting to the courts to determine the validity of the statute—that is, that an unsuccessful effort to do so would work their destruction—they are invalid. No such result could follow the en-

forcement of the statute under consideration. While it may be that, in some cases, the penalty imposed may be large as compared with the value of the property involved, or the actual damage sustained, yet as, in the case before us, the refusal to receive freight may work serious injury, destructive of the business of the party aggrieved. The plaintiff was engaged in operating a sawmill, cutting and selling lumber for sale in other markets. He had contracted to sell to Westall other car loads of lumber, which by reason of the refusal of the defendant to receive for shipment Westall refused to take. He "had to shut down his mill for months." It is not difficult to see what disastrous results would naturally follow to plaintiff from the refusal of defendant to discharge its duty, and yet in an action for damages it would be difficult for him to recover full compensation for such injury. It is to compel obedience to its manifest duty and protect the public from just such results that penalties are imposed upon the carrier.

We do not find in the amount of the penalty any ground for questioning the validity of the statute as violating any provision of either the state or federal Constitution. In regard to the remedy prescribed for its enforcement, every legal right of the defendant is safeguarded. The penalty can be recovered only by an action in a court of competent jurisdiction, in which trial by jury, regular procedure, and the right to appeal is secured. The statutory presumptions are made to relieve the plaintiff from proving his case. It may be, and doubtless is, sometimes difficult for those engaged in the management of railroads to meet and discharge all of the duties imposed upon them. We venture to hope that, with a clear understanding of the relative rights and duties of carriers and the public, more satisfactory business relations will prevail.

We have discussed the questions presented upon this record at more than usual length because several appeals are pending in the court in which they are involved.

Upon a careful consideration of the entire record, we find no error.

(150 N. C. 608)

WAMPUM COTTON MILLS v. CAROLINA & N. W. RY. CO.

(Supreme Court of North Carolina. May 5, 1909.)

1. CARRIERS (§ 20*)—REGULATION—PENALTIES—"TENDER."

To entitle a shipper to the statutory penalty for refusal to receive freight for shipment, it is not enough to constitute a tender that he place the freight on the carrier's platform merely as a matter of convenience, but he must tender it for shipment, and simply asking the agent when the freight can be shipped is not a tender, but there must be an actual tender, though it is not essential that any particular language

be used, but it is sufficient if the language amount in common understanding to a tender and refusal.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6910, 6911.]

2. CARRIERS (§ 20*)—REGULATION—PENALTIES—QUESTION FOR JURY.

Evidence held to present a question for the jury as to the sufficiency of a shipper's daily tender of freight to a carrier to entitle him to the statutory penalty for failure to receive the freight for shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

3. CARRIERS (§ 20*)—REGULATION—TENDER.

To entitle a shipper daily to the statutory penalty for failure to receive freight for shipment, there must have been a tender and refusal each day.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Lincoln County; Justice, Judge.

Action by the Wampum Cotton Mills against the Carolina & Northwestern Railway Company. From a judgment for \$100 for plaintiff, it appeals. No error.

See, also, 64 S. E. 588.

Plaintiff sued for a penalty of \$50 a day for 72 days, alleging that defendant refused, on each day, to receive freight tendered for shipment. The evidence tended to show that plaintiff deposited on the defendant's platform, the usual place for receiving freight, 25 bales of cotton waste and tendered it to defendant's agent for shipment, which was refused. The bales were left on the platform. Plaintiff's president says: "Later on I called to see the agent from time to time as I was passing from my place of business. Every day or two I stopped to see whether or not he was in a position to ship the waste, and he said he was not," etc. Mr. Carter, defendant's agent at Lincolnton, after testifying in regard to the transaction substantially as the president of plaintiff company, said: "After that Mr. Abernathy made a further tender of this shipment of waste, once that I remember. That was some little time after. I could not give the exact date. It was along the latter part of March or first of April. * * * He told me he would tender it to me again for shipment." His honor instructed the jury: That it was not enough to constitute a tender that the plaintiff placed the freight on defendant's platform merely as a matter of convenience, but that it must tender it for shipment; that simply asking the agent when the freight could be shipped was not a tender; that the president must have made an actual tender and the defendant a refusal to entitle plaintiff to the penalty; that it was not essential that any particular language be used to constitute a tender and refusal; but that, if such language

was used as "amounted in common understanding" to a tender and refusal, that would be sufficient. The plaintiff excepted. Plaintiff tendered a number of prayers for special instructions not necessary to set out. The jury answered the third issue, "Two days," and the fourth, "\$100." Judgment was rendered upon the verdict. Plaintiff excepted and appealed.

A. L. Quickel, for appellant. O. F. Mason, O. E. Childs, and J. H. Marion, for appellee.

CONNOR, J. The evidence left the question of the status of the freight, after the first tender and refusal, in doubt. It seems that the freight was placed upon the defendant's platform in accordance with a custom, but without any express contract with defendant. After completing the number of bales constituting a car load, the president tendered it to the agent for shipment, which was refused. The freight remained on the platform, and the president of plaintiff company frequently talked with the agent about shipping. There is evidence that some 30 days after the tender he made a second tender. In *Garrison's Case* (at this term) 64 S. E. 578, it was conceded that defendant furnished the car upon which plaintiff loaded the lumber, and it remained on the car until shipped. There the facts were conceded. We concur with his honor's instruction to the jury. The status of the freight was uncertain. This is shown by the conduct of the parties. It was therefore a question for the jury and was properly left to them. If the plaintiff wished to insist upon a daily tender and refusal, its president should have made it clear to defendant's agent that he was keeping the tender good. We cannot undertake to do more than dispose of each case as it arises in regard to what constitutes a tender and refusal. When the conduct and language of the parties leaves the matter in doubt, it must be submitted to the jury. His honor correctly told the jury that they must find that there was a tender and refusal each day.

Upon an examination of the entire record and the charge of the court, we find no error.

CLARK, C. J. (dissenting). Concurring entirely in the opinion in the defendant's appeal in this case, I must dissent from the conclusion reached in the plaintiff's appeal.

The court should have instructed the jury that if they believed the evidence to find a verdict in favor of the plaintiff for the penalty prescribed by the law for 72 days. The evidence is uncontradicted that the plaintiff placed on the defendant's platform, the usual place for receiving freight, 25 bales of cotton waste and tendered it to the defendant's

agent for shipment, which was refused. The bales were left on the platform. The plaintiff's chief officer called to see the defendant's agent every day or two thereafter to learn if he was ready to ship the waste, and he said he was not. The law of tender is as old as the hills and as well settled. When one tenders money, for instance, it is not necessary to tender it again every day. It is sufficient if it is "kept good." Here the tender was made and kept good. The cotton remained on defendant's platform, a standing tender, irrespective of the constant reminder by the plaintiff's agent. The statute makes, and was intended to make, the common carrier liable for every day that he thus refuses to accept freight. The people of this country make, and have a right to make, its laws. The business interests of the country, great and small, are absolutely at the mercy of the railroads, and can be destroyed at will, unless these great common carriers are subject to public regulations. Experience having demonstrated that the common-law remedy by damages is not always adequate where common carriers refuse to receive freight when tendered, or fail to ship and transport in a reasonable time, the people have enacted through their Legislature that in such cases a prescribed penalty, in nature of liquidated damages, shall be recovered by the "party aggrieved." If such penalty is high in this case, it is because the defendant persisted in its violation of law. The courts have no choice but to obey the law themselves. For 72 days the plaintiff's bales stood on defendant's platform awaiting shipment. The bales had been tendered for shipment and refused. For 71 more days they stood on that platform awaiting shipment. Every day the defendant's agent saw them and knew they were there for shipment, besides being constantly reminded by the plaintiff's officer. Every day the bales remained there, the defendant's agent knew they were a standing tender, and his not shipping them was a refusal, for "actions speak louder than words." *Pierson v. Telegraph Co.* (at this term) 64 S. E. 577. Had the defendant's agent each day said, "I will ship them," and then did not ship, could it be said that in fact he did not refuse, and therefore the defendant would not be liable? Such construction would but be trifling with the law.

The law says that for each day the carrier refused to ship the plaintiff was entitled to recover \$50. The Legislature thought this penalty necessary to compel respect for the rights of shippers. The evidence being uncontradicted, the court should have told the jury that, if they believed it, they should return a verdict in favor of the plaintiff for 72 days at \$50 per day. When the law is enforced, it will be respected and obeyed.

(150 N. C. 612)

WAMPUM COTTON MILLS v. CAROLINA & N. W. RY. CO.

(Supreme Court of North Carolina. May 5, 1909.)

1. CARRIERS (§ 20*) — REGULATION — PENALTIES—EXCUSES.

That a connecting carrier refuses to receive freight for a certain consignee does not relieve the initial carrier from liability for the penalty imposed by Revisal, § 2631, for refusal to receive freight.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

2. CARRIERS (§ 20*) — REGULATION — PENALTIES.

That a shipper asked for a bill of lading to a point on a connecting line does not relieve the carrier from liability for the penalty imposed by Revisal, § 2631, for refusal to receive the freight for shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Superior Court, Lincoln County; Justice, Judge.

Action by the Wampum Cotton Mills against the Carolina & Northwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. No error.

See, also, 64 S. E. 586.

Action for recovery of penalty for failing to receive goods for shipment. The facts, as stated in defendant's brief, are: Defendant is a common carrier, with track and equipment running from Lenoir, N. C., to Chester, S. C., through Lincolnton, N. C., intersecting with the Southern Railway at Gastonia, N. C.; both roads using the same depot, the property of the Southern. The Southern runs from Gastonia to Charlotte, N. C. Defendant receives freight for shipment to Charlotte, delivering to Southern at Gastonia. The Seaboard Air Line Railway runs from Lincolnton to Charlotte. Defendant and Seaboard use at Lincolnton a depot in common. On March 6, 1907, B. G. Fallis, superintendent of the Southern Railway at Charlotte, sent the following notice to the general manager of defendant company at Chester: "Until further notice, we will not accept any cotton waste from your road consigned to the South Atlantic Waste Company, Charlotte, N. C. Please be governed accordingly." This embargo was raised May 20, 1907, and then only as to three cars per day from defendant. On March 11, 1907, plaintiff tendered to defendant company at Lincolnton, N. C., 25 bales (one car load) of cotton waste for shipment to the South Atlantic Waste Company, Charlotte, N. C. The agent of defendant declined to receive this shipment, assigning as a reason that he had instructions from his company not to receive it because of embargo against South Atlantic Waste Company. Thirty days later the agent of defendant company offered to issue a bill of lading to plaintiff "Subject to delay on account of embargo at Gastonia." The plaintiff declined to ac-

cept this proposition and suggested to defendant's agent to carry the waste to Gastonia and tender it to the Southern. There is evidence tending to show that it would not have been received by the Southern at Gastonia. There was evidence tending to show that defendant's manager and officers made several efforts to induce the Southern Railway Company to accept this particular shipment, but in each instance was notified that the Southern would, under no circumstances, accept the shipment. A request was also made to the Seaboard Company and refused. There was no contention that the defendant did not have room to store and care for the freight at Lincolnton, nor that it did not have motive power and cars sufficient to carry it to Gastonia. There was evidence that the tracks and yards of the Southern at Gastonia were congested. His honor was of the opinion that the statute (section 2631, Revisal 1905) made it the duty of the defendant to receive the freight for shipment, carry it to Gastonia, and tender it to the Southern Railway Company, and that the embargo placed upon shipments to the waste company was not a legal excuse for defendant's refusal to receive it for shipment at Lincolnton and so instructed the jury. Defendant excepted. There was a verdict and judgment for plaintiff. Defendant excepted and appealed.

O. F. Mason, C. E. Childs, and J. H. Marion, for appellant. A. L. Quickel, for appellee.

CONNOR, J. This action is prosecuted for the recovery of the penalty imposed by section 2631, Revisal 1905, for refusing to receive for shipment freight tendered defendant at Lincolnton, N. C., to be transported to Charlotte, N. C. We have discussed and decided many of the questions presented and argued upon this record in *Garrison v. Railroad* (at this term) 64 S. E. 578. As we then endeavored to point out, there is no question of transportation and delivery involved in this case. The sole question is whether the reasons assigned by defendant for refusing to receive for shipment constitute a legal excuse. There is no suggestion that the defendant's warehouse at Lincolnton was insufficient to care for the freight until it could be shipped, or that defendant did not have the cars, motive power, and other facilities for carrying the freight to Gastonia and tendering it to the Southern Railway. Defendant's agent says that it could have been handled as far as Gastonia. It was clearly its duty to comply with the requirement of the statute by receiving for shipment and throwing upon the Southern the responsibility for failing to perform its duty at Gastonia. The fact that the Southern maintained an embargo upon shipments to the waste company at Charlotte could not excuse the defendant

from discharging its duty at Lincolnton. We have no doubt that the defendant's officers and agents acted in good faith in endeavoring to induce the Southern to promise to take the freight at Gastonia, but this did not measure up to the standard of its common-law or statutory duty. It should have received the freight, carried it to Gastonia, and then tendered it to the Southern. If, by simply ordering an embargo against one of its customers at Charlotte, the Southern could paralyze all of the connecting roads and relieve them from the duty to receive shipments to such person, the common law would fail, and the statutes passed to enforce the public duty be of no avail—one company could destroy the business of any person or corporation, starve it out of existence, bankrupt it by ordering an embargo and notifying all other roads that it would not receive freight for the person selected as the subject for discrimination. Each company must discharge its duty and cast the responsibility for refusing upon the one which is derelict.

There is no question of interstate commerce involved in this case. It is immaterial that plaintiff asked for a bill of lading to Charlotte. If defendant had received the freight for shipment to Gastonia, its terminus for Charlotte freight, or offered to do so, it would have met and discharged the duty imposed upon it. This it failed to do, but, 30 days after refusing to receive the freight, offered a bill of lading containing a provision which would have deprived plaintiff of any redress against the Southern if it had refused to receive at Gastonia. The defendant company was placed, by the action of the Southern, in an embarrassing position. We are not able to understand, upon the evidence, why the Southern selected the Carolina Waste Company of Charlotte as the subject of its embargo for more than two months. It is true that there is evidence that the general demand upon its capacity for transporting freight was very heavy, and that a large number of unloaded cars were on its tracks and yards at Charlotte and Gastonia; but this certainly does not justify it in imposing upon one manufacturing plant an embargo for 72 days, cutting off its supply of raw material not only over its own line, but from its connecting lines. If this can be done with impunity, the power of control and regulation, so essential to the protection of the right of all persons complying with the law to be served without discrimination, would be of but little value. We concur with his honor that it was the duty of defendant to receive the freight for shipment and cast upon the Southern the responsibility of discharging its duty. It elected to obey the Southern Railroad Company, rather than the law. The fact that the discharge of its duty to the plaintiff would have imposed the liabilities

of a common carrier is no excuse for refusing to do so. It is given by the state the franchise and the right to do business as a common carrier, in consideration of its assuming and performing the duties incident to the business.

Upon a careful examination of the entire record, we are of the opinion that his honor correctly instructed the jury. There is no error.

(150 N. C. 619.)

CRAWFORD v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 13, 1909.)

1. MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—DISOBEDIENCE OF RULES—PROXIMATE CAUSE.

Where an injury to a servant is occasioned by his disobedience to the orders of the master, such disobedience bars a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 759-775; Dec. Dig. § 243.*]

2. MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE OF ORDERS.

Where a brakeman in the habit of jumping on the pilot of an engine, in violation of a rule forbidding it, is given specific and repeated instructions not to do so, there can be no recovery for his death resulting from his jumping on the pilot of the engine while in motion, though the pilot step was defective, and though the rule had been generally disobeyed, since in view of specific instructions no question of abrogation of rules could arise.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 759-775; Dec. Dig. § 243.*]

Appeal from Superior Court, McDowell County; Adams, Judge.

Action by Lee P. Crawford, administrator, against the Southern Railway Company, for death of his decedent. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

These issues were submitted: "(1) Did the negligence of the defendant cause the death of the plaintiff's intestate as alleged in the complaint? Ans. Yes. (2) Did Bob Lytle by his own negligence contribute to his injury as alleged in the answer? Ans. No. (3) Did the defendant after the original injury to Bob Lytle cause his death by its neglect of him, while he was in its charge as alleged? Ans. ———. (4) What damage, if any, has the plaintiff sustained? Ans. \$1,500, with no interest." The court rendered judgment against defendant, from which it appealed.

S. J. Ervin and Avery & Ervin, for appellant. Craig, Martin & Winston and Pless & Winborne, for appellee.

BROWN, J. The intestate, Robert Lytle, was a brakeman in the employ of the defendant on its yards at Old Fort, and was injured while attempting to mount the pilot of one of defendant's engines while the same

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was in motion and running on the track about dark on the evening of January 20, 1907, and of the injuries sustained defendant died on the 26th day of January, six days later.

There was evidence on the part of the plaintiff tending to show that the intestate mounted the pilot on the engineer's side, and that the step on this side of the pilot was loose and gave way, and that the intestate fell to the ground and was injured and shortly thereafter died. There was evidence that the rules and regulations of the defendant forbade employes to mount the pilot while the engine is in motion, and there was also evidence that these rules and regulations were frequently disobeyed by the employes who were accustomed to mount the pilot while the engine was running. The defendant contended that, according to the evidence in the case, the intestate had personally received specific orders not to mount the pilot of the engine while moving, and that the violation of such orders was the proximate cause of his death. In order to present this view, defendant in apt time handed up several similar prayers for instruction, one of which is as follows: "If the jury find from the evidence that Robert Lytle had been ordered by the conductor in charge of the train, or the yardmaster in directing his work, not to mount the pilot while the engine was in motion on the track, and you further find that he did mount the pilot or attempt to mount it while the engine was in motion on the track, and that in consequence thereof lost his footing and fell, and by reason thereof sustained the injuries which resulted in his death, then it is your duty to answer the first issue, 'No,' although you may find that the step on the pilot was defective." His honor gave the prayer, but added these words: "Unless you shall find under the charge heretofore given that the rule was waived or abrogated."

We are of opinion that his honor erred in making such additions to the prayers. The defendant was entitled to have the instruction given without the added words. This is not a question of the abrogation of a rule by such long-continued violation of it that it becomes obsolete, as in *Bordeaux v. Railroad* (at this term) 64 S. E. 439. The question involved is the right of the defendant to exact of its brakeman obedience to the specific orders of his superiors given in good faith and meant to be obeyed. Assuming that the defendant's rule forbidding its employes from mounting the pilots of moving engines has been violated so long that it may be regarded as in abeyance, that did not deprive the defendant of its right to give specific orders to its employes and to insist on obedience to them. If the company is to be deprived of this right, then there is an end to all discipline. The evidence upon which the prayer was based is clear and uncontradicted. Burgin, the conductor of the train on which

the intestate was brakeman, testified: "I had told Bob Lytle that it was very dangerous to catch the pilot while the train was in motion. I gave him instructions several times not to do this. I saw him doing this and told him it was against instructions." Again: "I had a right to direct the work on the yard. Couplings were made under my direction. I had directed Bob Lytle not to mount the pilot while the engine was in motion. I had given him such orders several times. I gave such an order to Bob only a few days before the injury. He was on the yard when I gave this order and at the time of the injury." Again witness says: "I had been giving orders to Bob and others forbidding mounting moving cars. I always told them not to do it every time I saw it done. It was done often, and I would tell them not to do it. It was the most dangerous thing they could do. I could have had Bob discharged." E. L. Winslow testified: "I live at Old Fort. Engineer in employ of defendant. Robert Lytle fired for me and helped me couple and switch. Helped switch and couple about two weeks before the injury. I instructed him not to jump on pilot of engine while engine was in motion. Told him several times. It is not necessary for coupler to ride on pilot in order to make coupling."

Assuming that the intestate was compelled to mount the engine's pilot in order to perform his duty (which is denied), he was not compelled to mount it when the engine was running. It was his duty to get on it before it started. Had the intestate done so, he would not have been run over, although the step had given way. We have recently said that it was the duty of railway companies to frame rules for the protection of its employes not only to protect them from the carelessness of their fellow servants, but to guard them as far as practicable from their own carelessness as well. *Bordeaux v. Railroad*, supra. We have here such a rule well calculated to guard the brakemen and switchmen from their own recklessness, which is the usual result of constant exposure to danger. It is said that the rule had been violated so much that it was in abeyance. Assuming that to be so, it cannot be denied that the defendant had a right to revive the rule and enforce it. That is what the conductor and the engineers were endeavoring to do in regard to the intestate, for the evidence shows that these orders were given repeatedly, and almost up to the very time of the accident. There is not a scintilla of evidence, or even a suggestion, that the conductor and engineer were "joking" or indulging in "mere talk," as is said in *Smith v. Railroad*, 147 N. C. 609, 61 S. E. 575. If words mean anything, then their orders were given in earnest, with the expectation and intention that they should be obeyed. They were not suffered to become stagnant, but were reiterated and repeated almost up to the hour

of the disaster. It is difficult to understand what more the conductor or engineer could do to enforce obedience. They could not commit an assault and punish the disobedient servant without subjecting themselves to indictment and the company to damages. This court has repeatedly said that, where the injury to the servant is occasioned by his disobedience to the orders of the master, such disobedience is the proximate cause of the injury and bars recovery. *Stewart v. Carpet Co.*, 138 N. C. 64, 50 S. E. 562, and cases cited. In that case Mr. Justice Walker well says: "When he chose to disregard the instructions he had received and do the work in his own way, the resultant injury to himself will be referred to his own negligence or willful disobedience, as its proximate cause, and not to any fault of his employer." There being no evidence that the orders given to the intestate by the conductor and engineer, under whose control he worked, were in any way revoked or modified, his honor erred in not giving the instructions as prayed. The additions he made were unwarranted.

As this case is to be tried again, we will suggest that the first issue is not in very good or the usual form. It seems to assume that the defendant was guilty of negligence, which is denied in the pleadings and contested in the proof.

New trial.

(150 N. C. 854)

STATE v. CLINE.

(Supreme Court of North Carolina. May 18, 1909.)

1. PERJURY (§ 1*)—ELEMENTS OF OFFENSE.

"Perjury" is committed when a lawful oath is administered in some judicial proceeding or due course of justice to a person who swears willfully, absolutely, and falsely to a matter immediately in issue or to a material circumstance having a legitimate tendency to prove or disprove the fact immediately in issue.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5305-5310; vol. 8, p. 7751.]

2. INDICTMENT AND INFORMATION (§ 56*)—INDICTMENT—STATUTES—SUFFICIENCY.

Revisal 1905, §§ 3246, 3247, providing that in an indictment for perjury it shall be sufficient to set forth the substance of the offense and by what court or before whom the oath was taken, together with the proper averment to falsify the matter wherein the perjury is assigned, etc., do not violate the constitutional provision requiring that, before a citizen is called on to answer a criminal charge, he must be informed of the accusation against him.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 175, 176; Dec. Dig. § 56.*]

3. PERJURY (§ 25*) — INDICTMENT — SUFFICIENCY.

An indictment for perjury must show on the face of the facts alleged that the matter sworn to and on which the perjury is assigned

was material, or there must be an express averment to that effect.

[Ed. Note.—For other case, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

4. PERJURY (§ 11*)—FALSE TESTIMONY CONSTITUTING PERJURY.

A witness giving a false answer to a question asked for the purpose of impeachment is a good assignment of perjury, under the rule that a question having no general bearing on the matters in issue may be made material by its relation to the witness' credit, and that false swearing thereon is perjury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 51; Dec. Dig. § 11.*]

5. PERJURY (§ 19*) — INDICTMENT — SUFFICIENCY.

An indictment for perjury, which alleged that accused committed perjury on the trial of an action before a justice of the peace, wherein a third person was plaintiff and accused was defendant, by falsely stating on oath that he had offered to a county commissioner a specified sum to influence his official action as a member of the board of commissioners in awarding to him a contract, etc., but which did not show the character of the action or the matter in issue, nor aver that the false testimony was material, was insufficient, notwithstanding a bill of particulars showing a purpose on the cross-examination of accused testifying at the trial was to show that he had spread a false report concerning the officer, and that he denied that he had spread any report concerning him.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 65, 66, 70; Dec. Dig. § 19.*]

6. INDICTMENT AND INFORMATION (§ 121*) — BILL OF PARTICULARS—EFFECT.

A bill of particulars cannot supply a defect in the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 320; Dec. Dig. § 121.*]

7. PERJURY (§ 37*) — MISLEADING INSTRUCTIONS.

An instruction on a trial for perjury that, if accused had satisfied the jury that the statements he made were true, and that they were lacking in any of the essential ingredients of perjury, it was their duty to return a verdict of not guilty, was misleading, as leading the jury to believe that accused must show that the statements he made were true, and had no other essential elements of perjury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 134-138; Dec. Dig. § 37.*]

8. PERJURY (§ 31*)—BURDEN OF PROOF.

The state, in a trial for perjury, has the burden of proving beyond a reasonable doubt all the essential elements of the offense.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 107; Dec. Dig. § 31.*]

Appeal from Superior Court, Catawba County; Murphy, Judge.

B. S. Cline was convicted of perjury, and he appeals. Reversed.

See 146 N. C. 640, 61 S. E. 522.

The defendant was called upon to plead to the following bill of indictment: "That B. S. Cline, of Catawba county, did willfully, unlawfully, and feloniously commit perjury upon the trial of an action in a justice of the peace court before J. H. McLelland, in Catawba county, wherein W. H. Marlow was plaintiff and B. S. Cline was defendant, by falsely and feloniously asserting on oath that

he, the said B. S. Cline, offered to D. M. Boyd, a member of the board of county commissioners of Catawba county, the sum of \$25 to influence his official action as a member of said board in procuring for and awarding to the said B. S. Cline the contract with the said board of county commissioners, as keeper of the home for the aged and infirm of Catawba county, for two years, and subsequently paid to the said D. M. Boyd, commissioner as aforesaid, \$10 on the said offer, after having been awarded said contract for one year by said board, and that the said D. M. Boyd accepted the same, knowing said statement or statements to be false, or being ignorant whether said statement was true." Defendant moved in apt time that the solicitor furnish bill of particulars. Motion allowed. Bill of particulars filed. Whereupon defendant moved to quash the bill of indictment on the ground that the same, with the bill of particulars, does not charge any crime in law. Motion denied. Defendant excepted and pleaded "not guilty."

After hearing the evidence his honor instructed the jury as follows:

"If you shall find from the evidence, beyond a reasonable doubt, that in the trial of Marlow v. Cline the defendant Cline made the statements set out in the bill of indictment under oath, and that after an oath was lawfully administered to him, and that such statements were willfully, corruptly, and falsely made, it will be your duty to return a verdict of guilty.

"If you shall find beyond a reasonable doubt that the statement or statements were not true, and if you shall further find beyond a reasonable doubt that other essential elements or ingredients of perjury, as I have defined it, appear in this evidence then it will be your duty to return a verdict of guilty.

"But if the defendant has satisfied you, gentlemen, that the statements he made are true, and, further, that they are lacking any of the essential ingredients or elements of perjury, as I have defined it, then it will be your duty to return a verdict of not guilty."

Defendant excepted to the last paragraph. There was a verdict of guilty, motion in arrest of judgment for that the bill did not charge any indictable offense, motion denied, judgment and appeal.

W. A. Self, R. Z. Linney, A. B. Whitener, and C. W. Bagby, for appellant. The Attorney General, for the State.

CONNOR, J. Prof. Greenleaf, with his usual accuracy, thus defines "perjury" at the common law: "The crime is committed when a lawful oath is administered in some judicial proceeding or due course of justice to a person who swears willfully, absolutely, and falsely in a matter material to the issue or point in question." 3 Greenleaf, Ev. 191, citing 3 Inst. 164; 4 Blackstone, Com. 1371;

Hawk. P. C. 69; 2 Roscoe's Crim. Ev. 1045, 836. The indictment in this case conforms to the statute (Revisal 1905, §§ 3246, 3247). The defendant, when called upon to plead, moved the court to quash the indictment because it failed to set forth facts showing that the alleged false testimony was material to the issue being tried in the case in which it was given. His honor refused the motion. Defendant excepted. The statute relieves the state from alleging mere matters of form, as was theretofore required. It does not, however, do violence to the constitutional provision which requires that before a citizen is called upon to answer a criminal charge he must be informed of the accusation against him. Matters of substance must be alleged, to the end that the court may see that an indictable offense is charged. It has always been uniformly held that to constitute perjury the false oath must be in regard to "some material fact tending to injure some person. If it be entirely immaterial, it cannot affect any one." State v. Dodd, 7 N. C. 226. It is equally well settled that "it must either appear on the face of the facts set forth in the indictment that the matter sworn to, and upon which the perjury is assigned, was material, or there must be an express averment to that effect." 2 Roscoe's Crim. Ev. 849. "The materiality of the false swearing to the issue or point of inquiry must appear from the indictment, either by general averment or by the facts set forth." Note to State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485-498, where the authorities are collected. 2 Wharton's Crim. Law, § 1304; 2 Bishop's Crim. Proc. § 921. "An indictment for perjury must show upon its face that the oath assigned as perjury was willful and false, and that the alleged false statement was material to the issue, or it cannot be sustained." Marvin v. State, 53 Ark. 395, 14 S. W. 87; State v. Chandler, 42 Vt. 446.

The bill of indictment in this record contains no averment that the testimony alleged to be false was material. We are therefore to ascertain whether the facts, appearing upon the face of the indictment, are, as matters of law, material to the issue which was being tried. It is well settled that "a party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact." Com. v. Grant, 116 Mass. 17. So in State v. Strat, 5 N. C. 124, it was held that if the question asked the defendant, when testifying as a witness, was for the purpose of impeaching him, a false answer was properly assigned as perjury. "A question having no general bearing on the matters in issue may be made material by its relation to the witness' credit, and false swearing thereon will be perjury." 2 Roscoe, 1062. As if one being examined as a witness be asked for the purpose of impeachment if he had been convicted

of larceny, a false answer will undoubtedly be a good assignment of perjury. The principle is stated in *King v. Nicholl*, 1 Barn. & Adol. 21, 20 E. C. L. 336, wherein Bayley, J., said: "An indictment must be good without the help of argument or inference. In the case of perjury, the indictment must show, either by a statement of the proceedings, or by other averments, that the question to which the offense related was material." In the indictment before us it is charged that the alleged false testimony was given upon the trial of an action wherein W. H. Marlow was plaintiff and B. S. Cline was defendant. It is not suggested what the character of the action was, or what the matter in issue, whether an account, the items of which were disputed, a note, the execution of which was denied, or a plea of payment interposed. We are left to conjecture in respect to each and all of these matters. The charge is that he swore that he paid to D. M. Boyd, a member of the board of commissioners, \$20 to influence his official action, etc. It does not appear that Boyd's official conduct was, in any respect, under examination, or had any relation whatever to the matter in issue or the parties to the action. There is not the slightest suggestion, either directly or by inference, how the matter set out in the indictment was material or could, in the most remote degree, affect the result.

It is suggested that possibly the purpose of the question was to impeach the witness—to affect his credibility. If this be conceded, although it would be the merest conjecture, we are unable to perceive how charging himself falsely with having given a bribe could strengthen his credibility. To deny it might do so. As said by Bayley, J., in *King v. Nicholl*, supra: "We know nothing of the merits of the case except from the indictment. The innuendoes introduce greater doubt than certainty." To sustain this view we would be compelled to conjecture that the witness was asked whether he did not give Boyd the money as a bribe for the purpose of affecting his credibility, and that he falsely swore that he did so for the purpose of weakening his credibility; whereas, in truth he did not do so. In swearing falsely that he gave Boyd a bribe, he injured Boyd; but it is difficult to see how, by admitting the truth of the impeaching question, he injures his adversary in the civil action or interfered with the due course of justice. The fact is that the question was not asked the witness for the purpose of impeaching him. He demanded that the solicitor file a bill of particulars. From this it appears that defendant was asked: "What connection, if any, did you have with circulating a report against Sheriff D. M. Boyd during the political campaign in which it was charged that you had paid him \$10 for securing for you a position as keeper of the county home? I had none whatever." He

was then asked whether he signed a statement to that effect, to which he answered that he did not. "How, then, was such a report circulated, if you didn't circulate it?" He answered, "I don't know." He then, of his own motion, asked if the counsel wanted the whole truth about it, and proceeded to state the facts set out in the indictment. From this it appears that the purpose of the cross-examiner was to show that he had spread a false report about Boyd having taken from him a bribe. He denied that he had spread any report whatever, and there is nothing in the indictment charging that he had sworn falsely in that respect. If he had denied spreading the false report, when in truth he had done so, it was well calculated to weaken the credibility of his testimony in the case on trial; but nothing of this kind is suggested. While we have held in *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, that a bill of particulars cannot supply a defect in the indictment, and we adhere to that ruling, if we could look to the bill of particulars to supply the missing link, we would fail to find it.

The defendant may be guilty of uttering a slander against Boyd, but, in no aspect of the case, is he guilty of perjury as defined at common law. We think that in refusing to quash the bill of indictment there was error. While not necessary to the decision of this appeal, we think it proper to say that exception to the last paragraph of the instruction is well taken. While probably not so intended by his honor, it was calculated to make the impression upon the jury that it was the duty of the defendant to satisfy them that the statements he made were true and had no other essential elements of perjury. It will be noted upon that hypothesis alone he instructed the jury that they could return a verdict of not guilty. In the trial of criminal cases, it is always best to adhere closely to well-settled forms of expression. Save in a few exceptional cases, of which this is not one, the state carries the burden of proof to show beyond a reasonable doubt all the essential elements of the crime charged.

It must be certified that there is error.

(150 N. C. 624)

POOL et al. v. ANDERSON et ux.

(Supreme Court of North Carolina. May 13, 1909.)

1. **BILLS AND NOTES (§ 499*)—ACTIONS—PRESUMPTIONS—PAYMENT.**

Mere possession by the payor of a note, without any indorsement thereon, is not evidence of payment, unless it appears that it was delivered to the payee.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1696; Dec. Dig. § 499.*]

2. **VENDOR AND PURCHASER (§ 299*)—NOTE FOR PRICE—EVIDENCE OF PAYMENT.**

A note from which the payor's name has been cut off, found wrapped in a bond for title

among the papers of the obligee after his death, the note being in the same handwriting as the bond and corresponding to its recitals except as to amount, is admissible, in an action to recover the land, to show payment of the bond, especially where the obligee and those claiming under him have been in possession of the land for 28 years.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 299.*]

3. EVIDENCE (§ 271*)—DECLARATIONS—SELF-SERVING DECLARATIONS.

Declarations by the obligee in a bond for title that he had paid a note for the purchase money are inadmissible in his favor.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1068, 1072; Dec. Dig. § 271;* *Payment*, Cent. Dig. § 205.]

Appeal from Superior Court, McDowell County; J. S. Adams, Judge.

Action by M. A. Pool and others against A. T. Anderson and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

Action for recovery of land. Plaintiffs claim under John E. Gray, who, on March 12, 1879, executed a bond obligating himself to make title to S. N. Stockton upon the payment of \$300 "as stipulated by note or otherwise." The signature to the bond was attested by H. W. Wise. Stockton went into possession of the land upon the execution of the bond and remained thereon, until his death, devising it to the feme defendant, Cordelia Anderson, who has been in possession at all times since the death of said Stockton. Defendants alleged that the purchase money for the land was paid by Stockton. There was evidence of acts and declarations of Gray and Stockton tending to sustain the contention of both parties. For the purpose of sustaining the allegation of payment, defendants offered to introduce a note of which the following is a copy: "\$200. On or about the 15th day of April, 1879, I promise to pay John E. Gray the sum of two hundred dollars for value received of him. Witness my hand and seal this the 12th day of March, 1879." The defendant A. T. Anderson testified that he found the note wrapped in the bond for title among the papers of S. N. Stockton after his death, and that when he first saw it it had Harve Wise's signature as a witness. He does not know Harve Wise's initials. The clerk of the court testified that the note and bond for title are on the same kind of paper and in the same handwriting and appear to have been written about the same time, though it might appear this way if one had been written one year after the other. H. W. Wise is dead. The note had no signature, but the paper appeared to have been cut off at the place for the signature. Plaintiff objected to the introduction of the note. His honor, being of the opinion that there was some evidence to identify the paper as a part of the note referred to in the bond, admitted it to be read to the jury, leaving to them the ques-

tion of its identity. Plaintiffs excepted. There was a verdict and judgment for defendants. Plaintiffs assigned as error the admission of the note and appealed.

Pless & Winborne, for appellants. Sinclair & McBrayer, for appellees.

CONNOR, J. Conceding that, notwithstanding the fact that Stockton, and those claiming under him, have been in possession of the land since the execution of the bond for title, the burden of proof to show that the purchase money had been paid was on defendant, we think that his honor correctly held that the note was competent evidence to be considered by the jury upon that issue. Plaintiff's counsel strongly urges that there is no evidence connecting the note with the bond for title. We think that there is evidence tending to show that it was given in part payment of the purchase money for the land. In every respect except amount it is shown to correspond with the recitals in the bond. It bears the same date. There is evidence tending to show that it was written and witnessed by the same person, at the same time, and that the name of the payor has been cut off. If the jury found that it was given in part payment of the purchase money, we think the fact that it was found in its present condition wrapped in the bond for title, among Stockton's papers after his death, is a pregnant circumstance tending to show that it was paid by him. Especially is this so in view of the long-continued possession of the land under the bond. It is true that the mere possession, by the payor, of a note without any indorsement thereon, is not evidence of payment, unless it appears that it was delivered to the payee. When, however, the bond for title, executed by the payor, reciting the execution of a note, accompanied with the possession of the land by the payor for 28 years, both parties to the transaction being dead, the note is found in the possession of the payor wrapped in his muniment of title, it should not be excluded from the jury. The possession does not raise any presumption of payment or change the burden of proof. It is a circumstance—a condition open to explanation, but of sufficient relevancy to the fact in issue to entitle it to be considered in connection with other evidence to aid the jury in arriving at a correct conclusion.

It is a mistake to say that rules governing the admissibility of evidence where the question of relevancy is involved are technical. They are based upon conclusions drawn from experience rather than logic. For instance, it is well known that among persons not engaged in trade, banking, or other occupations requiring the keeping of books, containing a record of their transactions, where a note is paid, the payor

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

usually cuts or tears his name out of it and preserves it. Any one having occasion to examine the papers of persons deceased knows that he usually finds the notes which such persons have paid canceled, as the one in controversy. It may be said that such is the general custom. The possession of a note under the conditions found in this case would be regarded as very strong evidence of its payment. This conclusion would be strengthened when the person claiming that the debt for which the note was given has not been paid is unable to produce another note corresponding to the debt, in date, amount, and other respects. It was suggested that the declaration by Stockton that he had paid the note would not be admissible. This is true, but its exclusion would not be based upon the suggestion that such declaration was not relevant, but upon the principle that a man's declarations made in his own interest are not admissible. Here we have an act consistent with admitted facts and conditions, and inconsistent with the theory that he had not paid for the land. The other evidence bearing upon the issue is not set out in the record. It is simply stated that declarations of both parties to the transaction were admitted. Certainly, in the condition of the case, it would aid the jury to show that the note was found in the possession of the payor wrapped in his bond. Jurors are men of experience and observation. They usually attach proper weight to facts and circumstances relating to the transactions which they are investigating. While the courts should carefully exclude such evidence as is misleading or confusing, they should admit such as experience has shown to be enlightening and helpful in getting at the truth—which is the ultimate end to which every judicial investigation should be directed.

We concur with his honor's ruling.
There is no error.

(82 S. C. 333)

STATE v. STOCKMAN.

(Supreme Court of South Carolina. April 9, 1909. On Rehearing, May 5, 1909.)

1. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETION OF TRIAL COURT—LEADING QUESTIONS.

The allowance of leading questions, being within the discretion of the trial court, will rarely be cause for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1153.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Permitting a witness to answer a leading question is not reversible error, where the evidence elicited thereby was fully brought out in other testimony given previously, and afterwards by other witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8138; Dec. Dig. § 1169.*]

3. CRIMINAL LAW (§ 1043*)—APPEAL—OBJECTIONS FOR REVIEW.

Error in allowing a leading question to be asked a witness will not be reviewed on appeal, where the objection to the question did not state the reasons for objecting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

4. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE—EVIDENCE ALREADY ADMITTED.

The overruling of an objection to a question asked a witness in regard to his testimony, if he meant to say a certain thing, was not prejudicial, where the witness had already so stated without objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8138; Dec. Dig. § 1169.*]

5. CRIMINAL LAW (§ 656*)—TRIAL—COMMENTS OF JUDGE ON EVIDENCE.

In a prosecution for homicide, a witness for the state having denied that he and decedent were intoxicated on the day of the homicide, a witness for the defense was permitted to testify that on that day he met them on a road, and that they were apparently intoxicated. Counsel for the defense then asked whether witness was traveling in a wagon, and how many wagons he had, both of which questions were answered, and finally, who had the wagon, when the court said: "All that is irrelevant." Held, that the court's action was not error, as it in no wise excluded the real matter sought to be shown, which was that witness met decedent and the witness for the state, and that they were both apparently intoxicated.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 656.*]

6. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE—EVIDENCE OTHERWISE ADMITTED.

In a prosecution for homicide, refusal to permit a witness to answer a question inquiring if he heard decedent make threats against defendant, on the ground that it was a conclusion, was not reversible error, where the witness was later permitted to state the language constituting the threat.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8147, 8148; Dec. Dig. § 1170.*]

7. HOMICIDE (§ 189*)—SELF-DEFENSE—EVIDENCE—HOSTILE FEELINGS OF DECEDENT.

Where there is some evidence tending to support a plea of self-defense in a trial for homicide, evidence reasonably tending to show that decedent had hostile feelings toward defendant at the time of the encounter, such as former threats to injure, quarrels, or difficulties, assaults, and the like, is competent to show that decedent was the aggressor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 398; Dec. Dig. § 189.*]

8. HOMICIDE (§ 189*)—SELF-DEFENSE—EVIDENCE.

In a prosecution for homicide, the exclusion of evidence that decedent considered himself to be of better stock than defendant as not bearing on issue of self-defense was not error, since it might well be supposed by the trial court that such a feeling could not tend to show such a hostile state of mind as would prompt or explain a personal assault upon decedent, but would rather tend to produce aloofness.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 189.*]

9. CRIMINAL LAW (§ 338*)—EVIDENCE RELEVANT IN CONNECTION WITH EVIDENCE ALREADY INTRODUCED.

In a prosecution for homicide, in which the state, to show bias of a witness for the defense against decedent, elicited the fact that the witness had been prosecuted by decedent for the killing of his dog, evidence as to whether decedent sometimes killed dogs was irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

10. CRIMINAL LAW (§ 450*) — OPINION EVIDENCE—MATTERS DIRECTLY IN ISSUE.

In a prosecution for homicide, in which the defense was self-defense, evidence of a non-expert as to what would have happened if defendant had not killed decedent at the time he did, being a mere opinion on the vital question in the case, and not within the class of cases which allow a nonexpert witness to give his opinion as to matters which cannot be made intelligible to the jury except as interpreted by the impression made on the mind of the witness at the time, is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1036; Dec. Dig. § 450.*]

11. CRIMINAL LAW (§ 683*)—TRIAL—SCOPE OF EVIDENCE IN REPLY.

Where, in a prosecution for homicide, a witness for the defense had testified that he met decedent and a witness for the state on the day of the homicide while traveling on a certain road, and that they were both apparently intoxicated, evidence for the state by another witness that he also had met them on such day while traveling on the same road, and that they both appeared to be sober, was admissible in reply.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 683.*]

12. CRIMINAL LAW (§ 457*)—OPINION EVIDENCE—INTOXICATION.

The determination of whether a person is intoxicated or sober at a particular time, being a matter which involves the impression on the mind of one seeing the person, produced by the various circumstances occurring at the time, and not being a matter relating to which it is practicable to put the jury in possession of all the facts as they appeared upon which the opinion is grounded, may be the subject of nonexpert opinion evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1046; Dec. Dig. § 457.*]

13. WITNESSES (§ 398*)—IMPEACHMENT—NECESSITY OF FOUNDATION.

Where, in a prosecution for homicide, a witness testified as to a conversation in a certain house on the day after the homicide, the laying of a foundation for contradicting the testimony was not necessary as a prerequisite to the admission of evidence that the witness was not at the house on that day.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1274; Dec. Dig. § 398.*]

14. CRIMINAL LAW (§ 683*)—TRIAL—SCOPE OF REPLY—EVIDENCE.

Where, in a prosecution for homicide, a witness for the defense testified that he heard decedent declare that he would kill the defendant, and fixed the day of the declaration as the time in a certain month when he purchased some goods at decedent's store and had them charged, evidence in a reply was admissible to show that goods were sold and charged to witness on only one day in the month named, and that on such day decedent was out of town, and not in the store.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 683.*]

15. WITNESSES (§ 398*) — CONTRADICTION — FOUNDATION—SUFFICIENCY.

Where, in a prosecution for homicide, a witness for the defense had admitted meeting a man in the road close to the place of the homicide, and shortly thereafter, but stated that he did not know whether it was a certain person or not, and denied that he had made certain statements incriminating the defendant, a proper foundation was laid for contradicting the witness by the person whom he met.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 398.*]

16. CRIMINAL LAW (§ 478*) — OPINION EVIDENCE—TESTIMONY OF EXPERTS—COMPETENCY.

In a prosecution for homicide, there was evidence that decedent, while engaged in a personal encounter with a person other than defendant, just before the commission of the crime, struck such person with his pistol, or a pair of knucks, or the butt of a whip, breaking his nose. The sheriff, who arrested the person with whom decedent had the encounter, testified in reply that, when such person arrived at the jail that night after the homicide, he had a bruise on each side of his nose, and that the skin was not broken. *Held*, that the sheriff, after describing the wounds and stating that he had seen bruises made by a man's fist, and was familiar with such wounds, was competent as an expert to give his opinion that the bruises on the nose must have been made with the fist.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 478.*]

17. CRIMINAL LAW (§ 822*)—TRIAL—CONSTRUCTING CHARGE AS A WHOLE.

In a prosecution for homicide, an instruction that self-defense is an affirmative defense, and must be established by a preponderance of the testimony, is not error, where the jury is also instructed that, in order to convict, the state must establish defendant's guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 822.*]

18. HOMICIDE (§ 116*)—SELF-DEFENSE—IMMEDIATE DANGER — BELIEF OF REASONABLE PERSON.

To make out a case of self-defense, the evidence should satisfy the jury that accused actually believed that he was in immediate danger of losing his life, or sustaining serious bodily harm, so that it was necessary to take the life of his assailant, and the circumstances must have been such as would, in the opinion of the jury, justify such a belief in the mind of a person possessed of ordinary firmness and reason.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

19. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTIONS—IGNORING DEFENDANT'S FAULT—MODIFICATION.

A requested instruction as to self-defense, omitting the principle that defendant must have been without fault in bringing about the difficulty, is properly modified by the court by adding such principle.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

20. HOMICIDE (§ 123*)—DEFENSE OF HABITATION—IMMEDIATE DANGER.

Though a man's dwelling is his castle, and he may repel force by force in defense of his personal habitation and property against one who manifestly endeavors by violence to commit a felony on either, and in such case is not bound to retreat, but may pursue his adversary until he has secured himself from all danger, even taking his life if necessary, and the danger

is imminent and immediate, still he cannot take life if the danger has passed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 182, 183; Dec. Dig. § 123.*]

Appeal from General Sessions Circuit Court of Lexington County; Chas. G. Dantzler, Judge.

S. W. Stockman was convicted of manslaughter, and appeals. Affirmed.

Graham & Sturkie and W. H. Sharpe, for appellant. Geo. Bell Timmerman, for the State.

JONES, J. The defendant, S. W. Stockman, at his residence in Lexington county on December 29, 1906, shot and killed his son-in-law, Hampton Hartley. Upon an indictment of murder he was tried at summer term, 1907, general sessions for Lexington county, Judge Dantzler presiding, convicted of manslaughter, with recommendation to mercy, and sentenced to seven years' imprisonment in the State Penitentiary. The defendant contended that Hartley entered his home under the influence of whisky, and was guilty of impropriety of conduct toward one of defendant's daughters, a sister of Hartley's wife, and was rebuked therefor by defendant, and ordered to leave the house; that thereupon Hartley with a buggy whip made an attack upon defendant and his nephew, J. W. Taylor, who was visiting at the house; that Mrs. Stockman got Hartley to leave the house; that he went some distance, and started back again towards the house, meeting Taylor near the gate, and assaulted Taylor, with whip in left hand and pistol in right hand; that Hartley, after knocking Taylor down, pointed his pistol at defendant, who was then in the yard with a shotgun in hand, and threatened to kill defendant, whereupon defendant shot and killed Hartley in defense of his person and habitation. The theory of the state's case was that, whatever may have taken place in the house, Hartley left it and went out of the gate into the road; that Taylor came out of the gate and went up to Hartley, and they commenced fighting, Taylor with his fist, and Hartley with a buggy whip held in his right hand; that Hartley drew no pistol, his pistol being found in his right hip pocket under him, with his overcoat buttoned up; that defendant fired upon Hartley while he was fighting Taylor, the line of fire being from the rear at an angle of about 45 degrees, some of the shot striking Hartley in the right temple, some striking behind and in front of the right ear.

The defendant presents 18 exceptions to the ruling of the court as to the admissibility of certain testimony, and 8 exceptions to the charge given the jury.

1. State's witness Elzy Long testified as to the position of Hartley's body on the ground where he fell, and the solicitor, with refer-

ence to the position of his hands, asked the question, "Were they or not lying by his side?" Defendant's counsel objected without stating reason, and, the court ruling the question competent, the witness answered, "Yes." Appellant claims that the question was leading and prejudicial. Conceding that questions beginning "Whether or not," etc., may be leading in certain circumstances, such questions are in the discretion of the trial court and will rarely be cause for reversal. State v. Marchbanks, 61 S. C. 22, 39 S. E. 187; Koon v. Southern Ry., 69 S. C. 104, 48 S. E. 86. There is nothing to show abuse of discretion nor prejudice to appellant. The position of the hands of deceased was fully brought out in other testimony given previously, and afterwards by other witnesses. Further, the trial court was not informed that the question was objected to as leading, and had no opportunity to have the question properly framed.

2. Defendant's witness Pick Sullivan testified that John Wingard, a witness who was present at the homicide and testified for the state, told witness at a house on McCarthy's place, a few days after the killing, that he went behind the shed, and did not see the killing. Defendant's counsel asked who was living in that house, and witness answered, "Mr. Wingard." Then counsel asked: "You mean to say that Wingard was living in this house where this conversation took place?" The witness answered, "Yes," when the solicitor objected, and the court sustained the objection as to what he meant to say, saying to defendant's counsel: "He is your witness, let him state." There was no error and no prejudice. As the witness had stated without objection that Wingard was living in the house where the conversation occurred, the point seems very immaterial.

3. State's witness Wingard having denied that he and Hartley were drunk on that day previous to the homicide, when riding together in a buggy leading two mules, and having testified that he did not on that occasion meet Simeon P. Alewine in the road, Alewine for the defense testified that he did meet them in the road apparently drunk; that the horses had broken out of the buggy. Counsel for defendant asked, "Did he get them?" and the witness answered, "Yes." The court asked counsel, "How is that relevant?" Counsel did not think it strictly relevant, but proceeded to ask the witness whether he (witness) was traveling in a wagon, which was answered, and how many wagons he had, which was answered, and then, finally, who had the wagon, when the court said: "All that is irrelevant." The third exception complains of this ruling. It is manifest that the court was correct, and that the ruling in no wise excluded the real matter sought to be shown; that is, whether Ale-

wine met Wingard and Hartley at the same time mentioned, and that they were apparently drunk.

4 and 5. The fourth and fifth exceptions are based upon the following from the case: "Q. Did you know the late Hamp Hartley? A. Yes, sir. Q. Did you hear him make threats against Stockman? The Solicitor: We object. The Court: Objection sustained. That is a conclusion. Q. (By Mr. Graham) Did you hear him say anything about Stockman? A. Yes, sir; I heard him speak about him. Q. What did he say? A. I heard him say that he considered himself of better stock than Stockman. The Solicitor: We object. The Court: Yes, sir; strike that out. Q. Give me the words he used. A. He said if Stockman fooled with him, he would shoot him the same as a rattlesnake. Q. How long before Hartley was killed did you hear him say that? A. I suppose it was over a year. He talked and ran on."

The fourth exception is based upon the first ruling of the court above. It is proper, in giving evidence as to the threats, for the witness to state the language, or the substance of the language, used by the declarant, so that court and jury may determine whether there was in fact any threat, and what was the nature thereof. The appellant met this view later by having the witness state the language constituting the threat, and hence there is no ground for objection. Under the fifth exception it is contended that it was harmful for the court to strike out the statement that Hartley said he considered himself of better stock than Stockman, as the statement tended to show the mind and feeling of Hartley towards the defendant. Where there is some evidence tending to support a plea of self-defense in a trial for homicide, it is competent, for the purpose of showing that the deceased was the aggressor, to introduce evidence reasonably tending to show that deceased had hostile feelings towards defendant at the time of the encounter such as former threats to injure, quarrels or difficulties, assaults, and the like. *State v. Emerson*, 78 S. C. 90, 58 S. E. 974. The trial court may well have supposed that the particular matter under consideration could not reasonably tend to show such a hostile state of mind as would prompt or explain a personal assault upon the deceased. Generally and naturally, a feeling of superiority of birth, or social superiority, would tend to produce aloofness rather than a personal encounter. The testimony would at most tend to show that deceased "had a prejudice" against defendant, and falls short of being a threat. *State v. Wyse*, 33 S. C. 582, 12 S. E. 556.

6. The solicitor having, on cross-examination of the defendant's witness Hair, brought out the fact that the witness had been prosecuted by the deceased for killing his dog,

with a view to show bias, defendant's counsel asked the witness whether the deceased sometimes killed dogs. The court correctly ruled the matter irrelevant.

7. It is contended that there was error in refusing to allow the defendant's witness Eugene Stockman to answer the question, "State if your father had not killed him at the time he did, what would have happened?" The question involved the mere opinion of a lad of 16 years upon the vital issue in the case as to what the deceased would have done. This does not fall within the class of cases which allow a nonexpert witness to give his opinion after detailing circumstances, as for example, as to time, distance, and such matters as cannot be made intelligible to the jury, except as interpreted by the impression made on the mind of the witness at the time, as in *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761; *Wood v. Ry. Co.*, 19 S. C. 521; *Bridger v. Ry. Co.*, 25 S. C. 24; *Harmon v. Ry. Co.*, 32 S. C. 127, 10 S. E. 877, 17 Am. St. Rep. 843; *Easler v. Ry. Co.*, 59 S. C. 311, 37 S. E. 938. What the deceased was doing, or threatening to do, when he was slain was an issue, and the witness testified fully as to all the circumstances, the meaning of which could not be made plainer by his opinion, and the inference to be drawn from the circumstances was peculiarly for the jury.

8. The court allowed state witness T. S. Nichols to state in reply that he met the deceased and Wingard in the road in a buggy on the road from Lexington to Summit the day of the homicide, and that they appeared to be sober. It was objected (1) that this was not in reply; and (2) that it involved the opinion of the witness. The ruling was correct. The testimony was in reply to the testimony brought out by the defendant that deceased and Wingard were drunk while traveling that same road that day. Whether one is drunk or sober at a particular time is one of those matters which involve the statement of the impression or belief in the mind of the witness produced by the various circumstances occurring at the time, and falls within the rule of the case of *Jones v. Fuller*, and other cases cited supra. Questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, state of sickness or health, disposition, temper, anger, fear, excitement, intoxication, and generally where it is not practicable to put the jury in possession of all the facts as they appeared at the time upon which the opinion is grounded, may be subject-matter of nonexpert opinion. *Elliott on Evidence*, §§ 676, 678, citing, among cases as to intoxication, *Edwards v. City of Worcester*, 172 Mass. 104, 51 N. E. 447; *West Chicago Ry. Co. v. Fishman*, 169 Ill. 186, 48 N. E. 447. Similar testimony was allowed on behalf of defendant, and the ruling was fair, and

consistent with the ruling discussed under the seventh exception.

9. The court allowed Sarah Wingard, witness for the state, to testify in reply that Pick Sullivan was not at her house on Sunday after Hartley was killed; Pick Sullivan having testified as to a conversation with J. W. Wingard at that house on that day. It was objected that no foundation had been laid for a contradiction. The court correctly ruled that the question was not of that class of contradictions, by previous statements of a witness, as required the laying of a foundation. It was a mere contradiction of Sullivan's testimony at the trial by the statement of a fact which, if true, would make it impossible that Sullivan's testimony could be true. Sullivan, having testified that he was at the house at the time mentioned, did not need to be advised that such statement would be contradicted.

10. Charles Howard testified for the defense that he heard deceased, Hartley, in August, 1905, in the afternoon, before the arrival of the train from Columbia, and about 2½ miles from Summit, in Lexington county, declare that he would kill the defendant. Witness fixed the day of the declaration as the time, in August, 1905, when he purchased some goods at Hartley's store from Socrates Keisler, the clerk and bookkeeper, and had them charged. The solicitor was allowed to show in reply by Keisler that he sold and charged goods to Howard on August 31, 1905, and on no other day in that month, with the purpose of showing that Hartley was in Columbia, S. C., at the time mentioned. There was no error in this. The testimony was strictly in reply.

11. For the same reason there was no error in allowing witness O. M. Asbill to testify in reply that Hartley was in Columbia, S. C., on the afternoon of August 31, 1905.

12. The testimony of J. W. Taylor was taken at a former trial of this case, and, he having afterwards died the same was introduced on this last trial. Taylor having testified that Hartley was some feet from him after knocking him between the wheels of a buggy and was pointing his pistol at Stockman when Stockman shot him, the solicitor sought to contradict Taylor by showing that he had made a different statement to F. D. Shealy on Saturday after the killing, in the road close to the place of the difficulty. Taylor admitted meeting a man that day who was driving two mules and a wagon, but stated that he did not know whether it was Shealy or not, and denied that he said to the man on that occasion that when Stockman fired Hartley was striking him (Taylor), and that it was a wonder Stockman had not hit him (Taylor). Shealy testified that such statement was made to him by Taylor at the time and place named. It is objected that the foundation for contradiction was not sufficiently laid. We

think the witness was sufficiently advised as to time, place, person, and subject-matter of the proposed contradiction. The fact that he did not know the name of the party as F. D. Shealy did not render the question incompetent, if the court was satisfied that the witness was sufficiently advised as to the identity of the conversation with another as to give him a fair opportunity to recollect, so as to deny or explain. *State v. Hampton*, 79 S. C. 182, 60 S. E. 669. It appears that Taylor was also indicted in this case, and, in that view, on the former trial it was not necessary to advise him of the purpose to contradict by previous statements. *State v. Emerson*, 78 S. C. 92, 58 S. E. 974; but, as Taylor was not on trial in this case, being dead, we have treated the question as if Taylor was a mere witness.

13. There was some testimony that Hartley, at the time of encounter with Taylor, struck Taylor with his pistol, or a pair of knucks, or the butt of his whip, breaking his nose, P. A. Corley, who was the sheriff of Lexington county, was put upon the stand by the state in reply and testified that when Taylor got to the jail that night after the killing he had a bruise on each side of his nose, and that the skin was not broken. The witness, after describing the wound, and stating that he had seen bruises made by a man's fist, was asked whether or not in his judgment the bruises appeared to have been made with a man's fist. Upon objection the court ruled that, if the witness was familiar with wounds made by the fist, he could answer. Thereupon he gave his opinion that the bruises on the nose must have been made with the fist. It is charged that this ruling was erroneous, as it appeared by the testimony of the witness that he was not an expert, and not sufficiently acquainted with wounds and bruises as to express an opinion. As the ruling of the court required that the witness should be familiar with wounds made by the fist, we must assume that it was understood that the witness had such special knowledge on the subject as would result from such familiarity. As such he might be considered an expert, and entitled to express an opinion as to what agency was capable of producing such wound. *State v. Senn*, 32 S. C. 400, 11 S. E. 292. No objection was made on the trial that the form of the question and answer was in the concrete instead of the abstract, and the only point of objection raised in the exception is that the witness was not such an expert as to express an opinion. This is not a case in which an expert was allowed to give an opinion on the very point in issue, as it was a collateral matter, and practically immaterial whether Hartley struck Taylor with fist, whip, or pistol. Defendant does not claim to have shot Hartley because of the character of his assault on Taylor, but that he shot in defense of his own person.

14. The court did not err in charging the jury that self-defense is an affirmative defense, and must be established by the preponderance of the testimony, when the jury was also instructed that, in order to convict, the state must establish the guilt of the defendant beyond a reasonable doubt. *State v. Welsh*, 29 S. C. 4, 6 S. E. 894; *State v. Bodie*, 33 S. C. 132, 11 S. E. 624; *State v. Way*, 38 S. C. 346, 17 S. E. 39; *State v. Way*, 76 S. C. 94, 56 S. E. 653.

15. In behalf of the defendant the court was requested to instruct the jury: "(10) The law, recognizing the imperfections of human nature, does not require that one charged with homicide should show that there was no other possible means for escape when he struck the fatal blow, but he is only called upon to satisfy the jury that, under all circumstances by which he was surrounded, he really believed there was a necessity for taking the life of his adversary in order to preserve his own, or to save him from serious bodily harm, and that, in the opinion of the jury, those circumstances were such as would justify such a belief." In response to which the court said: "That will not do as it stands. This is right to a certain extent, but it does not go far enough. Now, for instance, 'that, in the opinion of the jury, those circumstances were such as would justify such a belief'; that is, such belief in the mind of a person possessed of ordinary firmness and reason, that the accused at the time of the killing actually believed that he was in such immediate, imminent danger of losing his life, or sustaining serious bodily harm, that it was necessary for his own protection to take the life of his assailant, and that the circumstances in which the accused was placed were such as would justify such belief in the mind of a person possessed of ordinary firmness and reason. With that modification I charge you that request." The modification was correct. *State v. McGreer*, 13 S. C. 464; *State v. Thompson*, 68 S. C. 137, 46 S. E. 941.

16. The court was requested to charge as follows: "In a case where the testimony shows that the deceased assaulted the defendant with a gun or pistol in such a way or manner as to cause a defendant to believe that such deceased was about to take defendant's life, or inflict some great bodily harm upon him, at the time he fired the fatal shot, and that a man of ordinary reason would have so believed, it would make no difference whether the deceased intended to take the life of such defendant, or to do him some serious bodily harm; for, under such circumstances, the shooting would be justifiable, the killing excusable, and such defendant should be acquitted." Responding to this request, the court said: "There is one essential element of excusable homicide lacking in that request, and that is he must have been without fault in bringing about the diff-

culty. I charge you that proposition in the light of my general charge to you, and as modified." The modification was in accordance with the well-settled law as to self-defense. *State v. Dean*, 72 S. C. 84, 51 S. E. 524.

17, 18 and 19. These exceptions complain of error in charging the law as to defense of one's dwelling. The court was requested to instruct the jury: "(16) That the dwelling house where a man lives is his home or castle, and that he may repel force by force in the defense of his person, habitation, or property, against one who manifestly intends and endeavors by violence to commit a felony on either, and in such case is not bound to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kill his adversary in so doing, it is justifiable defense, and the jury should acquit him." In response to this the court said: "Very true, Mr. Foreman, as I charged you before; no one has the right to take the life of another if the danger is passed, but he has the right, where the danger is immediate, to take the life of another to protect his home and family." In the general charge the court, said: "Now, a man's house is his castle. He has the right to protect every member occupying it, or there with him, and he may take life, if it is necessary to do so, in order for such protection; but the danger must be imminent, must be immediate. When the danger has passed, one has no right to follow up another who has invaded his home for the purpose of taking his life. He has no right to do that under the law; no such law anywhere making the taking of human life excusable, unless there be a necessity for it. But one when danger is passed, is over, is not allowed, under the law, to follow up another and take his life. The danger must be imminent; it must be immediate." The modification was correct. The deceased, when killed, was in the public road near the gate of defendant's yard, and defendant had left his yard, and come into his yard armed with his shotgun. The theory of the defense was that deceased, after knocking Taylor down, started to enter the gate with pistol pointed at defendant, and threatening to kill him. The theory of the state was that deceased left the house when ordered out, and was in the road striking Taylor with a whip in his right hand, and with no pistol drawn, when Stockman shot him from the rear. The issues thus presented made it very proper for the court, in charging the law as to defense of one's dwelling, to point out that the danger should not be passed, but should be imminent. The charge was in harmony with the law as declared in *State v. Rochester*, 72 S. C. 199, 51 S. E. 685, and *State v. Brooks*, 79 S. C. 149, 60 S. E. 518, 17 L. R. A. (N. S.) 483.

20 and 21. These exceptions allege that the charge as a whole conveyed to the jury that, in the opinion of the court, the defendant

was guilty. These exceptions are without foundation. The charge was fair and impartial.

The judgment of the circuit court is affirmed.

On Rehearing.

PER CURIAM. After careful consideration for rehearing in this case the court is unable to discover that any material question involved in the appeal has been overlooked or disregarded. It may be concluded that the court was in error in supposing that the deceased was killed while within the limits of the public road in front of defendant's dwelling, and that deceased was really shot when he was some 18 feet in front of defendant's gate and between defendant's inclosed yard and the public road, still such mistake does not materially affect the correctness of the conclusions reached by the court.

It is therefore ordered that the petition for rehearing be dismissed, and the order staying remittitur herein revoked.

(82 S. C. 542)

STEPHENS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. May 11, 1909.)

1. MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—FELLOW SERVANTS.

A railroad company is liable for injuries to a fireman caused by the engineer's negligence in giving orders within the scope of his authority to control the fireman's services.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 779; Dec. Dig. § 245.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

The question whether it is negligence for an engineer to order a fireman to jump from a train moving six or seven miles an hour is one of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1041; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

The question whether an injured employé was acting in the course of his employment is for the jury, where different inferences may be drawn from the testimony.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1005; Dec. Dig. § 284.*]

4. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

The question whether an engineer's order is within the scope of his authority to control a fireman's services is one of law for the court, where the order requires the performance of a personal service which cannot reasonably be supposed to be essential to the prosecution of the engineer's services.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1005; Dec. Dig. § 284.*]

5. MASTER AND SERVANT (§ 145*)—INJURIES TO SERVANTS—RULES.

A rule requiring an employé of a railroad company to refuse to obey orders exposing him to danger means that he must refuse to obey

orders known to be dangerous beyond the peril which is reasonably incident to the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.*]

6. MASTER AND SERVANT (§ 289*)—LIABILITY FOR INJURIES—ACTIONS—QUESTION FOR JURY.

The question whether an injured employé knew the rules of caution in a book given to him, or should have known them by the exercise of reasonable diligence, is one of fact, where more than one inference can be drawn from the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1127; Dec. Dig. § 289.*]

7. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

Whether it is negligence for an employé to jump from a moving train is a question for the jury, unless it appears that the train was going at such a speed that it would have been obvious to a reasonable man that injury would probably result.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 11, 23; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

An experienced fireman, who obeys an order of the engineer requiring him to jump from a train moving six miles an hour, when he knows the act is dangerous and there is no emergency, is guilty, as a matter of law, of contributory negligence warranting a nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 781; Dec. Dig. § 245.*]

Appeal from Common Pleas Circuit Court of Dorchester County; R. W. Menninger, Judge.

Action by Thomas Stephens against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

E. J. Dennis and J. P. K. Bryan, for appellant. J. W. Barnwell, for respondent.

WOODS, J. This action was brought for damages on account of personal injuries suffered by the plaintiff while in defendant's employment as a fireman. The appeal is from an order of nonsuit made on the ground that the evidence admitted of no other inference than that the injury was due to plaintiff's own negligence, or that his negligence contributed to it as a proximate cause. The facts may be shortly stated: Charles Alphonse was engineer, and the plaintiff fireman, on defendant's freight train which left Columbia about 7 o'clock on the morning of August 11, 1904. The claim of the plaintiff is that his injury resulted from the negligence of the engineer in requiring him to jump from a moving train. His account of the order of the engineer and his own conduct and the resulting injury is best given in his own language: "A. Just before we got to the block, and while the train was running, he told me, 'Stephens, I am not going to eat any breakfast this morning, but I want you to get down and go back to the cab and get me a cup of coffee.' Q.

peared from the evidence that the rule book was given to the plaintiff some time in 1904, but it does not appear how long he had it before the accident in August of that year. The court could not say as a matter of law that the time was long enough to justify the inference that the plaintiff should have known the rules. His ignorance of them, and consequent failure to obey them, cannot as a matter of law be imputed to him as negligence. If he knew those rules of caution, or would have known them by the exercise of reasonable diligence, then he could not recover, because his act was in direct violation of them; but the court could not decide this issue, because the evidence left room for more than one inference.

But aside from the company's rules of caution above mentioned, the plaintiff could not stupidly, recklessly, or even carelessly obey an order of the engineer requiring him to do an obviously dangerous act, and hold the defendant responsible for a resulting injury. For in doing so he would be guilty of contributory negligence. The remaining inquiry is whether the plaintiff's act was of this character. To show contributory negligence, it is not sufficient that the employé receiving the order should have misgivings and believe the act required to be hazardous, unless the danger is so imminent and obvious that a man of ordinary prudence would not incur it. If there is ground for reasonable difference of opinion as to the danger, the servant is not bound to set up his judgment against that of his superior, whose orders he is required to obey; but he may rely on the judgment of such superior. The matter is thus well stated by Mr. Justice Holmes in *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542: "When we say that a man appreciates a danger, we mean to say that he forms a judgment as to the future, and that his judgment is right; but if against this judgment is set the judgment of a superior, one to whom, from the nature of the callings of the two men and of the superior's duty, seems likely to make the more accurate forecast, and if to this be added a command to go on with the work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and degree of the danger, the extent of plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down." The numerous authorities sustaining this statement of the law are collated in the note in *Houston, etc., Ry. Co. v. De Walt*, 97 Am. St. Rep. 877.

Whether it is negligence to jump from a slowly moving train is a question for the jury, and the court will not hold it to be contributory negligence as a matter of law. To

take the case from the jury it must clearly appear that the train was going at such a high rate of speed that it was in fact obvious to the plaintiff, or would have been obvious to any reasonable man, that injury would probably result from jumping. *Creech v. Railway Co.*, 66 S. C. 533, 45 S. E. 86; *Gyles v. Railway Co.*, 79 S. C. 176, 60 S. E. 433; *Northern Pac. R. R. Co. v. Egeland*, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82. In the last case, and in others decided on its authority, the fact that the plaintiff jumped at the direction of his superior was held to be an important consideration. Here, it is true, the order was given by the engineer; but, even regarding it within the scope of the engineer's authority, there was no emergency, and nothing of consequence to be accomplished, and the plaintiff testified that he regarded the jump from the train so dangerous that he twice refused to take the risk. There was in fact great peril in making the jump, full appreciation of the danger by the plaintiff, who had been in the railroad business a long time, and no exigency or emergency of any kind. On this point the case falls under the case of *Smith v. Railway Co.*, 80 S. C. 1, 61 S. E. 205, where a demurrer was sustained on the ground that the plaintiff had alleged in the complaint that he jumped from a moving train when he knew the act was dangerous.

There is no view of the law under which a verdict for the plaintiff could be sustained, and the nonsuit was properly granted.

The judgment of this court is that the judgment of the circuit court be affirmed.

(82 S. C. 534)

BREEDEN et al. v. MOORE et al.

(Supreme Court of South Carolina. May 10, 1909.)

1. TRUSTS (§ 168*) — SUCCESSION OF NEW TRUSTEE.

On the death of a trustee, his eldest son succeeds him by operation of law.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 221; Dec. Dig. § 168.*]

2. PERPETUITIES (§ 4*)—FUTURE ESTATES—RE-MOTENESS.

Testator devised land in trust for his son for life, to be conveyed to his son's children on his death, or, if he should die without surviving children, testator directed that his trustee should permit testator's daughter to occupy the land for life and convey the same to her children, or, if she should die without surviving children, to divide the same equally among testator's children and the issue of any deceased child. *Held*, that limitation over to testator's surviving children after his daughter's death without children her surviving was not too remote.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. ADVERSE POSSESSION (§ 4*) — AGAINST WHOM PRESCRIPTION MAY BE CLAIMED.

To support title by adverse possession, it must be shown that the person against whom asserted was not prevented by law from assert-

ing his right during the period of the possession alleged to be adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 15; Dec. Dig. § 4.*]

4. LIFE ESTATES (§ 8*)—AGAINST WHOM PRESCRIPTION MAY BE CLAIMED—REMAINDERMEN.

Testator directed that, if his son should die without children him surviving, his trustees should permit testator's daughter to occupy land for life, and at her death, convey the same to her children, and, if she should die without children her surviving, should divide the same equally among testator's surviving children and the issue of any deceased child. Held that, under the rule that a trustee takes no larger estate than necessary to perform the duty imposed, testator's daughter took a life estate free from the trust, and her grantee could not set up adverse possession against the trustee or remaindermen, as testator's daughter had a right to convey the land for life, and neither the trustee nor the remaindermen had any right of action for possession until her death.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

5. TRUSTS (§ 131*)—CONSTRUCTION—ESTATES CREATED—STATUTE OF USES.

That testator directed his trustee to "permit" testator's daughter to use and occupy land does not indicate that any duty is to be performed by the trustee so as to preclude the operation of the statute of uses, and prevent the vesting of the legal title to the life estate in testator's daughter.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 175½; Dec. Dig. § 131.*]

6. LIFE ESTATES (§ 8*)—AGAINST WHOM PRESCRIPTION MAY BE CLAIMED.

Where a life tenant undertook to convey only her interest in land and it does not appear that her grantees did anything to bring home to the trustee under the will creating the life estate notice that they claimed by any higher claim than the life tenant could or did confer, and the land was agricultural and cultivated and rented as other land of the grantees was and their possession was entirely consistent with the claim of the trustee and remaindermen, and there was nothing with which either could interfere, there is nothing to support title by adverse possession in such grantees.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.*]

Appeal from Common Pleas Circuit Court of Marlboro County; Chas. G. Dantzler, Judge.

Partition by Lucy Breedon and others against Alice G. Moore and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Knox Livingston and Newton & Owens, for appellants. J. H. Hudson, McColl & McColl, and Townsend & Rogers, for respondents.

WOODS, J. Thomas Stubbs, Sr., of Marlboro county, died on 18th June, 1847, leaving a will, by the fifth clause of which he made this devise: "I give and devise to my friend Holden W. Liles, one hundred acres of land whereon my son, Thomas Stubbs, Jr., now lives, composed partly of the Bowyer tract and partly of the Terrel tract, in trust nevertheless, to permit my said son, Thomas Stubbs, Jr., to use and enjoy the same to his sole and separate use, without rendering an

account of the rents and profits, during the term of his natural life, and after his death to convey the same to the children of the said Thomas Stubbs, Jr., lawfully begotten that may be living at the time of his death, to them and their heirs forever, and should he die leaving no heirs lawfully begotten, surviving him, I give the said tract of land to the said Holden W. Liles in trust to permit my daughter Lucy Ann Goodwin to use, occupy and enjoy the same during her natural life and after her death to convey the same to the heirs of her body, to them and their heirs forever, should she die leaving no such heirs, then the said trustee to divide the same equally among my surviving children, the issue of any deceased child taking the share of any of my children who may then be dead." Thomas Stubbs, Jr., held possession of the land as devisee until 1856, when he died without having had issue of his body. Immediately after his death Lucy Ann Goodwin went into possession and held until 1881, when she made a deed of conveyance to Milton A. J. Moore and his wife, Alice Moore. This deed purported to convey nothing more than the interest of the grantor; the words used being, "all my interest and estate in and to" the premises described, and it contained no warranty clause. Mrs. Goodwin, the life tenant, died in June, 1898, without ever having any issue of her body. Soon after her death, the plaintiffs, claiming as heirs of children of Thomas Stubbs, Sr., who survived him, brought this action, alleging that, the life estate having fallen in, they were entitled as remaindermen to a partition of the land. M. A. J. Moore and his wife, Alice Moore, having been made parties to the suit, by their answer set up these defenses: First, that the deed from Lucy Ann Goodwin conveyed to them a good fee-simple estate; and, second, that they had held the land adversely to the plaintiffs and all other persons since their entry under the deed in 1881; and, third, that they had acquired by deeds of conveyance whatever interest in the land existed in favor of certain of the persons named in the complaint as holding an interest in common with the plaintiffs and by the same right. During the pendency of the action M. A. J. Moore died, and his executors and executrix and his devisees and legatees were substituted for him as defendants. From the date of the deed in 1881 M. A. J. Moore and his wife and his devisees have been in possession of the land. The original trustee, Holden J. Liles, died about the year 1881, and his eldest son, James E. Liles, became his successor by operation of law (Reynolds v. Reynolds, 61 S. C. 243, 39 S. E. 391; Cone v. Cone, 61 S. C. 512, 39 S. E. 748), and, as trustee, was made a party to the suit. He testified, however, that he never heard of the trust until this action was commenced, and, of course, had nothing to do with the land.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The circuit judge held the limitation over after the death of Lucy Ann Goodwin to be too remote, and that she, therefore, took a fee-simple title which passed by her conveyance to M. A. J. Moore and Alice Moore. This conclusion would be correct but for the fact that the limitation over is to the testator's "surviving children." Such a limitation was held not too remote in *Selman v. Robertson*, 46 S. C. 262, 24 S. E. 187, where the subject is fully discussed and the authorities cited.

The circuit court held, further, that the grantees of Mrs. Goodwin had acquired title by adverse possession. We think this conclusion also was erroneous, for two reasons: First, the grantees of Mrs. Goodwin could not hold adversely against the remaindermen or the trustee for them until the termination of the life estate of Mrs. Goodwin; and, second, there was not a scintilla of evidence of adverse possession. To support the plea of adverse possession, it is necessary to show that the claimant against whom it is asserted was not prevented by law from asserting his right during the period of the possession alleged to be adverse. In the effort to meet this requirement, the respondents maintain that, assuming the remainder over to be valid, yet the legal title was in the trustee during the life of Mrs. Goodwin, that she had no right to convey, and that, when they took a deed from her and entered under it, their adverse possession began. The question then is whether the trustee or Mrs. Goodwin held the legal title to the life estate; for it will not be doubted, if Mrs. Goodwin held the legal estate for her life, no act of hers could defeat the remaindermen, and no possession during her life could be adverse to the trustee or the remaindermen. In *Howard v. Henderson*, 18 S. C. 184, the conveyance was to a trustee "for the use, benefit, and behoof of the said William S. Howard, Sr., during the term of his natural life, with remainder at his death to the said Georgia V. Howard, during the term of her natural life, and upon her death to such child or children of the said William S. Howard, Jr., and the said Georgia V. Howard, as may be living." It was held that the statute executed the use as to the life estate; the court saying: "So that, whatever may be the proper construction of this deed in reference to the application of the statute of uses on the estates of Mrs. Howard and the children in remainder, there is no reason why it should not execute the estate of W. S. Howard, Sr., the plaintiff, vesting in him a legal estate for life, the fee possibly remaining in the trustee for the benefit of the married woman and for the preservation of the contingent remainders to the children." The same principle was applied conversely in *Willman v. Holmes*, 4 Rich. Eq. 475, and *Wleters v. Timmons*, 25 S. C. 488, 1 S. E. 1. In these cases it was held the trustee retained the legal title as to the life estate, while as to the remainder the statute executed the use, and vested

the legal title in the remaindermen freed from the trust. These adjudications rest on the rule of universal application that a trustee will not be held to take any larger estate than is necessary to enable him to perform the duty imposed by the instrument creating the trust. This principle and the authority of the cases above cited are recognized and restated in *Ayer v. Ritter*, 29 S. C. 137, 7 S. E. 53, *Young v. McNeill*, 78 S. C. 150, 59 S. E. 986, and *Moseley v. Hankinson*, 25 S. C. 519.

There is difficulty, it is true, in reconciling the case of *Bristow v. McCall*, 16 S. C. 545, which preceded *Howard v. Henderson*, supra, with the principle just stated. There the trustees were required to make division of the land between D. and E. "and permit each to use, possess, and enjoy his or her half in severalty during his or her natural life, and after the death of either to divide the share of each among his or her children equally." The trustees divided the lands between D. and E., but it was held that the legal title to the life estates, as well as the remainders, remained in the trustees, because the duty devolved on them to make division among the remaindermen after the termination of the life estate of D. or E. We can perceive no difference between *Bristow v. McCall*, 16 S. C. 545, and *Howard v. Henderson*, 18 S. C. 184, except that in the latter case the statute executed the use automatically immediately upon the execution of the deed, while in the former the trustee completely performed the duties devolving upon him under the will with respect to the life interests; and this difference seems to be too unsubstantial for judicial recognition. While the case of *Bristow v. McCall* has been often cited, its doctrine on this point has never been restated nor recognized. On the other hand, the rule followed in *Howard v. Henderson*, 18 S. C. 184, is, as we have pointed out, but an application of the principle before laid down in *Willman v. Holmes*, supra, and reaffirmed in the later cases cited. This principle is too well supported by reason and authority to be rejected, and the case of *Bristow v. McCall* must be overruled so far as it is inconsistent with it. If it is followed, clearly Mrs. Goodwin held the life estate freed from the trustee, and no one holding under her could set up adverse possession against the trustee or the remaindermen, for whom he held, for the obvious reason that Mrs. Goodwin had a right to convey the land for her life, and neither the trustee nor the remaindermen could have any right of action for the possession until the death of Mrs. Goodwin. *Moseley v. Hankinson*, 25 S. C. 519; *Rawls v. Johns*, 54 S. C. 395, 32 S. E. 451; *Rice v. Bamberg*, 59 S. C. 507, 38 S. E. 209; *Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 83. The fact that in this case the trustee was to permit Mrs. Goodwin "to use, occupy and enjoy" the land did not indicate that any duty was to be performed by the trustee, and did not take the case out of the statute of uses. *McNish v.*

Guerard, 4 Strob. Eq. 74; Holmes v. Pickett, 51 S. C. 280, 29 S. E. 82. But, even if it be assumed the trustee retained the legal title of the life estate of Mrs. Goodwin, the result would be the same. In Benbow v. Levi, 50 S. C. 120, 27 S. E. 655, it was held in accordance with a rule of general acceptance, that, if the legal title is in the trustee, the cestui que trust may be defeated by possession adverse to the trustee; but that case went no farther than to hold that a cestui que trust would be barred by such adverse possession when her right to possession might have been asserted by the trustee during the period of the adverse holding. Even if the case of Young v. McNeill, 78 S. C. 143, 59 S. E. 986, be considered to extend the principle of Benbow v. Levi to the rule that a cestui que trust in remainder will be barred by an adverse holding against the trustee during the time that he might have asserted the life tenant's right of possession and before the accrual of the right of the remaindermen to possession, still this case does not fall within the rule; for the reason that there was no evidence whatever of adverse possession against the trustee or the remaindermen.

Mrs. Goodwin had the right "to use, occupy, and enjoy" the land during her life. This right, whether legal or equitable, she could convey or assign to another, and the trustee had no right to interfere. Far from asserting an adverse right, Mrs. Goodwin undertook to convey only her interest and estate. Under this conveyance or assignment her grantees or assignees had the right "to use, occupy and enjoy" the land during Mrs. Goodwin's life without interference from the trustee. There is not a particle of evidence that they did anything to bring home to the trustees notice that they claimed to hold the land by any higher claim than Mrs. Goodwin could and did confer. The lands were agricultural, and the evidence shows that they were cultivated and rented out just as the other lands of the grantees were, and just as any one having the right "to use, occupy and enjoy" would have cultivated or rented them. Not a single fact or condition appears in the testimony inconsistent with the occupation and use which the life tenant and those claiming under her were entitled to have for the life of Mrs. Goodwin, with which use and occupation neither the trustee nor the remaindermen could interfere. On the contrary, the possession was entirely consistent with the claim of the remaindermen or of the trustee for them.

The circuit decree is without support in the evidence and must be reversed, and it is adjudged the lands be partitioned in accordance with the rights of the parties.

JONES, C. J., and GARY, A. J., concur on the ground that the remainder over was

good, that the statute executed the use in Mrs. Goodwin, and therefore adverse possession of her grantees could not commence until her death.

(83 S. C. 34)

STATE v. GIBSON.

(Supreme Court of South Carolina. May 11, 1909.)

1. CRIMINAL LAW (§ 450*) — OPINION EVIDENCE—ADMISSIBILITY.

On a trial for receiving stolen bonds, objection to a question asked a witness by defendant as to whether cancellation marks on a bond would affect its negotiability, was properly sustained; the construction of a written instrument being for the court, and not the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1036; Dec. Dig. § 450.*]

2. CRIMINAL LAW (§ 1028*)—APPEAL—PRESENTATION OF QUESTIONS BELOW.

A conviction for receiving stolen bonds will not be reversed because the court failed to construe the bonds, where it was not requested to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2619; Dec. Dig. § 1028.*]

3. CRIMINAL LAW (§ 1165*)—APPEAL—HARMLESS ERROR.

A conviction for receiving stolen bonds will not be reversed because the court failed to construe the bonds, where it is not made to appear that such failure was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085; Dec. Dig. § 1165.*]

4. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where on a criminal trial accused was allowed to introduce evidence, which was uncontradicted, that his reputation for honesty and integrity was good, a refusal to permit such witnesses to state whether from his reputation they would believe him under oath was not prejudicial to accused; for, if he was a man of integrity, that reasonably tended to show that he was worthy of belief under oath.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3145; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 1038*)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW—REQUEST FOR INSTRUCTIONS.

An assignment that the court erred in failing to give an instruction cannot be sustained, where there was no request therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

6. CRIMINAL LAW (§ 756*) — INSTRUCTIONS — CHARGE ON FACTS.

A statement by the court, in response to an inquiry by the jury on a trial for receiving stolen bonds, that "My recollection is—but the jury must go by their own recollection of the testimony—my recollection of the testimony is (if I state it wrongly you gentlemen can correct me; and if there is any dispute I will have it read) that Z. said that [accused] handled all those \$12,000 bonds, except one \$500, which was sent to Washington, and he did not say when he took that \$500 bond," and that "the only testimony as to the Washington bond is from Z., and that is what he said about it, and that is all that he did say as to that bond," was not prejudicial to accused as being in violation of Const. 1895, art. 5, § 26, forbidding a judge to charge on matters of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1766; Dec. Dig. § 756.*]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Thomas J. Gibson was convicted of receiving stolen goods, and he appeals. Affirmed.

Clark & Clark and Logan & Edmunds, for appellant. Christie Benet, for the State.

GARY, A. J. The defendant was tried under an indictment charging him with receiving stolen goods knowing them to be stolen; and the jury rendered a verdict of guilty, with a recommendation to mercy, whereupon he was sentenced to imprisonment in the penitentiary for six months. He appealed upon exceptions, the first of which assigns error, on the part of his honor the presiding judge, in ruling that the defendant's question to the witness J. F. Lyon, "If these cancellation marks were not on it, would it be a negotiable bond or not," was incompetent, and in not permitting the witness to answer the same. The circuit judge properly ruled that the construction of the written instrument presented a question to be determined by the court, and not by the jury.

The second question raised by the exceptions is whether the presiding judge erred in failing to construe the said bond. In the first place the record does not disclose the fact that he was requested to construe the bond; and, in the second place, it has not been made to appear that such failure was prejudicial to the rights of the appellant.

The third exception raises the question whether the presiding judge erred in refusing to permit the defendant's witnesses, after they had testified that they knew his general reputation for honesty and integrity, and that it was good, to answer the following interrogatory: "From that reputation would you believe him on oath?" The reason assigned by the circuit judge for this ruling was that the reputation of the defendant for veracity was not attacked. The case of *Sweet v. Gilmore*, 52 S. C. 530, 30 S. E. 395, shows that when it is sought to impeach the credibility of a witness, the impeaching witness may be asked, "What is the general character of the witness, good or bad?" and, if he answers that the character is bad, then he may be asked, "Would you believe him on his oath?" And the case of *Chapman v. Cooley*, 12 Rich. Law, 654, decides that the character of a witness can be defended by evidence only, when it is directly assailed by evidence. Even, however, if it should be conceded that the character of a defendant is attacked, when he is charged with a crime involving moral turpitude, and that ordinarily he should be allowed to introduce testimony as to his reputation for veracity, nevertheless, we fail to discover in what respect the ruling of the presiding judge was prejudicial to the appellant, when he was allowed to offer testimony (which was uncontradicted) that his reputation for honesty and integrity was good. If he was a man of integrity, that fact reasonably tends to

show that he was worthy of belief under oath. This ruling also disposes of the fourth exception.

The fifth assignment of error is because the presiding judge failed to instruct the jury that it was not safe to convict the defendant on the uncorroborated evidence of an accomplice. This ground cannot be sustained, for the reason, if for no other, that the presiding judge was not requested to make such a ruling.

The sixth exception is as follows: "Because his honor erred, it is respectfully submitted, in response to a question by the foreman: 'The Foreman: One of the jurors desires to know if the bond sent to Washington is the last bond that was stolen'—in charging as follows: 'The Court: I cannot tell you. There is nothing in the evidence to show, unless counsel can agree about that. Solicitor Davis: The question is that these two were the last that were stolen. Mr. Crawford: There is no evidence on that, as to that Washington bond. The Court: My recollection is—but the jury must go by their own recollection of the testimony—my recollection of the testimony is (if I state it wrongly, you gentlemen can correct me; and if there is any dispute I will have it read) that Mr. Zimmerman said that Mr. Gibson handled all those \$12,000 bonds, except one \$500, which was sent to Washington, and he did not say when he took that \$500 bond. Mr. Crawford: Mr. Gibson says in answer that he bought only six bonds from him. The Court: The only testimony as to the Washington bond is from Mr. Zimmerman, and that is what he said about it, and that is all that he did say as to that bond.' Error being (a) that such charge constituted a charge on the facts, in violation of the provisions of the Constitution of the state of South Carolina (article 5, § 28, Const. 1895); (b) that in so doing his honor undertook to, and did, state to the jury the testimony, in violation of the provisions of the Constitution of the state of South Carolina, above referred to." We fail to see wherein the remarks of the circuit judge were prejudicial to the rights of the defendant.

The seventh and eighth exceptions are too general for consideration.

The ninth exception assigns error, on the part of the presiding judge, in refusing to grant the motion for a new trial on the ground that "It is nowhere proven that those were the bonds that were stolen [referring to the bonds described in the indictment]." The appellant's attorneys did not argue this exception, and we deem it only necessary to state that it is without merit.

The tenth exception assigns error in failing to charge the jury as to the effect of the defendant's good character. The presiding judge says: "I recall that counsel did, in arguing the case to the jury, turn to me and call my attention to that law, but I forgot it when I was charging the jury." A request

should have been presented in accordance with the requirement of the rule of court.

The eleventh exception assigns error on the part of the presiding judge in refusing to grant the motion for a new trial, on the ground that he failed to charge the jury that the uncorroborated statement of a confessed accomplice should be received with caution. This question is disposed of by what was said in considering the tenth exception.

The twelfth exception assigns error on the part of the circuit judge in refusing to grant the motion for a new trial, on the ground that there was no evidence that the defendant knew the bonds had been stolen. The reasons assigned by the presiding judge in overruling this ground for a new trial are satisfactory to this court.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(65 W. Va. 241)

LOHR v. GEORGE et al.

(Supreme Court of Appeals of West Virginia.
March 2, 1909. Rehearing Denied
May 12, 1909.)

1. TAXATION (§ 677*)—SALES—COMBINATION AMONG BIDDERS.

Combination among bidders at a tax sale for the purpose of eliminating or restraining competition in the bidding may be shown by parol evidence, and, if established, will invalidate the purchase of, and deed for, any tract of land, purchased by any of the confederates in pursuance thereof and to which the improper conduct extended.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1356; Dec. Dig. § 677.*]

2. TAXATION (§ 677*)—SALES—COMBINATION AMONG BIDDERS.

A prima facie case of such combination and restraint of competition, made out by facts and circumstances giving rise to a strong inference thereof, is aided by the failure of the purchasers to deny the inculpatory facts, and calls for relief.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1356; Dec. Dig. § 677.*]

3. TAXATION (§ 743*)—SALES—COMBINATION AMONG BIDDERS—SUBSEQUENT GRANTEE.

A deed so acquired will not be set aside as to a grantee of the purchaser, if he establishes the fact that he is a bona fide purchaser for a valuable consideration; but the burden is upon him to show that he is a good-faith purchaser for a valuable consideration.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1485-1488; Dec. Dig. § 743.*]

4. TAXATION (§ 743*)—SALES—COMBINATION AMONG BIDDERS—BURDEN OF PROOF.

Such subsequent purchaser must deny notice of the misconduct of his grantor, whether it be alleged or not, and the burden of proof thereof is on the party seeking relief against him; but he must both plead and prove the payment of consideration.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1487; Dec. Dig. § 743.*]

5. TAXATION (§ 689*)—SETTING ASIDE DEED—REPAYMENT OF TAXES.

Equity will not set aside a tax deed without providing for repayment of the taxes, interest, and costs paid by the purchaser, except

in those cases in which the taxation itself is illegal, or the taxes have been paid, and the bill should tender payment thereof, or aver willingness on the part of the plaintiff to pay the same; but, if such offer to do equity be omitted, the defect may be cured by a tender or offer of the money in court before, or on, the entry of the decree.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1385; Dec. Dig. § 689.*]

6. TAXATION (§ 689*)—SETTING ASIDE DEED—WRIT OF POSSESSION.

On setting aside a tax deed, the court may award the plaintiff a writ for the possession of the land, if the purchaser is in possession thereof at the time of the rendition of the decree.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1385; Dec. Dig. § 689.*]

7. TAXATION (§ 689*)—SETTING ASIDE DEED—INJUNCTION.

In such case an injunction should not be awarded to restrain the defendant from acts of dominion over the land, since the plaintiff, on being restored to his possession, will be able to invoke proper remedies for his protection, and there is no presumption that further acts of molestation will be done by the defendant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1385; Dec. Dig. § 689.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Action by Isaac J. Lohr against William T. George and others to set aside a tax deed. Decree for defendants, and complainant appeals. Reversed and remanded, with directions.

Fred O. Blue, for appellant. J. Hop Woods, for appellees.

POFFENBARGER, J. Isaac J. Lohr and wife owned a 16-acre tract of land in Barbour county, which was charged with taxes in the name of Isaac J. Lohr for the years 1898 and 1899, as a tract of 11 acres and 30 poles, and for the years 1900, 1901, 1902, and 1903, as a tract of 16 acres. It was returned as delinquent for nonpayment of the taxes for the year 1899, in the name of D. J. Lohr, and sold for such delinquency in December, 1901, in the name of B. J. Lohr; William T. George being the purchaser. A surveyor's report, subsequently made, describes it as land conveyed to Isaac J. Lohr and Mary V. Lohr, and as having become delinquent in the name of D. J. Lohr. The clerk of the county court later executed a deed, based on this report, by which he conveyed the land to S. L. Reger, trustee, assignee of George, and in which he recited that it had been charged with taxes for the year 1899 as a tract of 11 acres and 30 poles in the name of I. J. Lohr. Reger and his cestuis que trustent conveyed it to Chas. W. Rosler, reserving to themselves the coal under it, and Rosler conveyed it to S. L. Wolfe. Lohr had previously conveyed the coal to J. M. Guffey. This suit was brought by Lohr to set

aside the tax deed on the ground of irregularities in the tax sale proceedings, and for fraud on the part of George and his associates in effecting the purchase, and the court dismissed the bill.

Want of necessary parties is relied upon as justifying the decree; it appearing from the bill that Mary V. Lohr had died intestate in the year 1898, supposedly leaving heirs, who are not made parties. On her death the plaintiff became seised of an estate by the curtesy in her interest, and so entitled to a freehold in severalty estate in the entire tract. Independently of this he had a right of redemption as a former owner, and his right to set aside this deed, if it is void, is coextensive with his right of redemption. The defect in the proceedings is a mere irregularity in the return of delinquency and sale, clearly cured, after deed made, by the provisions of section 25, c. 31, Code 1899 (Code 1906, § 884). There was a proper and valid assessment, and this statute declares that no mere mistake, irregularity, or defect in the return, delinquent list, or affidavit shall constitute ground for setting aside a deed. *Hogan, Adm'r, v. Pig-gott*, 60 W. Va. 541, 56 S. E. 189; *Hornage v. Imboden*, 57 W. Va. 206, 49 S. E. 1036. The distinction between curable and incurable infirmities in tax deeds must be regarded. If there is no delinquent list, no valid sale or deed can be made. *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537; *Metz v. Starcher*, 60 W. Va. 657, 56 S. E. 196, 116 Am. St. Rep. 925. Some errors in assessments are not cured. *Collins v. Reger*, 62 W. Va. 196, 57 S. E. 743; *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915. Here there was a sufficient assessment, a return of delinquency, sale, and return of sales. The defects are simple mistakes in the list, sale, and return of sales. These are expressly cured.

The charge of fraud in the sale is predicated on the testimony of the sheriff who made it. The hypothesis, the plaintiff attempted to establish by this testimony, was that certain persons, including George, the purchaser of this tract, made a pretense of bidding against each other for the purpose of preventing bids in good faith by others, and, having reduced the quantity of land to be taken for the taxes by competitive bidding, they refused to accept it, withdrew all the bids but the first for the whole tract, and so obtained undue advantages. The witness admitted that in some instances the bidders refused to take the land in accordance with their bids, and claimed that he (the sheriff) could then declare it sold to preceding bidders, but said that they had finally taken all the tracts as they had bid them off. He then named some of the persons who had made such contentions. He thought the parties had bidden against each other. Refusals to comply with the bids occurred after the sale, some time in the

evening after the crowd attending the sale had dispersed and gone away, and after the sale had been completed; but he protested throughout the examination the contracts were closed as they had been made. These parties had bought nine tracts at less than the quantity charged. Of the 71 tracts sold, they bought 47. He thought they had bid against each other, and, before the sale was closed, withdrew their bids so as to permit bidders for larger quantities to take the land, and said it was a very common occurrence among the parties named. On cross-examination he said he had no recollection that more than one bid was made on the tract of land in question. He made out receipts to the purchasers as it was sold. When speaking of withdrawals of bids, he meant they had occurred prior to the declaration of the sale. Each party got what he bought. He had not reported any sale to any person of more land than he had actually purchased. Only one bid was made on the tract of land involved here, but the answer admits that all the defendants except Rosier and Wolfe "had a joint interest" in "some purchases made by the defendant George, among others the land in controversy." It will be remembered that George had the sheriff convey to S. L. Reger, trustee. George, S. A. Moore, Samuel R. Woods, and R. E. Talbot, joined Reger in the deed to Rosier, and so disclosed their interest. These are the parties as to whom the sheriff said it was "a very common occurrence for them" to bid against each other and then withdraw bids before sale, and permit one of their number to take a greater quantity than that specified in the final bid or lowest bid made. It further appears that they bought 47 of the 71 tracts sold.

Duerr v. Snodgrass, 58 W. Va. 472, 52 S. E. 531, seems to assert that a tax sale may be set aside for fraud, perpetrated by the officer who made it, or the bidders. That such frauds afford ground for setting them aside is undoubted. *Cooley on Taxation* (3d Ed.) pp. 941, 945, inclusive; *Black on Tax Titles* (2d Ed.) §§ 246, 247; *Blackwell on Tax Titles* (5th Ed.) § 557. The text in these works is fully sustained by numerous well-considered decisions, including *Slater v. Maxwell*, 6 Wall. 263, 18 L. Ed. 790; *Dudley v. Little*, 2 Ohio, 509, 15 Am. Dec. 575; *Eldridge v. Kuehl*, 27 Iowa, 161; *McCready v. Sexton*, 29 Iowa, 356, 4 Am. Rep. 214; *Kerwer v. Allen*, 31 Iowa, 578; *Springer v. Battle*, 46 Iowa, 688; *Beeson v. Johns*, 59 Iowa, 166, 13 N. W. 97; *Frank & Darrow v. Arnold*, 73 Iowa, 370, 35 N. W. 453; *Gallaher v. Head*, 108 Iowa, 598, 79 N. W. 387; *Merritt v. Poulter*, 96 Mo. 237, 9 S. W. 586; *Stephens v. Williams*, 70 Ind. 536; *Brown v. Hogle*, 30 Ill. 119. In some of the cases cited, the sales were invalidated because the purchasers prevented competition in bidding by representing that the owners would re-

deem the land. In others, it appeared that all the bidders had, by agreement, arranged to bid by turn and not against each other. In some others, the officers had virtually made private sales by allowing the purchasers to go through the lists and select, in advance of the sales, the lands they wanted. We think it may be clearly deduced from all the decisions that the fraud, in order to give relief, must have extended to the land as to which relief is asked. In other words, it does not suffice that somebody perpetrated a fraud at the sale in respect to land other than that conveyed by the deed the plaintiff seeks to impeach. This was expressly decided in *Eldridge v. Kuehl*, cited; the court holding as follows: "Evidence that the purchaser at the tax sale, by his conduct, prevented competition with him by the bidders present in reference to many pieces of land bid for by him, is not admissible to impeach the validity of the sale, where it is not shown that such conduct extended to, or was in some way connected with, the tract in controversy." In *Frank & Darrow v. Arnold* there was a combination among the bidders which, owing to a disagreement, was interrupted for a time. The evidence showed, however, that the purchase made by Arnold occurred before the bidding by turn ceased. This, the court was particular to note, from which fact it may be inferred the sale would have been upheld if it had been made after the collusive bidding stopped. It has been held that a partnership for the purchase of delinquent lands is contrary to the policy of the law (*Dudley v. Little*, 2 Ohio, 509, 15 Am. Dec. 575), but a number of well-considered cases are to the contrary (*Dawson v. Ward*, 71 Tex. 72, 9 S. W. 106; *Morrison v. Bank*, 81 Ind. 335; *Pearson v. Robinson*, 44 Iowa, 413). See *Black, Tax Titles*, § 246, and *Blackwell, Tax Titles*, § 559. As circumstances, other than mere association in the purchases, are involved here, which, in our opinion, taken together with the fact of association, fully establish the charge that competition was stifled or restrained by the conduct of the purchasers and the combination extended to, and included, the land as to which the bill seeks relief, we are not called upon to say what effect proof of partnership alone among them in the purchases they made would have.

The sheriff says he thinks they resorted to by-bidding. He made the sale. This amounts to saying they did, according to his recollection. They admit that some purchases were made for all in the name of one. This tract was so purchased. Hence the combination extended to it. This makes a prima facie case to which they have not responded. In our opinion the facts disclosed amply justify the inference of a combination in restraint of competition, and there is no evidence whatever tending in the opposite

direction. The verdict of a jury predicated upon it could not be disturbed by this court. The charge cannot be presumed and must be proved, but the inference is strengthened by the silence of the defendants. None of them testified. Any of them could have taken the witness stand and denied the charge and contradicted the inculpatory testimony, if they were false. They are not justified by any rule of law or principle of equity in remaining silent with the expectation that the law affords some means of establishing in their favor what they themselves were under a duty to make out by their own testimony. *Stout v. Sands*, 56 W. Va. 663, 49 S. E. 428; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644; *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025; *Bindley v. Martin*, 28 W. Va. 775. Clear proof is required, but the requisite of clearness as well as the degree is fixed by the rules of evidence. These say a prima facie case must prevail unless overcome by opposing evidence, and that failure to meet it by one having evidence at his command gives rise to a strengthening or supporting presumption or inference.

As to the allegations of fraud, we have carefully examined the bill and concluded that they are sufficient. The combination and mode of bidding is charged substantially as above set forth. The bill further alleges that Rosier and Wolfe colluded and conspired with the other defendants, and that they paid no consideration for the successive conveyances made to them. There is no specific or direct averment of notice to them of the circumstances under which, and the method by which, the other defendants acquired the deed, but, as stated, their complicity in the conspiracy is positively and directly charged. The joint and separate answer of all the defendants denies the fraud, collusion, and conspiracy, and also that the consideration expressed in the deeds to Rosier and Wolfe are fictitious; but there is no averment in the answer that any consideration was paid by either Rosier or Wolfe. Aside from the admissions of the answer, it is negative in character all the way through.

From what has been said, it is plain that the deed must be set aside as to all of the defendants except Rosier and Wolfe. Whether their title must fall also depends upon whether their status is the same as that of ordinary purchasers from fraudulent grantees. We think it is. The defect in this conveyance from the sheriff to Reger is not a defect of record. Defects apparent upon the record of tax sales are generally treated as rendering the deeds, not merely voidable, but void. However this may be, the ground of relief here is not such a defect. It is one established by parol evidence, and does not pertain to the record. It makes out, not a legal defect, but a ground of equitable re-

lief. It is a mere equity which may be waived, and therefore makes the deed not void, but voidable. There is authority for the position that a purchaser for value without notice is protected against such a defect. *Van Shaach v. Robins*, 36 Iowa, 203; *Martin v. Ragsdale*, 49 Iowa, 589.

Such being the principle by which the rights of Rosler and Wolfe are to be determined, the next inquiry is whether they have made out a case of bona fide purchasers. This is an affirmative defense, except as to the matter of notice, which they must deny, whether averred in the bill or not. *Downman v. Rust*, 6 Rand. (Va.) 587; *Tompkins v. Mitchell*, 2 Rand. (Va.) 430; *Bowlby v. Dewitt*, 47 W. Va. 323, 327, 34 S. E. 919. Notice having been denied, the burden of proof as to it is on the plaintiff or the party who alleges the fraud. 2 Min. Ins. 887; *Carter v. Allen*, 21 Grat. (Va.) 241; *Vest v. Michie*, 31 Grat. (Va.) 149, 31 Am. Rep. 722; *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. 72. This last case says the fact of notice may be inferred from circumstances, as well as proved by direct evidence, and that facts and circumstances may raise the presumption of notice, so as to shift the burden of proof; but it asserts that the burden in the first instance is upon the party seeking relief. As the answer denies collusion, conspiracy, and fraud, alleged against all of the defendants, we are of the opinion that it sufficiently denies notice; but it is deficient in that it does not aver payment of any consideration. Essential elements of this defense are the payment of a valuable consideration and a fair price for the property, and these must be averred in the answer or plea. *Bowlby v. Dewitt*, 47 W. Va. 323, 34 S. E. 919; *Speldel Grocery Co. v. Stark*, 62 W. Va. 512, 59 S. E. 498; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 635; *Curtin v. Isaacs*, 36 W. Va. 391, 15 S. E. 171; *Bindley v. Martin*, 28 W. Va. 773; *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268; *Doswell v. Buchanan*, 3 Leigh (Va.) 365, 381, 23 Am. Dec. 280; *Mutual Assur. Soc. v. Stone*, 3 Leigh (Va.) 218; *Hoover v. Donally*, 3 Hen. & M. 316. Rosler testified that he had paid the amount specified in his deed as the consideration for the conveyance, but this avails him nothing in view of his failure to plead such payment. As to him and Wolfe both, the basis for such evidence should have been laid in the answer.

From the conclusions above stated, it results that the court below should have set aside these deeds, unless there is something in the objection that the bill fails to tender, or allege a tender of, the taxes and cost paid by the purchasers. There is no such allegation in the bill; but it appears from a memorandum, appended to the final decree dismissing it, that the plaintiff, after the announcement of the decree, offered to pay to the defendants in open court the amount to

which they were entitled. At the time of this offer, the court still had control of the case. The bill is complete in everything except the offer to do equity. It sufficiently alleges the fraud, but fails to bring the plaintiff within a condition imposed by the rules of equity procedure. This condition applies, not before suit brought, but merely before the relief is granted. A tender in court, on or before the entry of the decree, places the plaintiff within the rule. The offer to do equity may be incorporated in the bill, and generally is, and its omission is a ground of demurrer; but, since a tender of the taxes, interest, and costs is not a condition precedent to the right of action, we perceive no reason why the tender or offer to pay in open court, though not alleged in the bill, does not cure the defect. The imposition of this duty upon the plaintiff concerns his conduct in court as a supplicant for relief, rather than his cause of action against the defendant. We think, therefore, his submission, in any form, to the rule requiring him to do equity, suffices, and from this conclusion it follows that the court below should have ascertained the amount due the defendants, and, on payment thereof, set aside the deeds complained of. It has been suggested in some of our decisions that a decree might be entered setting aside a void tax deed conditionally; that is, on the payment of the purchase money. While this may be proper, it seems to us the court should make a finality of the cause by requiring the money to be paid to the defendant or into court, or by setting aside the deeds and decreeing a lien on the land in favor of the defendant for the taxes, interest, and costs.

After the execution of the deed to Wolfe, he took possession of the land, and the other defendants aided him in maintaining it. The bill prays an injunction inhibiting and restraining them from the exercise of dominion over it, but no preliminary injunction was awarded. As the court has jurisdiction, and the pretensions of the defendants rest solely on the tax deed, it may, on setting aside the deed, give full and complete relief in the premises, by awarding the plaintiff a writ for the possession of the land. We do not think an injunction is necessary. On the adjudication of the invalidity of the tax deed, nothing will remain as the basis of a claim of title, on the part of the defendants, and it is not to be presumed that they will continue their efforts to hold the land. If they should, the plaintiff will be in possession and able to invoke such remedies for his protection as are afforded other owners of real estate who are in possession thereof.

For the reasons stated, the decree complained of will be reversed, and the cause remanded, with directions to ascertain the amount due the defendants, and, on payment thereof by the plaintiff, to cancel and

set aside the three deeds complained of in the bill and award the plaintiff a writ for the possession of the land.

Reversed and remanded.

(65 W. Va. 459)

BROWN et al. v. CLICK et al.

(Supreme Court of Appeals of West Virginia.
April 20, 1909. Rehearing Denied
May 14, 1909.)

1. MORTGAGES (§ 338*)—SALE BY SUBSTITUTED TRUSTEE—INJUNCTION.

Equity will not enjoin a sale by a substituted trustee on the ground that the original trustee was improperly removed.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 338.*]

2. EQUITY (§ 373*)—HEARING ON BILL AND ANSWER.

When a case is heard upon bill and answer without replication, and no proof is taken, the allegations of the answer must be taken as true.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 711; Dec. Dig. § 373.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Putnam County.

Bill by H. C. Brown and others against Philip Click, administrator, and others. Decree for defendants, and plaintiffs appeal. Affirmed.

J. W. English and Null & Higgins, for appellants. Rankin Wiley, for appellees.

WILLIAMS, J. This is an appeal from a decree of the circuit court of Putnam county made on the 17th day of August, 1907, directing Rankin Wiley, substituted trustee, to sell certain real estate under a deed of trust given by H. C. Brown and E. R. Brown, his wife, to secure a debt to defendant's intestate, C. Click, deceased.

W. L. Higgins was the original trustee, and was required by Click's administrator to give bond under the provision of section 3053 of the Code of 1906, and, failing to do so, notice was given to Brown and wife and said Higgins, trustee, by said administrator, that he would apply to the circuit court in term on the 14th day of November, 1906, to appoint a trustee in his place. The court appointed said Wiley in his stead, and Wiley thereupon gave bond as substituted trustee and published notice in a newspaper that he would sell the property publicly in front of the courthouse on the 30th day of January, 1907. There appears to have been two adjournments of the sale, first, to the 12th of February, 1907, and again to the 27th of February, 1907, by a continuation of the original notice in the paper and subjoining thereto notices of the adjournments of the sale. Plaintiffs presented to the circuit judge, in vacation, their bill praying for an injunction against the sale on the grounds: (1) That the original trustee had been improperly removed; (2) that notice of sale had not

been served on the grantors as required by section 3056 of the Code of 1906; (3) that proper notices of the adjournments of sale had not been given. These points are also assigned as errors committed by the lower court in dissolving the injunction and directing a sale, and as an additional error it is assigned (4) that it was improper to direct a sale without ascertaining the amount of the debt. On the 21st of February, 1907, the judge, in vacation, granted a temporary injunction, and on the 15th of May, in term, the defendant demurred to and answered the bill. Plaintiffs excepted to the answer and objected to its filing, which were overruled. No written exceptions were filed. The case was heard at the August term, 1907, on bill and exhibits and answer, and the decree appealed from was entered. This decree does not expressly dissolve the injunction, but does so, in effect, by directing the trustee to make sale according to the terms and conditions of the deed of trust.

Some affidavits appear in the record, but as they are not identified by the pleadings, or by any order of the court, they cannot be considered as being any part of the record. *Trump v. Tidewater C. & C. Co.*, 46 W. Va. 238, 32 S. E. 1035; *Bias v. C. & O. Ry. Co.*, 46 W. Va. 349, 33 S. E. 240; *Washington National B. & L. Ass'n v. Westfall*, 55 W. Va. 305, 47 S. E. 74; *Bloss v. Hull*, 27 W. Va. 503. No replication was made, and no proof taken. Consequently under the well-established rule of equity practice, the allegations of the answer must be taken as true. *Wilt v. Huffman*, 46 W. Va. 473, 33 S. E. 279, and *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804.

As to the errors assigned: The first is not good, because the removal of the original trustee and the appointment of Wiley in his stead is collateral to this proceeding and cannot be reviewed upon this appeal. That proceeding is not void. The order therein made is final, and if erroneous must be corrected by writ of error. The answer denies plaintiff's allegation that notice of the sale was not served upon the grantors, and under the rule of pleading above stated we are bound to hold that notice was served upon them. This disposes of the second point relied on. A copy of the notice of sale published in some newspaper is made an exhibit with the bill, from which it appears that the notice of the two adjournments of sale was given by continuing the publication of the original notice, and inserting just below it this notice of postponement. This is usual, and we see no objection to it. We therefore hold the third point not good. The fourth point relied on is that it was error to decree a sale without ascertaining the debt. Plaintiffs do not controvert the debt, nor allege payments. There are no facts alleged which would tend to render the amount

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the debt uncertain. The trust deed makes it certain as to the amount and the time it bears interest, and so this assignment we hold also to be groundless. *Watterson v. Miller*. 42 W. Va. 108, 24 S. E. 578.

We find no error in the decree appealed from, and affirm it.

5 W. Va. 512)

KEYSTONE LUMBER & MINING CO. v. BROOKS.

(Supreme Court of Appeals of West Virginia.
April 20, 1909.)

LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—FAILURE TO REMOVE.

In case of a deed conveying legal title to timber, though the deed contemplates removal of timber, there being no limit of time for removal and no clause of forfeiture for failure to remove, title to the timber is not lost to the purchaser for such failure.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 11; Dec. Dig. § 3.*]

(Syllabus by the Court.)

Error to Circuit Court, Webster County.

Action by the Keystone Lumber & Mining Company against Arthur Brooks. Judgment for defendant, and plaintiff brings error. Affirmed.

Haymond & Fox, for plaintiff in error.
Morrison & Talbott, Morton & Woddell, and Brown, Jackson & Knight, for defendant in error.

BRANNON, J. By deed June 16, 1900, in consideration of \$23,000, half in cash, the Keystone Lumber & Mining Company conveyed to George W. Barricklow certain timber by the language: "Does grant unto the party of the second part all kinds of timber standing or being on all that certain tract of land lying and being in the county of Webster in the state of West Virginia on the waters of Laurel creek and Birch river, and bounded and described as follows," containing 3,986 acres, more or less. Next comes the clause: "Together with the right to second party to enter upon and use the land so far as is necessary or required in manufacturing and removing said timber, free of any rental or charge whatsoever for a period of six (6) years for that part of said land drained by Birch river and Beaver creek and tributaries thereof and for a period of two (2) years for that part drained by Glade Run and Laurel creek and tributaries with the right to construct road and tramways and place mills thereon and to remove the same at any time during, at or after the periods of time above mentioned." The deed closes with the clause: "The party of the first part covenants that it will warrant generally the title to the timber and other property hereby conveyed." Barricklow conveyed to the Union Lumber

Company all that part of the timber on the Birch river and Beaver creek side, and later the Union Lumber Company conveyed same to Arthur Brooks. Brooks put on the land a costly mill, constructed an incline with steam hoisting engines, tramroads, houses for employes, and means of removing timber and converting it into lumber, employing many men and teams, and pursuing the work actively. Shortly before the expiration of the six years specified in the deed from the Keystone Company to Barricklow, Brooks learned that the company considered that deed as one giving a time limit of six years, so that all rights of Brooks to cut or remove timber and hold possession of the land would then expire, and all timber remaining then unfelled and that felled lying on the land not converted into lumber would revert to the company, and he felled all the timber on the land, and refusing to acknowledge this claim of the company, and refusing to quit possession of the land, but proceeding in the work of converting the timber into lumber, the Keystone Company brought an action of unlawful entry and detainer, and a jury having found Brooks not guilty of unlawfully withholding the possession of the land, and judgment having been rendered for the defendant, the Keystone Company obtained a writ of error from this court.

The case turns on the construction of the deed. The Keystone Company says that it gives a limit of six years' time for the severance and removal of the timber from the land, after which rights of Brooks end, and timber standing or in felled trees or logs not yet converted into lumber would revert to the Keystone Company and be lost to Brooks, not by forfeiture, as the Keystone Company contends, but because the deed only conveys so much timber as in a bona fide intent to manufacture into lumber could be so cut and manufactured within that time. In case of a conveyance of timber, with a time limit requiring its removal from the land in a given time, the weight of authority is that the conveyance is conditional; the purchaser taking only what timber shall be removed within that time, and the balance reverting to the owner of the land, or rather remaining his. *Null v. Elliott*, 52 W. Va. 229, 43 S. E. 173; *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649; 28 Am. & Eng. Ency. L. 541. We cannot concur in such a construction of the deed. Look at it. There is at the outset the separate, distinct, vital clause found in deeds of grant, prescribed in our Code as a form "to convey the grantor's whole interest" in the thing granted, having the operative words "does grant." That vests full legal title in the grantee to the timber. Where do we find in this granting clause any words to tell us that only so much of the timber as may be removed within six years is granted? To the

reverse, the grant is "all and all kinds of timber," without limitation of time for removal. This important section of the deed contains no limit of time, no forfeiture clause for nonremoval. If timber is conveyed, and no limit of time as to removal, the title vests absolutely in the grantee, and it is not lost or forfeited by reason of the fact that it is not removed in a reasonable time. *Magnetic Ore Co. v. Markbury L. Co.*, 104 Ala. 465, 16 South. 632, 27 L. R. A. 433, 53 Am. St. Rep. 73; *Holt v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119. In the latter case the court says: "In such a sale there is no foundation for an exception to the general rules of land or to make that a conditional conveyance of trees which would be an absolute conveyance of other property." In the *Magnetic Ore Case* the court asserted the same. The *Keystone Company* would in effect insert a condition subsequent defeating the title or right of *Barricklow*. Conditions are not to be raised by inference or argument. 2 *Devlin on Deeds*, § 970. Conditions subsequent are not favored in law, "because they tend to destroy estates, and a vigorous exaction of them is a species of summum jus, and in many cases not reconcilable with conscience." 4 Kent, 129. *Rawson v. Inhabitants*, 7 Allen (Mass.) 125, 83 Am. Dec. 670, and other authorities in *Zimmerman v. Daffin*, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 65, where there was a time limit, the court said that if the intent was that, at the close of the limit, the failure to remove should work a reverter, it would have been easy to have said so; but that on the face of the instrument it was, at least, a question of doubt whether the limitation was a condition subsequent, or a covenant, not operating as a clause of forfeiture, citing cases so holding. There we see that, "if it be doubtful whether a clause imports a condition or a covenant, the latter construction will be adopted." If such the case where there is a time limit, how much more so where there is none, and the only covenant is one to be implied? It is a mere covenant. So the construction of the deed does not give it a time limit for removal of the timber, so as to give the *Keystone Company* any timber, whether standing, or in felled trees or logs. Without such limit, or some forfeiture clause, the title thereto remains in *Brooks*. The law does not imply such limit or condition. *Ludwick L. Co. v. Taylor*, 100 Tex. 270, 98 S. W. 238, 123 Am. St. Rep. 805.

But that granting clause alone does not, as contended by counsel, solve the case, though we think it does being a grant without condition. It is claimed that the clause beginning, "together with," fixes a time limit of six years for removal of the timber. It gives right to enter upon the land and use it for removing and manufacturing the timber, "free of any rental or charge for six years." That period, in its connection in the sentence, only applies to fix the term or limit of freedom from rental. In its place in the deed it has no reference to time fixed for removal of timber. It is immediate in place after, or is a very part of, the clause giving right to use the land for removing and manufacturing timber. Why take it from that clause and carry the six years' provision back over that clause, and connect it with the granting clause, and qualify the latter clause by saying that the grant must be

used within six years? In place and in sense it belongs to the clause giving right to occupy the land. It has a function to perform in that clause. It is needed there. It serves only to limit the period during which no charge was to be made for the use of the land. It is no covenant by *Barricklow*. There is no express covenant by *Barricklow* to remove the timber at any time. The most we could say as to this is that the deed contemplates a removal, and that thus a covenant to remove is implied. Likely so. But it is only a covenant, not a time limit, not a condition operating as a forfeiture. It would only demand removal in a reasonable time. Delay unreasonable might be the subject of action for breach, or the cause of some legal procedure. We say not as to this; but we do say it does not work a loss of *Barricklow's* vested title. In *Zimmerman v. Daffin*, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 65, where there was a time limit, the court said that if the intent was that, at the close of the limit, the failure to remove should work a reverter, it would have been easy to have said so; but that on the face of the instrument it was, at least, a question of doubt whether the limitation was a condition subsequent, or a covenant, not operating as a clause of forfeiture, citing cases so holding. There we see that, "if it be doubtful whether a clause imports a condition or a covenant, the latter construction will be adopted." If such the case where there is a time limit, how much more so where there is none, and the only covenant is one to be implied? It is a mere covenant. So the construction of the deed does not give it a time limit for removal of the timber, so as to give the *Keystone Company* any timber, whether standing, or in felled trees or logs. Without such limit, or some forfeiture clause, the title thereto remains in *Brooks*. The law does not imply such limit or condition. *Ludwick L. Co. v. Taylor*, 100 Tex. 270, 98 S. W. 238, 123 Am. St. Rep. 805.

The *Keystone Company* asserts that the timber not removed within six years became or remained its property, as according to its theory that the deed passed only so much timber as should be so removed. The above authorities deny this. There is no time limit; but, even if there were, the timber, having been severed from the land, and thus made personalty, would be the property of *Brooks*. *Null v. Elliott*, 52 W. Va. 231, 43 S. E. 173; *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649. The courts say that severance is removal within the meaning of time-limit deeds. *Williams v. Flood*, 63 Mich. 493, 30 N. W. 93; *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133.

This is not an action to recover trees down, or logs, or damages. It is unlawful entry and detainer; the plaintiff expecting, likely, if *Brooks* should be put out, to take possession of the trees and logs. The ques-

tion here is: Has Brooks right to retain such partial possession as is necessary to work up the timber? Recurring to the deed, we find it in words to give Barricklow right "to enter upon and use the land so far as is necessary or required in manufacturing and removing said timber." As we hold that the deed passed unconditional title to the timber, and that there is no time limit or condition of forfeiture to destroy his right, it follows, under the clause just quoted, that Brooks has right to hold possession until the work closes. This right comes from the deed. If Brooks still holds title to the timber, what avails that right without continued possession? When an owner grants coal away, the law, without any provision in the deed, implies and confers right to enter and hold such possession and use of the land as are necessary to remove the coal. Otherwise the coal would have no value. 27 Cyc. 688; Snyder on Mines, § 1007; Marvin v. Brewster, 55 N. Y. 538, 14 Am. Rep. 322. So with timber granted away. Judge Dent, in Null v. Elliott, 52 W. Va. 229, 43 S. E. 173, said that in a time-limit contract there is an implied right after the limit to enter and remove timber cut before the end of the limit. This expression is challenged as not good law, but we think the cases cited by Judge Dent sustain his statement. We now refer to Ludwick v. Taylor, 100 Tex. 270, 98 S. W. 238, 123 Am. St. Rep. 803, holding that a conveyance of all the timber on a tract "is a conveyance of the timber with an interest in the land, with the right to cut it any time without importing into such grant that it must be cut within a reasonable time." The court says: "There goes with the title to the timber right to use the soil for its sustenance and of entry upon the land for its enjoyment." It does seem to me that there is force in the view that the mere grant of timber does carry right of entry and possession to remove the timber. It would as to coal. See 104 Ala. 465, 16 South. 632, 27 L. R. A. 434, 53 Am. St. Rep. 73. The opinion by Judge Poffenbarger, 58 W. Va. 650, 52 S. E. 775 (3 L. R. A. [N. S.] 649), asserts the position that, when timber is conveyed with warranty, "it conveys an interest in the land, though there be a time limit; but it vests either a defeasible title to the timber or a leasehold estate for the time limited, with a right of appropriation during the term." That is where there is a time limit. In this case there is none. There is a qualified interest in the land, right of partial possession to enable the owner of the timber to remove it. So the Keystone Company could not maintain this action against Brooks.

In view of the construction which we give the deed, it is unnecessary to discuss other questions, since they turn on it, and would not be ground of reversal.

Judgment affirmed.

(65 W. Va. 523)

STATE v. MARKS.

(Supreme Court of Appeals of West Virginia.
March 12, 1907. On Rehearing, April
20, 1909.)

INTOXICATING LIQUORS (§ 147*) — PLACE OF SALE.

One who as agent for a retail liquor dealer licensed in one county solicits and receives orders for his principal in another county for liquors, to be forwarded to his principal at the licensed place of business, and there filled and shipped C. O. D. to the customer, and who does not deliver the goods or receive the money for his principal, is not guilty of the offense of selling, offering, or exposing for sale, or soliciting and receiving orders for, spirituous liquors, etc., as provided in section 1, c. 32, Code 1899 (Code 1906, § 913).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.*]

(Syllabus by the Court.)

Error to Circuit Court, Raleigh County.

J. L. Marks was convicted of a violation of the local option law, and brings error. Reversed.

J. Lewis Bumgardner, Osenton & McPeak, Holt & Duncan, and McGinnis & Hatcher, for plaintiff in error. C. W. May, Atty. Gen., Wm. G. Conley, and A. A. Lilly, for the State.

MILLER, J. The defendant, J. L. Marks, was indicted in the circuit court of Raleigh county at the July term, 1905, thereof, charged with unlawfully, without a state license therefor, selling, offering, and exposing for sale and soliciting and receiving orders for spirituous liquors, wines, porter, ale, beer, and drinks of like nature. The case was tried by agreement of parties before the court in lieu of a jury upon the following agreed state of facts: "That the Fayette Liquor Company, a copartnership, the members of which are J. P. Chapman and W. E. Deegans, trading under the firm name and style of the Fayette Liquor Company, has both wholesale and retail liquor dealers license, issued by the county court of Fayette county, to carry on its business as wholesale and retail liquor dealers at Beury, Fayette county, W. Va., for the license year 1905. That the said firm employed the defendant, J. L. Marks, as its agent and traveling salesman to represent both the wholesale and retail branches of its business, and to travel through Fayette, Raleigh, Nicholas, Logan, and Wyoming counties, and solicit and receive orders for the sale of spirituous liquors, wines, porter, ale, beer, and drinks of like nature, at wholesale and retail, to be shipped by express from the place of business of the said firm at Beury, Fayette county, W. Va. That the defendant, J. L. Marks, acting as such agent and traveling salesman of said firm, the Fayette Liquor Company, did in the county of Raleigh on the 1st day of June, 1905, and

during the period covered by the retail license aforesaid, in the course of his employment solicit and receive from James Cousins an order for one gallon of whisky, to be shipped in a jug by express C. O. D. from the Fayette Liquor Company at Beury, Fayette county, W. Va., to the Adams Express office at Stanaford, in Raleigh county, W. Va., in the name of said James Cousins; that the said Fayette Liquor Company received the order, and filled a gallon jug with whisky, and delivered the same to the Adams Express Company at Beury, Fayette County, W. Va., addressed to the said James Cousins at Stanaford, Raleigh county, W. Va. That the said James Cousins received from the express office at Stanaford, Raleigh county, W. Va., the jug of whisky aforesaid, and paid to the express agent the sum of \$3, the price therefor and the express charges, and that the express agent at said place transmitted the sum of \$2.50, the price of said liquor, to the Fayette Liquor Company at Beury, W. Va. That the said J. L. Marks had no authority from said company except to solicit and receive orders as aforesaid, which were sent to the said company by said Marks for their final ratification and approval, and to be shipped to the consignee as aforesaid. That the said Marks had no authority to collect any money or to deliver whisky except in the manner aforesaid, and that he did not collect any money or deliver whisky. That Raleigh county is a 'dry' county; that is, no licenses were issued in said county for the license years of 1904 and 1905 for the sale of spirituous liquors, etc."

There was a demurrer to the indictment, which was overruled; no grounds being assigned. The indictment was in the usual form in such cases. The point made here by the plaintiff in error is that the indictment was bad for charging defendant with two separate and distinct offenses, namely: (a) Selling liquor without a license; (b) soliciting and receiving orders for the sale of liquors without a license. The indictment is founded on section 1, c. 32, Code 1906, which makes it unlawful for any person without a state license therefor to sell, offer, or expose for sale and solicit or receive orders for the sale of spirituous liquors, wines, porter, ale, beer, and drinks of like nature. By its disjunctive provisions it would seem to make selling, offering, and exposing for sale, and soliciting and receiving orders for, spirituous liquors, each separate and distinct subjects for a state license. The law makes no such provision. The license imposed is for selling spirituous liquors, by section 87 at retail and by section 88 at wholesale. How would one acquire a license under this law, for instance, to offer or expose for sale? Is it not plain that the provision of section 1 referred to must be interpreted as if it read: "No person shall sell or offer or expose for sale, or solicit or receive orders for spirituous liquors,

wines, porter, ale, beer and drinks of like nature, without a state license to sell the same"? If the person offending is armed with a state license to sell at wholesale or retail as provided by sections 87 and 88, may he not offer or expose for sale or solicit or receive orders for spirituous liquors without offending against the law? We can see no escape from the conclusion that he can do so. The selling of the liquor is the thing which the statute intended to provide against; but one can neither offer or expose for sale nor solicit or receive orders without a license to sell. Such sale, it is true, cannot be effectuated without a violation of the law, unless it is made to be executed at the place where the sale is authorized. We think the indictment good, therefore, and that two separate offenses are not charged. *State v. Hall*, 26 W. Va. 236; *State v. Swift*, 35 W. Va. 543, 14 S. E. 135.

The only remaining question for consideration upon the agreed state of facts is: Is the defendant Marks guilty of any offense under the indictment for having solicited and received an order for one gallon of whisky from James Cousins in Raleigh county as agent and travelling salesman for the Fayette Liquor Company? It is agreed that this firm has a retail and a wholesale liquor license in Fayette county. These license laws are not prohibitory laws. They are revenue laws, enacted for the purpose of raising revenue for the support of the state. While it is permitted to the several counties and municipalities in which liquor may be sold to say whether or not they will suffer persons to establish licensed places of business therein, yet we must interpret these laws looking through the eye of a Legislature at the purpose in view. We must read them in light of the fact, which was patent to the Legislature when adopting these laws, that the federal Constitution, as interpreted by the Supreme Court of the United States, protects nonresident wholesale and retail dealers in sending their soliciting agents into all parts of the state to solicit and receive orders for spirituous liquors; and that, if we should interpret our laws so as to exclude, for example, a wholesale liquor dealer of this state from sending his agents from his place of business in one county into other counties to solicit and receive orders for goods in the same way, we would defeat the revenue object of the statute; for no resident wholesale dealer could pay the license and compete with a nonresident dealer.

Such being the reason of the law, let us look at the case at bar from this standpoint and in the light of the prior decisions of this court on the points involved. In *State v. Hughes*, 22 W. Va. 743, decided in 1883, before the words "solicit and receive orders" were inserted in the statute by the act of 1887, it was held that a partner of a licensed liquor firm in Wood county, who solicited

and received orders for his firm in Taylor county, which he forwarded to his firm in Wood county to fill, and who subsequently collected the price, could not be indicted in Taylor county for selling without license, because the sale and transfer of property were made in Wood county on acceptance of the order and delivery to the express agent; there being until then only an executory contract. In *State v. Lichtenstein*, 44 W. Va. 99, 28 S. E. 753, the defendant was held not guilty for selling and soliciting and receiving orders for liquors in Mineral county without a license, to be shipped to the purchaser from his house in Cumberland, Md., for the reason that no sale took place in Mineral county, as decided in *State v. Hughes*. In this case section 1 of chapter 32 of the Code was held void so far as it affected interstate commerce. In *State v. Wheat*, 48 W. Va. 259, 37 S. E. 544, it was held "immaterial that the law confines the license to business at a particular place or one county, since the solicitation and receipt of orders are not for sale and delivery in other counties, but for sale to be executed as consummated contracts at the place and in the county designated in the license; that is, the place of sale." In this case a liquor dealer in Ohio county solicited orders by means of circulars addressed to persons in Brooke county, and was indicted for a sale in Brooke county. Judge Brannon said in this case: "A wholesale business, for success, requires solicitation for orders, and it is usual for wholesale dealers to send out agents and circulars asking custom; * * * the privilege of soliciting and receiving orders being incident to the sale license, and it may be exercised as an attendant upon such wholesale license anywhere either in person or by agent. If this is not so, the wholesale dealer, though he has paid for his license, would be deprived of rights essential to his business, and would be in soliciting confined to his county; indeed, he would be confined to his place of business." In distinguishing this case from *State v. Swift*, supra, Judge Brannon says: "That case did not involve the rights of one having a wholesale liquor license, but involved the rights of a druggist who can sell only for specific purposes, and it was not shown in that case that the sale was for the purpose authorized by the druggist license. This case involves the rights of one having a lawful wholesale liquor license." The only real difference between the case at bar and the case of *State v. Wheat* is that in the *Wheat* Case the wholesale dealer solicited by means of circular letters addressed to the customer in another county, and in this case the liquor company sent its agent to solicit the order. But Judge Brannon says in *State v. Wheat* that the dealer may solicit orders anywhere, either in person or by agent. The Attorney General in his brief in this case

admits that the decision in the *Wheat* Case is very nearly a decision of the case at bar, and the only difference he claims is the one just noted. We think the distinction is without difference. If it be true, as was held in *State v. Hughes*, that a partner of a licensed house might without violating the law solicit orders in another county without being liable in the county of solicitation, and, as was held in *State v. Flanagan*, 38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. Rep. 836, that a licensed dealer in one county might accept an order from a customer in another county and ship the same by the agency of the express company C. O. D. and collect the money through that agency, and, as was held in *State v. Wheat*, might send his circular letter and in that way solicit and receive orders from persons in other counties without rendering himself amenable to law—there is no escape from the conclusion which we now reach, that the defendant in this case was not guilty of the charge in the indictment, and we so hold.

In our opinion, therefore, the circuit court erred in finding the defendant Marks guilty of the offense charged. We therefore reverse, set aside, and annul the judgment of the circuit court of Raleigh county entered on the 18th day of July, 1905, finding the defendant guilty and adjudging and ordering that he be confined in the county jail of said county for the period of two months, and that the state recover of him the sum of \$25, for a fine assessed against him, and the costs of the prosecution. And this court, proceeding to make such finding and enter such judgment as the circuit court of Raleigh county should have found and entered, do find that the prisoner is not guilty upon the agreed state of facts of the offense charged against him, and it is therefore considered by the court that he go thereof without day, and be discharged from further prosecution in this behalf.

On Rehearing.

MILLER, P. We are asked in the light of *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, decided March 11, 1907, to give a different construction to our statute than that given in the opinion filed. The *Delamater* Case was decided March 11, 1907, the day before we handed down our original opinion in this case, and, of course, that decision was not before us, nor did we know of it until afterwards. The effect of the *Delamater* decision was to bring within the purview and scope of the so-called Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]) the business of soliciting orders for intoxicating liquors, although such orders might only contemplate a contract resulting from final acceptance in another state, where, as in South Dakota the highest court of the state has held that the act imposing a license on

traveling salesmen soliciting orders for intoxicating liquors is a police regulation, and not a taxing act. As formerly construed by the Supreme Court, the provisions of that act were supposed to extend only to intoxicating liquors after they had been brought within the state, and before they became commingled with the mass of other property of the state by a sale in original packages. That act is as follows: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." With respect thereto, the court says: "The proposition relied upon, therefore, when considered in the light of the Wilson act, reduces itself to this: Albeit the state of South Dakota had power within its territory to prevent the sale of intoxicating liquors, even when shipped into that state from other states, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the state, and the liquors to which they related were also outside the state. This, however, but comes to this: That the power existed to prevent sales of liquor, even when brought in from without the state, and yet there was no authority to prevent or regulate the carrying on the accessory business of soliciting orders within the state. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wilson act. That act, as we have seen, manifested the conviction of Congress that control by the states over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose, the regulation expressly provided that intoxicating liquors coming into a state should be as completely under the control of a state as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one state can by virtue of the commerce clause go himself or send his agent into such other state, there in defiance of the law of the state, to carry on the business of soliciting

proposals for the purchase of intoxicating liquors."

But we do not see what particular bearing the Delamater Case can have on the case in hand. No question of interstate commerce is here involved. We perceive, however, that that case may have a very material bearing thereon when we shall come again to consider a case involving an interstate transaction, such as was involved in *State v. Lichtenstein*, 44 W. Va. 99, 28 S. E. 753. We have held in this case that an agent of a licensed dealer in one county who solicits orders for his principal in another county is not guilty of the offense provided against by the statute. But our law is designed to regulate within the state the business of selling, offering, or exposing for sale or soliciting and receiving orders for spirituous liquors, and no one within the state without a state license can, by himself or his agent, engage therein. If, then, by virtue of the Wilson act a nonresident dealer is no longer protected by the federal Constitution, why should he without a state license to sell in this state be permitted to carry on by himself or his agents the business of selling or soliciting or receiving orders for spirituous liquors, a privilege not accorded our own citizens? Of course, this is not the question before us in this case, and it is not decided. It will be time to decide this question when such a case shall be presented.

The Legislature is perfectly competent to prohibit the business of soliciting and receiving orders for spirituous liquors without a state license therefor, and make a violation thereof a separate and distinct offense; but we do not think our present statute can be construed to have done so. The Delamater Case furnishes a guide whenever in its wisdom the Legislature shall see fit to act; but, until it has acted, we feel bound by well-recognized canons of construction to adhere to our former conclusions in this case.

(35 W. Va. 503)

ELKINS v. MICHAEL.

(Supreme Court of Appeals of West Virginia.
April 29, 1909.)

1. JUSTICES OF THE PEACE (§ 166*)—APPEAL—DISMISSAL.

A defendant, in an action before a justice appealing from a judgment against him, cannot dismiss his appeal, and thus deprive the plaintiff from trying the case and getting judgment against the appellant and his sureties.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 166.*]

2. JUSTICES OF THE PEACE (§ 162*)—APPEAL—EFFECT.

An appeal from a justice's judgment vacates and annuls the judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 603; Dec. Dig. § 162.*]

2. JUSTICES OF THE PEACE (§ 166*)—APPEAL—DISMISSAL—PROOF OF CASE BY PLAINTIFF.

When a defendant takes an appeal from the judgment of a justice, and abandons his appeal by asking its dismissal, the court cannot allow the motion, and render the same judgment for the plaintiff as the justice rendered without proof. The plaintiff must prove his case. The former judgment cannot be used as proof.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 166.*]

(Syllabus by the Court.)

Error to Circuit Court, Preston County.

Action by S. B. Elkins against P. B. Michael. From a judgment of the circuit court dismissing the appeal, plaintiff brings error. Reversed.

Nell J. Fortney, for plaintiff in error. Wm. G. Conley, for defendant in error.

BRANNON, J. S. B. Elkins sued P. B. Michael before a justice of Preston county to recover money due on contract, and, having recovered before the justice, Michael took an appeal to the circuit court, and that court entered an order saying that, on Michael's motion, "and for reasons appearing to the court, this appeal is dismissed." Elkins sued out a writ of error from this judgment.

In this case comes up the question, What is the effect of the dismissal by the court of the appeal? Does it restore the judgment rendered by the justice? The question is material because, if the dismissal restores the judgment of the justice, that dismissal does not harm Elkins, but gives him back his judgment, and thus favors him, and he cannot sustain a writ of error. On the other hand, if the judgment is not restored, it was Elkins' right to have the appeal tried, so that he might get judgment, and he is aggrieved by dismissal. This court has often said that an appeal vacates the judgment of the justice, and calls for a new trial, without regard to the judgment of the justice. *Evans v. Taylor*, 28 W. Va. 184; *Hopkins v. Railroad*, 42 W. Va. 537, 28 S. E. 187; *De Armit v. Town*, 63 W. Va. 300, 60 S. E. 136; *Pickenpaugh v. Keenan*, 63 W. Va. 304, 60 S. E. 137. It is so stated in *Chenoweth v. Keenan*, 61 W. Va. 108, 55 S. E. 991, and there is a discussion of matters pertinent to this question. We conclude that, as the appeal vacates the justice's judgment, and is the grant of a new trial, like the grant of a new trial in a circuit court, and as the papers go out of the justice's court into the circuit court, and as bond is given to answer such judgment as the circuit court may render, and as the Code says the appeal—that is, the action—shall be tried without regard to the judgment of the justice, the dismissal of the appeal does not restore the judgment. Will the justice issue execution? He would say that the case had left his forum. There is no law by which, when the appeal has been dismissed, the dismissal shall be certified to

this court to tell him that he should execute his judgment; no statute provision of that kind. Proceedings in justices' courts are only those allowed by statute. I think that *De Armit v. Town*, supra, virtually so decides. Taking the dismissal of the appeal as a dismissal of the action, without good ground, the action of the court is error of which Elkins may complain. The dismissal of the appeal is a dismissal of the action. The one cannot be expelled from the court and the other remain. The appeal is not in itself an action. It is only a name given to removal. It is a removal of the suit from one court to another for retrial. When we had the county court with jurisdiction as prescribed by the Constitution of 1872, we had a statute allowing a removal of a suit before trial from that court to the circuit court. Acts 1875, p. 127, c. 56. Nothing was left in the county court. An appeal leaves nothing, except the justice's docket, in the justice's court. The action has left his court forever. I am of opinion that when a judgment is given by a justice against a defendant, and he appeals, he cannot dismiss the appeal. Why? Because his appeal has only set aside the judgment, and removed the action into the circuit court for retrial, and what right has he to dismiss that action? The plaintiff's judgment has been vacated by the defendant's appeal, and the case transferred for retrial. He is entitled to get judgment again. The appeal has performed its function, only the action is left. By dismissing the appeal the court has dismissed the action. There is nothing else to dismiss.

The question arises: When a defendant dismisses or abandons his appeal, what judgment should be given? As he has abandoned his defense, should he be treated as withdrawing a plea and admitting the plaintiff's claim, or making a confession of judgment, and should the court render the same judgment as did the justice, or, taking the action as confessed, render judgment? We conclude that, as the justice's judgment has been annulled by the appeal, it cannot operate as proof for its re-entry, but the plaintiff must prove his case. The fact is the defendant cannot dismiss his appeal. He can confess judgment; but he cannot dismiss the action. He has simply by appeal removed the case into another court. His appeal has done its work of removal; but the action is yet alive, and is still the plaintiff's action. He is entitled to retry his case, and have judgment against the defendant and his sureties in the appeal bond. *Pickenpaugh v. Keenan*, 63 W. Va. 304, 60 S. E. 137; *Chenoweth v. Keenan*, 61 W. Va. 108, 55 S. E. 991. So Elkins can complain that he has been sent out of court without being given a trial. Final judgment dismissing his case, with costs against him, has been given. The judgment of dismissal was intended to end Elkins' action. It gave costs of his action to Michael.

No reason for the dismissal of the action is shown. From the justice's docket we see that Michael moved the justice to dismiss the action for want of jurisdiction, as title to real estate would come in question. If that was the ground of dismissal, that ground is not shown. There is not a particle of evidence in the record to show this. The Code demands, in chapter 50, § 50, cl. 12 (Code 1906, § 2001), that if the defendant wishes to make that defense, he must file a written answer, stating, not his mere opinion, but the facts showing that title to real estate will come in question, and swear to the answer, and further says that, if such answer be not filed the justice shall entertain the case, and the defendant shall not dispute the plaintiff's title to the premises. No such answer was filed; no showing that title to realty would come in question.

We reverse the judgment, and overrule the motion of Michael to dismiss his appeal, and we reinstate the appeal upon the docket of the circuit court, and remand the case to that court to be tried according to law.

(65 W. Va. 489)

CICERELLO v. CHESAPEAKE & O. RY. CO.
(Supreme Court of Appeals of West Virginia.
March 30, 1909. Rehearing Denied
May 14, 1909.)

1. APPEAL AND ERROR (§ 966*)—DISCRETION OF LOWER COURT—CONTINUANCE.

Refusal to continue a case called for trial because of the absence of leading counsel detained by an engagement in another court, where other competent counsel of record are present, will not be good cause for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

2. APPEAL AND ERROR (§ 966*)—DISCRETION OF LOWER COURT—CONTINUANCE.

Refusal to continue a case because of the absence of a material witness, not shown to have been served with process, and where proper diligence is not shown to have been used to secure the presence of the witness, will not be good cause for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

3. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT—COLLATERAL ATTACK.

The appointment of a nonresident administrator by a county court, though voidable, is not void in this state, and cannot be questioned collaterally; and a special plea tendered, setting up such appointment as a defense, or for the purpose of defeating an action brought by such representative, is properly rejected.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 178-182; Dec. Dig. § 29.*]

4. RAILROADS (§ 369*)—INJURIES TO PERSONS ON OR NEAR TRACK—EMPLOYÉS OF INDEPENDENT CONTRACTOR.

While it is the duty of employes of an independent contractor employed on or along a railroad to use reasonable care for their safety, yet as between them and the railroad company this duty is reciprocal, and in such cases the law does not require of such employes at work on or along the tracks to maintain a constant

lookout for approaching trains, and at the same time pursue their labors, but does require of the operatives of trains an active vigilance, and to give reasonable danger signals to attract the attention of the persons so employed, to avoid doing injury to them, and to enable them to get out of the way of moving trains. Instructions to the jury to the contrary were rightfully rejected.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 369.*]

Brannon, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Putnam County.

Action by Bruno Cicerello, administrator of the estate of Frank Olivino, deceased, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ferguson & Ellison, Null & Higgins, and C. J. Van Fleet, for defendant in error. Simms, Enslow, Fitzpatrick & Baker, for plaintiff in error.

MILLER, P. The plaintiff, as personal representative of Frank Olivino, deceased, seeks recovery of damages from defendant for negligently causing the death of decedent on February 8, 1907, while employed by Rinehart & Dennis, independent contractors, near Scott station, in Putnam county, in excavating and widening a hill side cut for another track along defendant's main line. Olivino's duty, as alleged, was to keep defendant's main track cleared of the dirt and rock which fell from the steam shovel employed in making the excavation. The negligence charged is that defendant's servants and employes so carelessly and negligently, and with such great force and violence, drove and struck against the said Frank Olivino a certain locomotive with cars attached, thereby inflicting upon him such severe and fatal wounds and injuries, that he then and there died. On the trial there was a verdict and judgment for plaintiff for \$1,500, and for errors alleged to have been committed preliminary to and during the progress of the trial, and for refusal of the court below to set aside the verdict and award defendant a new trial, the defendant seeks a reversal of the judgment below.

Of the preliminary rulings complained of the first is that the court refused to continue the case on motion of defendant when called for trial, because of the absence of F. B. Enslow, defendant's leading counsel, and because of the absence of J. B. Thomas, one of its witnesses; and the second is the rejection of defendant's special plea No. 2 tendered. The motion to continue was supported by the affidavits of said Enslow and R. M. Baker, another attorney for the defendant. Baker was also cross-examined on the matter of his affidavit, and the clerk of the court was also examined in relation to the

issuance of subpoenas for the witnesses, and the want of service and return thereof. This evidence shows that Enslow was necessarily absent in attendance upon the United States Circuit Court of Appeals at Richmond on the day this case was set for trial, but that Baker, who assisted in the conduct of the trial on behalf of the defendant, was present. The record of the trial shows that Enslow was a member of the well-known firm of Simms & Enslow, or Simms, Enslow, Fitzpatrick & Baker; that defendant's special plea No. 2 was signed by Alexander & Barnhart and R. M. Baker, attorneys, and not by either of the other firms of which Enslow was a member; and that Mr. Alexander was also present and assisted in the trial, and that the defense was conducted with skill and ability. In the case of *Rossett v. Gardner*, 3 W. Va. 531, relied upon, upon the question of the absence of counsel, it was shown that appellant had used due diligence to be prepared for trial; that one of his counsel was unavoidably absent; and that the other, though present on a preceding day, was for some cause, not explained in the record, absent when the cause was heard, and the appellant was left without the aid of any counsel. In the present case defendant had able counsel present to conduct the trial. In the case of *Myers & Axtell, Receivers, v. Trice*, 86 Va. 835, 841, 842, 11 S. E. 428, the absence of leading counsel on account of sickness, in connection with the absence of an important witness, not summoned by reason of mistake in name, was held good cause for continuance, and denial of the continuance was on writ of error held sufficient cause for a reversal of the judgment. Several cases are cited by the Virginia court in support of its ruling, two from Georgia, one United States Circuit Court decision, and the case of *Rhode Island v. Massachusetts*, 11 Pet. 228, 9 L. Ed. 697. In the latter case, says the Virginia court, a continuance was granted by the Supreme Court of the United States upon the ground that the leading attorney for the state of Rhode Island was ill, although the Attorney General of that state was present. The case was of exceptional importance says the court, and that the inference was that the court was influenced more by the deep concern and the high importance of the case than by any purpose to exemplify the rule in such cases. "In all such cases, however," says the Virginia court, "the application should be watched with jealousy, and the discretionary power of the court exercised with caution; but, if there is no sufficient reason to induce the belief that the alleged ground of the motion is feigned, a continuance should be granted, rather than to seriously imperil the just determination of the cause by refusing it." This court further says: "Under the peculiar circumstances of the present case, and especially in view of the very harsh ruling on

the preceding motion, we are clearly of opinion that the circuit court erred in refusing to continue the case on the ground of the absence of the leading counsel of the defendants by reason of sickness."

With respect to the absence of the witness Thomas, the evidence shows that he was or had been in the employ of the defendant company, was, in fact, the fireman on the engine at the time of the killing of Olivino; that a subpoena for him and another witness was secured from the clerk only six days before the case was called for trial and sent to the company's counsel at Huntington; that no return of service thereof on Thomas was made, and the testimony of Baker, counsel for defendant on cross-examination, shows that he sent the subpoena for Thomas to the company's superintendent requesting him to secure the presence of Thomas, who, he was told, was at Hinton, and gave directions that an order be given him on the ticket agent there for transportation. He did not know whether Thomas had been served or provided with transportation. We do not think the record shows due diligence on the part of defendant to secure the presence of Thomas. Besides, he was only one of the numerous witnesses present at the time of the killing of the deceased, including the engineer, and who were present and examined as witnesses on the trial and gave testimony. Motions for continuance are generally addressed to the sound discretion of the trial court; the judgment of the court thereon not being reviewable on writ of error and appeal unless there has been manifest abuse of such discretion. *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25; *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953; *State v. Lane*, 44 W. Va. 730, 29 S. E. 1020. It was not shown what was proposed to be proven by the witness. Where the motion to continue is based on the absence of a witness, it must be shown that proper diligence to secure his presence has been used; and, if there is any ground to suspect that the continuance is for delay, it must appear what evidence the absent witness is expected to give. *State v. Brown*, 62 W. Va. 546, 59 S. E. 508. In *Tompkins v. Burgess*, 2 W. Va. 187, and *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 83, 55 Am. Rep. 292, it is said that on such motion it must be shown that the same facts cannot be proved by any other witness in attendance, and that the party whose witness is absent cannot proceed in the absence of such witness. The affidavit of Baker is that the witness is material, and that defendant cannot prove the same facts by any one else as he is informed; but on cross-examination it is shown that he does not know what Thomas will swear, except from his report. It is not shown what this report was. It is suggested in brief of counsel, however, that, as Thomas was fireman on the engine that killed deceased, he would be a material

witness; he and the engineer being the only two persons on the engine, and that, each seeing what occurred from different points of view, this rendered Thomas a most important witness. But other witnesses were present and gave testimony as to what was seen and heard by them from their several view points, including the ringing of the bell and the blowing of the whistle, and we cannot see that the defendant was greatly prejudiced by the absence of Thomas. We cannot say from this record that there was any abuse of the discretion of the court on the motion to continue. We do not think this a parallel case to the Virginia case. Evidently the court there was more influenced by the arbitrary ruling of the trial court in refusing to continue on the ground of the absence of an important witness than because of the absence of counsel.

Was there error in rejecting special plea No. 2? By this plea defendant challenged the right of plaintiff to maintain this suit upon the ground of nonresidence, being an alien and a subject of the king of Italy, and thereby disqualified and prohibited by sections 3258, 3259, Code 1906, from acting as administrator. One is not disqualified, however, to act as administrator because a citizen of another state or country. Nonresidence would disqualify plaintiff. *Butcher v. Kunst* (decided at the present term) 64 S. E. 967. The plea by reference to the citizenship of plaintiff seems to imply that citizenship is the equivalent of residency. But can the appointment of the plaintiff be collaterally attacked on the ground of nonresidence? This depends upon whether such appointment would be void or voidable only. It is argued that the appointment of a nonresident administrator is absolutely void, and we are cited to the following cases for this proposition: *Scobey v. Gano*, 35 Ohio St. 551; *Sherman v. Bailou*, 8 Cow. (N. Y.) 304; *Shipman v. Butterfield*, 47 Mich. 487, 11 N. W. 283; and also *Bell v. Love*, 72 Ga. 125; *Dooley v. Bell*, 87 Ga. 74, 13 S. E. 284; *Grande v. Chaves*, 15 Tex. 550; *Perry v. St. J. & W. R. R. Co.*, 29 Kan. 420; *Jeffersonville R. R. Co. v. Swayne's Adm'r*, 26 Ind. 477; *Illinois Cent. R. R. Co. v. C. Cragin*, 71 Ill. 177. Some of these cases do seem to support the proposition, the others we do not think do, to the extent claimed. *Shipman v. Butterfield*, *Perry v. St. J. & W. R. R. Co.*, and *Jeffersonville R. R. Co. v. Swayne's Adm'r* seem to hold that, where the statute does not authorize or inhibit the appointment of a nonresident administrator, the question is jurisdictional, rendering the appointment of a nonresident void. In *Bell v. Love* the appointment of the guardian made at chambers, when the statute provided that such appointment could only be made at a regular term of the court, was held absolutely void. In one or two of the cases where the law required a petition setting

forth the jurisdictional facts, and the jurisdictional facts not being shown, the appointment was held void. But, whatever be the law of other states on the principal proposition involved here, it is certainly not the law of Virginia or of this state that the appointment by the county court of a nonresident administrator disqualified by the statute is absolutely void, and may be collaterally attacked. Whether one applying for administration be a resident within the meaning of the statute is often a question of law and fact, to be determined by the county court, a court of general and exclusive original jurisdiction of all matters of probate; and, having such jurisdiction, its orders are generally not void, but only voidable on appeal, writ of error, or some other process of review provided by law, and cannot be questioned collaterally. *Andrews v. Avory*, 14 Grat. (Va.) 229, 73 Am. Dec. 855, and other cases cited in monographic note. However, there may be cases where the appointment would be absolutely void and subject to collateral attack, as, for example, where letters of administration previously granted are still in force, or where there is a will naming an executor who is still alive, or where the granting of administration was made on the estate of a person not dead, or, as in *Bell v. Love*, supra, where the appointment is made at a special term of the county court held without notice, or where the notice does not cover the subject of appointment of a personal representative. In all such cases there is absolute want of jurisdiction of the subject-matter or of the parties, and the rule respecting collateral attack does not apply. In *Van Fleet on Collateral Attack*, § 590, the writer says: "The appointment of a wrong person, such as a nonresident, or a stranger before the widow had renounced her right, or an alien, as administrator, is not void, and his acts are binding after his removal." We are therefore of opinion that the court did not err in rejecting defendant's special plea number two.

We are left to dispose of the case on its merits. To do so rightly we must first determine what rules and principles govern cases of this character. Counsel for defendant would have us apply rules and principles generally applied in the case of travelers, and watchmen at street and road crossings, and to trackmen and yardmen, and to trespassers, or persons using the tracks and side tracks of a railroad company by license. We have numerous cases in this state, and there are many decisions in other states, holding it to be the duty of travelers in crossing a railroad to stop, look, and listen, and that their failure to do so will excuse a railroad company from liability, although there be also negligence of trainmen in failing to give the usual signals at such points; that, in the case of licensees or trespassers upon its track, a railroad company owes them no

duty except not to wantonly and willfully run upon them without signal or warning; and that in the case of trackmen and yardmen, servants of the company, and presumed to be experts in the places of their employment, the law imposes upon them the duty to keep a lookout, and to know how to avoid danger, and a railroad company is not liable for injuries due to the negligence of trainmen, fellow servants of such employes, in failing to give the usual warning and signals in the movement of trains. It is unnecessary for us to refer to this class of cases or to discuss them in this connection, for in our opinion this case belongs to a class which is *sui generis*, and must be disposed of on the rules and principles applicable to it. As we have said, Olivino was the servant of an independent contractor, and in no sense a servant of the railroad company, or a fellow servant of the engineer and fireman or of the other trainmen to whose negligence his death is imputed. He was not a trespasser on the track, not a trackman or a yardman employed by the defendant, nor was he using the track by mere leave or license of the railroad company. He was at the place of his death in the discharge of duties assigned him by his immediate employer, a place where he had the right to be, performing the very necessary and important duty of keeping the track clear of obstructions continually occurring in the work being conducted there by the independent contractor, that its property and lives of defendant's trainmen and the passengers on its trains might be protected and preserved. The place where Olivino was at work was in a deep side cut, within a few feet of where the steam shovel, engaged in making the excavations, was at work, and which the evidence shows made loud and distracting noises when in operation. About 300 feet west was a curve around the hillside, beyond which a train approaching from that direction could not be seen, and, when the steam shovel was in operation, the blowing of the whistle and the ringing of the bell, as the evidence shows, could be heard only with difficulty by those in charge of or in close proximity to the steam shovel. The defendant must be charged with full notice of these facts and circumstances surrounding the deceased, and the question is: What were the reciprocal duties and obligations of the deceased and the defendant under the circumstances?

The authorities hold that while the duty to use reasonable care in this relation is reciprocal, and the servant of a contractor cannot recover for injuries resulting from his own negligence, nevertheless the law does not require such persons at work on the track to maintain a constant lookout for approaching trains and at the same time pursue their labor, but it does require of the operatives of trains the exercise of an active vigilance to avoid injuring such persons, and that they

should give reasonable danger signals to attract the attention of men so employed so as to enable them to get out of the way before it is too late. 3 Elliott on Railroads (2d Ed.) §§ 1265b, 1265c, 1265d, citing under § 1265b *Haley v. New York, etc., R. Co.*, 7 Hun (N. Y.) 84; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *McWilliams v. Detroit Mills Co.*, 31 Mich. 274; *Barton v. New York, etc., R. Co.*, 1 N. Y. Super. Ct. 297, affirmed in 56 N. Y. 660; *Stinson v. New York, etc., R. Co.*, 32 N. Y. 333, 88 Am. Dec. 332; *O'Leary v. Chicago, etc., R. Co. (Iowa)* 103 N. W. 362. Some authorities even hold that persons thus employed have a right to become engrossed in their employment, and to expect that care and pains will be taken as to them. *Schultz v. Chicago, etc., R. Co.*, 44 Wis. 638; *Goodfellow v. Boston, etc., R. Co.*, supra. We think the true doctrine is, as laid down in Elliott, that the duty to use reasonable care in such relation is a reciprocal duty, and that the servant of a contractor cannot recover for injuries due to his own negligence. The duty of a railroad company on the other hand in cases like the one we have in hand would seem to require of it such reasonable provisions and precautions, and the giving of such proper and adequate warnings and signals, as will be reasonably adequate to avoid injury to persons thus employed. Here important work was going on in the building of a second track, and many men, including the deceased, were engaged about the work. The conductor says he had no orders to slow down at this point; the engineer that he was driving the train at the rate of 30 miles per hour around this curve when he struck Olivino. But the engineer says he blew the whistle on the curve below Scott station, and also as he came around the curve on the straight line; that, when he saw Olivino, he was standing there some eight feet from the track, with his shovel resting in his hands, facing the track and with his head turned towards the approaching engine, and that, as he guesses, when within 20 or 30 feet of Olivino he just stepped upon the track, and that, as he did so, he pulled the brake and emergency, and by the time he had done that the engine struck him that quick; that nothing he could have done at that moment could have prevented the accident. Another witness Rouser, employed by defendant to attend "to the interlocking and switches at Scott and the lamps also," says he was standing on the same side of the track about 210 feet from Olivino, and that, when the train had pulled past him, he saw Olivino walk right up across the track in front of the train, but he did not know whether he had gone across or not until after he had been killed and the alarm given. Jones, superintendent for Rinehart & Dennis, a witness for defendant, who was present, says: "At the time he was struck I was 50 or 60 feet from him, and looking right

at him. He was working on the main line, * * * shoveling dirt from a ditch on the north side of track, and carrying it across and depositing it on the south side. * * * I heard No. 8 coming, and, when it was 550 or 600 feet away, Olivino walked across the track to the south side and dumped a shovel full of dirt * * * about 6 feet from the rail. After he had dumped this dirt, he stood there probably 6 feet from the end of the ties for about four or five seconds, looking in the direction of approaching train, which was in plain sight of him, and coming along at about 40 miles an hour. When the train was about 180 feet from him, he slowly walked upon the track, and was struck about the time he got in the center of it." He says that Olivino where he was standing on the south side of the track was in a safe place; that about 350 yards west of the point of the accident the engineer sounded the whistle and no other signal was given. The conductor of the train, the only other witness for defendant, throws little light on the subject. His train, he says, was 50 minutes late that day; composed of 7 coaches, each about 70 feet in length, making the length of the train some 700 or 800 feet, including the engine. He is not questioned by either side as to whether or not the whistle was blown or the bell rung.

On the part of plaintiff, it was proven by Cicerello that he was foreman in charge of the steam shovel, and of the men at work there with Olivino, and by several other witnesses employed there that they heard no whistle or bell for the cut. A school boy 13 years of age on his way home from school with his brother crossed the track between Scott station and the place where Olivino was hit, and saw the train coming and heard the whistle blow for the station, but heard no whistle blown or bell rung to give warning to the men at work in the cut. Griffith in the employ of the contractors, a witness examined by both sides, who was engaged, with another man, in laying track some 400 feet from Olivino, and where he could see the station and the train approaching, says he heard no whistle or bell rung for the cut; that he and his fellow workman spoke of the subject immediately after the train passed, the latter remarking that the whistle was not blown, he replying he had not heard it. He admitted that the whistle might have blown and he not have heard it. The witnesses for the plaintiff also contradict flatly the evidence of Jones and of the engineer that Olivino stood looking at the approaching train, but, on the contrary, say that just before he was struck by the engine he was crossing the track diagonally with his back rather towards the approaching train, and evidently did not see it coming; that the steam shovel made a loud noise. The plaintiff, who was at work on the steam shovel, testified that he did not hear the whistle nor see the train approaching or he would himself have called

or warned Olivino. This is substantially all the material evidence bearing on the question of the negligence of defendant and contributory negligence on the part of Olivino.

The defense of the defendant is want of negligence on its part and contributory negligence on the part of Olivino. In the case in hand these were questions of fact under the evidence solely within the province of the jury. There is such a conflict therein, both in respect to the blowing of the whistle and the ringing of the bell, and as to whether or not Olivino saw the train approaching and deliberately walked upon the track in front of the engine, that we are not permitted to say as a matter of law that defendant was without negligence, or that Olivino was guilty of contributory negligence, resulting in his death. We need only refer to the authorities already cited in support of this proposition.

The defendant complains of the rejection of its instructions numbered 5 and 7. No. 5 would have told the jury that, if they believed from the evidence that the whistle was blown or bell rung for the last crossing west of where the accident occurred, such fact was immaterial, and that they might nevertheless find for the defendant if they should further find from the evidence that the defendant was not otherwise negligent. The crossing evidently referred to is the one crossed by the school boy between Scott station and the place where Olivino was killed, and near where the engine came in sight of Olivino, and the place where the whistle was usually blown to warn the workmen at work in the cut. This being so, the effect of the instruction would have been to tell the jury that, although the defendant might have been negligent in failing to give the usual signals of warning to the men at work there, yet, if the defendant was not otherwise negligent, they might find a verdict in its favor. As thus interpreted, it would have been contrary to the rules and principles governing the class of cases to which this belongs. The seventh instruction would have told the jury that, if they believed from the evidence that Olivino stepped upon the company's track in front of the approaching train so suddenly that the train could not have been stopped before striking him, they should find for the defendant. This instruction wholly ignores the question of negligence of the defendant in failing to give the usual warning signals, and whether under all circumstances he was guilty of contributory negligence in crossing the track in the manner prescribed. Both instructions we think were properly rejected.

These conclusions require an affirmance of the judgment below.

BRANNON, J. (dissenting). Very clear it is that the deceased knew well that trains might pass any time, and likely knew when this regular train was due, as he had been working at this spot two months. Very certain it is that he could have seen the train,

If he had looked, and likely have heard it. And, if the noise prevented hearing, that was still greater the demand to look out. Elliott on Railroads, § 1285. And very probable that he stepped on the track when the train was close and visible—a rash act. If he did not step on the track when train was close, then he committed the rash act of standing on the track not looking or listening. In any view careless. It seems to me that the court excuses him from all measure of care and prudence, and leaves out of the case contributory negligence of the most signal character. It requires a train to whistle at every party of men repairing track, building bridges, or doing other work. I thought that the law required of them care and watchfulness. In this case the danger was ever present and obvious, easily avoided—the negligence of the deceased great.

I hold that to hold the company liable in such a case its negligence must be wanton, and of this there is no proof. It was lawfully using its track and the deceased upon it.

(85 W. Va. 518)

W. F. BLACK & SONS v. B. JOHNSON & SON.

(Supreme Court of Appeals of West Virginia.
April 20, 1909.)

1. SALES (§ 61*)—EXECUTORY SALE.

Whether a sale of personal property is complete or only executory is to be determined from the intent of the parties, as gathered from the contract, the situation of the thing sold, and the circumstances surrounding the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.*]

2. PRINCIPAL AND AGENT (§ 179*)—NOTICE TO AGENT—EFFECT.

A principal is affected by notice to his agent respecting any matter distinctly within the scope of his agency when the notice is given before the transaction begins, or before it is so far completed as to render the notice nugatory.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 685-688; Dec. Dig. § 179.*]

3. PRINCIPAL AND AGENT (§ 178*)—NOTICE TO AGENT—SCOPE OF AGENCY.

The agent of a railroad company to inspect and take up railroad cross-ties, and to whom the vendor thereof has also intrusted the duty of measuring, inspecting, and taking up for and reporting said ties to him, is so far the agent also of such vendor as to make notice to him, obtained while engaged in measuring, inspecting, and taking up such cross-ties, of the rights and claims of the true owner thereof, notice also to such vendor.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 680-684; Dec. Dig. § 178.*]

(Syllabus by the Court.)

Error to Circuit Court, Lincoln County.

Action by W. F. Black & Sons against B. Johnson & Son. Judgment for plaintiff, and defendant brings error. Affirmed.

Williams, Scott & Lovett, for plaintiff in error. C. E. Burns and D. E. Wilkinson, for defendant in error.

MILLER, P. This is a civil action begun by plaintiffs against defendants, before a justice of Lincoln county, to recover the price of a lot of railroad cross-ties. The judgment of the justice was for defendants, but upon appeal to the circuit court the plaintiffs obtained a verdict and judgment there against defendants for \$235.59, and the defendants have brought the case here upon a writ of error.

It is conceded: That the ties were gotten out and delivered by plaintiffs at Six Mile, a way station on the Guyandotte Valley Railroad, pursuant to an order given by defendants to I. J. Swann and by the latter turned over to plaintiffs in August, 1904. That in February, 1905, some three or four months after the ties had been delivered at the railroad, and plaintiffs had notified them of Swann's failure to take up and pay for the ties, and after considerable correspondence with them, defendants sent J. W. Jorden, an inspector for the Pennsylvania Railroad Company, to inspect, measure, and take up the ties. Along with Jorden came T. J. Bowlen, representing J. W. Johnson & Co., to inspect, measure, and take up some other ties purchased by the latter firm from plaintiffs. That, after these ties had been partially inspected and loaded, W. F. Black, a member of the plaintiff's firm, appeared, and, Swann having failed in business, without having taken up and paid for the ties, he notified Bowlen and Jorden of this fact, that the ties belonged to his firm, and that he would not allow them to be billed out unless either J. W. Johnson & Co. or the defendants would agree to pay for them. So much is conceded, but what agreement was made before the ties were finally billed out the following day, if any, is controverted. Black, corroborated by his witnesses, says that Bowlen and Jorden promised they would write J. W. Johnson & Co., and, if either this firm or defendants would pay for the ties, they would bill them out the following day, and that upon this promise he permitted the ties to go. Bowlen and Jorden deny making any such promise, and defendants deny the agency of either to make such promise; in fact, they deny that either Jorden or Bowlen were their agents for any purpose. They admit, however, that they sent Jorden to measure, inspect, and take up and bill out the ties to the railroad company for their account, and to report to them, and that they had sent no other representative for that purpose. Black claims not to have known at the time exactly whom Bowlen and Jorden represented, but says he supposed Jorden represented defendants. Defendants place much stress on the fact that the day after the ties were shipped Black

wrote J. W. Johnson & Co. demanding pay from them, and that afterwards, on the suggestion of this firm that Swann was the man to pay, Black wrote him requesting him, if he was to pay for the ties, to send him a check for the amounts. Defendants also rely on the fact that plaintiffs never replied to their letter of October 18, 1904, saying, "We * * * presume you are getting these ties out for Mr. Swann," and that in their letter to defendants, December 7, 1904, they refer to the ties as the "switch ties I sold to I. J. Swann"; and that in their letter to defendants of October 25, 1905, plaintiffs substantially admit that they allowed the ties to be billed out and shipped without any agreement that defendants were to pay for them.

We do not see anything, however, in these admissions or transactions of plaintiffs materially inconsistent with their present claims. Swann, as a witness for defendants, admits, in corroboration of the testimony of plaintiffs: That he never measured, inspected, received, accepted, or paid the plaintiffs for the ties, or authorized or directed any one to do so for him; that, after being notified by plaintiffs of Swann's failure to take up the ties, defendants sent Jorden to take them up and bill them out to the railroad; that before completing the work of measuring, inspecting, and billing them out, Jorden was given notice that the ties were the property of plaintiffs, had never been delivered to Swann or paid for by him, and that they would not take Swann or look to him for their pay; that defendants have never paid or settled with Swann for the ties in any other way except to credit him on an old prior account, existing when the order for the ties was given Swann and by him turned over to plaintiffs. We must regard the controverted facts depending on the conflicting oral evidence as settled by the verdict of the jury in favor of plaintiffs.

Three questions are presented: First, had the title to the ties passed to Swann at the time they were inspected and taken up by defendants? Second, if the title had not passed to Swann, are plaintiffs estopped by their acts, conduct, or admissions as against defendants from controverting this fact? Third, was Jorden so far the agent of defendants in taking up the ties as to make notice to him of plaintiffs' claims and rights notice to his principals? The answer to these questions will dispose of all the material points of error presented by the record.

Whether a sale of personal property is complete or only executory is to be determined from the intent of the parties as gathered from the contract, the situation of the thing sold, and the circumstances surrounding the sale. *Morgan v. King*, 28 W. Va. 1, 14, 57 Am. Rep. 633; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910; *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859;

Bank v. Napier, 41 W. Va. 481, 23 S. E. 800. Although we must say from the evidence in this case that the ties involved had been delivered at the place where they were to be measured, inspected, and taken up either by Swann, or by the defendants on whose order they had been gotten out, yet Swann, though notified, as he admits, had never appeared to measure, inspect, receive, or take up the ties, and so as to ascertain the amount to be paid plaintiffs, and had not in fact received or accepted them; and the plaintiffs' evidence is that they had never parted with either the title or possession thereof at the time the ties were loaded and billed out by defendants. While these claims of plaintiffs and admissions by Swann might not be binding on an innocent purchaser without notice, we think, under the circumstances of the case, they are conclusive as between plaintiffs and Swann. Nor do we think there was anything in the location of the ties or the situation or circumstances of the parties to warrant defendants in assuming that the ties belonged to Swann. Plaintiffs had notified them of Swann's failure to take up the ties, and this notice seems to have been sufficient to put them on inquiry, for in a letter to Swann of October 14, 1904, and his reply thereto of October 16, 1904, properly rejected by the court below as against plaintiffs, they claim that in giving the order they had figured the amount of Swann's indebtedness to them, refer to plaintiffs' letter of notification, and say to him, if it was not his intention to pay plaintiffs and turn the ties over to them, in settlement of his account, they did not expect to take the ties. But plaintiffs had no notice of this correspondence, and defendants had actual notice from Swann's letter that, although he expressed his intention to do so, he had not in fact paid for the ties up to that time; and when defendants sent Jorden to take up and bill out the ties, if the notice to him was notice to them, they were given notice at the time that Swann had not taken up and paid for the ties, that the ties were not his, and that they should be billed out only on condition that defendants or J. W. Johnson & Co. would pay for them. Notwithstanding this notice, defendants took plaintiffs' ties, sold them as purchased from Swann, and credited the proceeds on Swann's old indebtedness to them. Nothing that plaintiffs said or did beforehand therefore caused loss or damage to defendants, and we do not think anything done or written by plaintiffs conclude them from now asserting their legal rights against defendants.

Was notice to Jorden notice to defendants of plaintiffs' rights? If he was their agent to inspect, measure, receive, take up, and report to them the ties billed out to the railroad company, as defendants admit, although he was also the agent for the railroad com-

pany about the same matter, we think that notice to him of plaintiffs' claims was notice to them and that it was his duty to have reported to them the facts. The defendants had no other agent present for that purpose. They relied on Jordan, and, if they had not had the notice directly from plaintiffs, notice to Jordan was sufficient to bind them. The law on this question as laid down in 1 Parsons on Contracts, and approved and followed by this court in *Hart v. Sandy*, 39 W. Va. 646, 655, 20 S. E. 669, is that: "A principal is affected by notice to his agent respecting any matter distinctly within the scope of his agency when the notice is given, before the transaction begins, or before it is so far completed as to render the notice nugatory." And this writer says in the same connection: "Knowledge obtained by the agent in the course of that very transaction is notice; and it has been said that knowledge obtained in another transaction, but so short a time previous that the agent must be presumed to recollect it, is also notice affecting the principal." In the footnote, at page 78, it is said in the same book: "The reason generally for charging the principal with notice is that it is the duty of the agent to communicate to his principal the knowledge he has of the subject-matter of the agency." *Lewis v. Arnold*, 13 Grat. (Va.) 454, relied on by defendants, we do not think in conflict with this doctrine. The only question decided in that case, and sought to be applied here, was that A.'s boatman sent to get the salt delivered to him by N., and, after it was delivered on the boat, was not competent as A.'s agent to abandon the salt and relinquish his legal rights—a point inapplicable here, for no such question is presented. If the question in that case had been whether notice then given the boatman of the claims of L. to the salt in question was notice to A., the exact point we have here would have been presented. In the case of *Hart v. Sandy*, supra, this court quotes from Story on Agency, § 140, as follows: "Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and, if he does not, still, the principal having intrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal; otherwise the neglect of the agent might operate most injuriously to the rights and interests of such party."

We perceive no errors in the judgment or ruling of the court below of a nature prejudicial to the defendants, and the judgment below is therefore affirmed.

(65 W. Va. 163)

EARLE et al. v. COBERLY et al.

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1909. Rehearing Denied
May 13, 1909.)

1. WILLS (§ 478*)—CONSTRUCTION—DISPOSITION BY IMPLICATION.

A will may operate to bequeath property by necessary implication from the will taken as a whole, even though there is no formal disposition thereof. Such implication, however, must be so strong as to preclude the idea of any other intention on the part of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 999; Dec. Dig. § 478.*]

2. WILLS (§ 610*)—CONSTRUCTION—INTEREST CREATED—ABSOLUTE GIFT—PERSONALTY.

Testator makes use of the following language in his will in relation to his personal property, viz.: "And she, the said L. E., is to sell and dispose of my personal property and after paying her for her trouble she can dispose as she thinks best." In the former part of his will he had directed the payment of his debts and had given some pecuniary legacies, but did not direct how they were to be paid. He had also devised to L. E., who was his daughter, a specific lot of land and had made her his executrix. He failed to make any disposition of a large part of his real estate. No other mention is made of his personal property than what is contained in the above quotation.

Held to constitute an absolute gift of his personal property to L. E.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1379-1385; Dec. Dig. § 610.*]

3. WILLS (§ 820*)—LEGACY—CHARGE ON LAND.

The right of a pecuniary legatee to have his legacy charged upon the undivided land is superior to the right of the heir.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 820.*]

4. SUBROGATION (§ 10*)—PAYMENT OUT OF OWN FUNDS.

An executor who uses his own funds to pay debts and pecuniary legacies is entitled to be subrogated to the rights of the creditors and legatees.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 30-34; Dec. Dig. § 10.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by Pearl Earle and others against Jesse C. Coberly and others. Decree for defendants, and complainants appeal. Reversed and remanded.

See, also, 60 W. Va. 295, 54 S. E. 336.

W. B. Maxwell, for appellants. Harding & Harding and Dailey & Bowers, for appellees.

WILLIAMS, J. This case is here on appeal from a final decree made on the 28th day of January, 1907, by the circuit court of Randolph county, and involves the construction of a will.

Wm. H. Coberly died in January, 1904, leaving a will by which he disposed of all his personal property, but only a portion of his real estate. He left a widow, Ruth Ann Coberly, to whom he gave nothing by his will. His widow survived him about one month and died, also leaving a will, by which

she gave all her property to a married daughter, Lummie Earle, whom she named as her executrix. Wm. H. Coberly left only two children as his heirs, the aforesaid Lummie Earle, a married daughter, and a son, Jesse C. Coberly. In his will he first directs the payment of his debts, but does not make them a charge on any particular fund. Next he devises, by specific description, a lot of land in the city of Elkins to his daughter, Lummie Earle, and appoints her his executrix. He then gives to four of his grandchildren, viz., Charley H., Della A., Pearl and Ruth Earle, children of Mrs. Lummie Earle, \$1,000 each, but does not specify how these legacies are to be paid. The will then concludes as follows, viz.: "And she the said Lummie Earle is to sell and dispose of my personal property and after paying her for her trouble she can dispose as she thinks best. I have payed my son Jesse C. Coberly his portion to him and his children in money and land." There is no residuary devise, and no mention made of other lands of testator. The will is dated January, 7, 1903. Lummie Earle administered on the estate. The personal property amounted to \$2,824.75, all of which went into her hands.

One of the principal questions presented is: Did the will give Lummie Earle the personal property absolutely, or was it charged with payments of debts and legacies? The will of the testator is supreme so long as it does not conflict with the general law, and is to be determined from the language used, taking it as a whole, and from the necessary implications arising therefrom. Testator did not expressly give Lummie Earle the personalty, but he gave her unqualified power to dispose of the proceeds by this language: "She can dispose as she thinks best." Unqualified dominion necessarily imports absolute ownership. Consequently, by necessary implication, she was given the absolute title to all of the testator's personal property, and we hold that this was testator's intention. Underhill on Law of Wills, § 463; Page on Wills, § 468. "When executors are given uncontrolled powers of appointment, they may appoint for themselves." Page on Wills, § 691; Graham v. Graham, 23 W. Va. 36, 48 Am. Rep. 364. The testator's intention that his debts and these four pecuniary legacies should be paid out of his estate was clearly expressed. He explicitly directs his "just debts" to be paid, and he just as certainly gives these four pecuniary legacies to his grandchildren above named; but he does not state how, or out of what particular property belonging to his estate, he desires either to be paid. Shall the expressed wish of the testator be defeated because he did not designate the particular part of his estate out of which these legacies and his debts should be paid? Certainly not, so long as there are sufficient assets belonging to his estate with which to effectuate his will.

He left undevised lands worth about \$7,000.

This was more than enough to pay both debts and legacies. Undevised real estate was liable, even under the common law, for the payment of legacies, and also for the payment of general debts when charged on the land. Underhill on Law of Wills, § 371; 2 Jarman on Wills, side page 1387. And, a fortiori, is it liable under the statute which makes real estate belonging to the estate of a decedent assets for the payment of all debts. It is true that the personalty is the fund primarily liable for the payment of debts and legacies where both land and personal property are willed generally, and the personalty is not expressly, or by necessary implication, exempted; but, in this case, we have seen that the personalty was exempted by being given to Lummie Earle by necessary implication. The undevised lands was therefore the fund primarily liable in this case to the payment of both debts and legacies. "General legacies are not applicable to the payment of debts until after the residuary personal estate, real estate devised in trust expressly for the payment of debts, or which is charged with their payment and land descended to the heir, are all exhausted." 1 Underhill on Wills, § 890; Bank v. Beverly, 1 How. 134, 11 L. Ed. 75; Thomas v. Rector, 23 W. Va. 26; 2 Jarman on Wills, side page 1430; Elliott v. Carter, 9 Grat. (Va.) 548; Cranmer v. McSwords, 24 W. Va. 599; Downman v. Rust, 6 Rand. (Va.) 587; Hershey's Estate, 21 Pa. Super. Ct. 651; Trent v. Trent's Ex'r, Gilmer (Va.) 174, 9 Am. Dec. 594. It is true that the executrix was not expressly directed to sell any land to pay debts and legacies; but it is not necessary that she should have been given such power, in order to charge the debts and legacies on the land. The law gave her a right to apply to the court to have it sold in order to carry out the purposes of the will.

The decree appealed from is erroneous, in that it releases the undevised lands of Wm. H. Coberly from the payment of the aforesaid legacies, and decrees that the personal property was primarily liable for the payment of testator's debts. The debts and legacies should both have been charged upon the undevised land; first the debts, then the four pecuniary legacies, and, if the land proved to be insufficient to pay both debts and legacies, then the legacies would have to be abated ratably. It appears from the commissioner's report in this cause that the executrix paid out of her own fund debts owing by her testator to the amount of \$1,338.72, and also paid two of the aforesaid legacies of \$1,000 each. She is therefore entitled to be subrogated to the rights of the creditors, and to the rights of the two legatees whom she paid, as against the aforesaid undevised real estate, with interest on said sums from the time of their payment. Gaw v. Huffman, 12 Grat. (Va.) 628; Hope v. Wilkinson, 14 Lea (Tenn.) 21, 52 Am. Rep. 149; Sheldon on Subrogation, §§ 202, 208; 2 Woerner on Adminis-

trators, side page 1109, § 496. The two infant plaintiffs to this suit are entitled to be paid their legacies out of the proceeds of said undevised lands, with interest on said legacies from the time that they were due. Mrs. Lummie Earle took possession of the undevised real estate and collected the rents therefrom, the net amount of which, after allowing credit for taxes and needed repairing is \$782.48; and after her death Charles H. Earle collected rents, the net amount of which is \$141. The unpaid debts of W. H. Coberly, deceased, amounting to \$98.40, should be paid out of these sums, and one-half the remainder paid to Jesse C. Coberly.

In 1904 Jesse C. Coberly brought a suit against Lummie Earle for partition of the aforesaid undevised lands, and on the 1st day of February, 1905, a decree was made giving him one-half of said lands "unincumbered." This decree was appealed from to this court and was modified to the extent that it was not proper upon the state of the pleadings in that suit to hold that his moiety was unincumbered with the aforesaid legacies; but in so far as said decree held that Jesse C. Coberly took the undivided half of said lands by inheritance from his father, Wm. H. Coberly, it was affirmed. See the case reported in 60 W. Va. 295, 54 S. E. 336. Plaintiffs thereupon brought this suit, and the two were heard together, and on the 28th day of January, 1907, the final decree now under review was made. This decree held that the personal property of W. H. Coberly was liable first to the payment of testator's debts, and, second, to the payment of the aforesaid pecuniary legacies, pro tanto, and that the undevised real estate was not in any manner liable for their payment. It also decided that the estate of Lummie Earle, deceased, was not entitled to be subrogated to the rights of the creditors and legatees whom she had paid as against said undevised real estate, and that plaintiffs, the two unpaid legatees, had no right to charge their legacies upon said land.

In these respects, and for the reasons set out in this opinion, the decree is erroneous, and must be reversed, and the case remanded to the circuit court of Randolph county for further proceeding according to law as herein expressed.

(65 W. Va. 15)

STATE ex rel. MT. HOPE COAL CO. v.
WHITE OAK RY. CO. et al.

(Supreme Court of Appeals of West Virginia.
Jan. 19, 1909. Rehearing Denied
May 14, 1909.)

1. MANDAMUS (§ 160*)—RECITALS OF ALTERNATIVE WRIT—SUFFICIENCY.

In mandamus by a coal operator commanding a railroad company, as required by section 2364, Code 1906, to make "reasonable provision" for the transportation of all coal offered it for shipment by him, the recitals in the alternative

writ showing that the things commanded thereby were substantially those which in prior negotiations between the parties the railroad company had regarded as reasonable and proper, will on a motion to quash the writ be regarded as equivalent to the recital of other facts and circumstances necessary to show the reasonableness of such demand, and as making a prima facie case entitling relator to the relief demanded.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. § 160.*]

2. CARRIERS (§ 40*)—CARRIAGE OF FREIGHT—REASONABLE PROVISION FOR TRANSPORTATION.

What will constitute such "reasonable provision" for the transportation of coal will depend on the facts and circumstances of each individual case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122; Dec. Dig. § 40.*]

3. CARRIERS (§ 40*)—CARRIAGE OF FREIGHT—REASONABLE PROVISION FOR TRANSPORTATION.

Provisions which a railroad company had determined before the alternative writ issued were proper to be made for the transportation of relator's coal offered it for shipment the court will assume on final hearing may reasonably be required by its mandate; at least, until a different showing be made.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 40.*]

4. CARRIERS (§ 40*)—CARRIAGE OF FREIGHT—REASONABLE PROVISION FOR TRANSPORTATION.

Where, in order that "reasonable provision" be made by it for the transportation of coal and coke offered it for shipment, as required by said section 2364, Code 1906, the facts and circumstances demand it, a railroad company may be compelled by mandamus to construct and operate upon its right of way a side track and switch for that purpose.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 40.*]

5. CONSTITUTIONAL LAW (§§ 276, 297*)—DUE PROCESS OF LAW—CARRIERS—SIDE TRACKS.

Requiring such "reasonable provision" to be made does not amount to a command to enter into a contract therefor with relator, or to build and maintain a permanent structure on such right of way, to be continued indefinitely, nor to the taking of the private property of such railroad company for private use without due process of law inhibited by article 14 of the amendment to the Constitution of the United States. It is a mere command of the temporary use by such company of a part of its right of way for the purpose of performing a duty imposed upon it by law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834, 845, 846; Dec. Dig. §§ 276, 297.*]

6. MANDAMUS (§ 160*)—ALTERNATIVE WRIT—AMENDMENT.

The alternative writ of mandamus, though regarded as a pleading—the declaration or complaint—is nevertheless the writ of the court; and, where the substantive matter thereof is sufficient to justify a part, but not all that is commanded by the writ, this court may in a case of original jurisdiction so amend the alternative writ as to make it conform to the mandate of the peremptory writ awarded, and that may properly be commanded thereby.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 160.*]

(Syllabus by the Court.)

Mandamus by the State, on the relation of the Mt. Hope Coal Company, against the White Oak Railway Company and others. Alternative writ amended, and peremptory writ awarded.

Price, Smith, Spilman & Clay and C. R. Summerfield, for petitioner. Dillon & Nuckolls, for respondents.

MILLER, P. The defendant owns and operates a railroad in Fayette county from Macdonald Station on the Loup Creek branch of the Chesapeake & Ohio Railway Company to Price-Hill Station, a distance of about three miles. The relator, the Mt. Hope Coal & Coke Company, has opened up a coal mine on the line of defendant's railway near Mt. Hope Station, where it has built a substantial tipple, and is ready to mine and ship coal. The defendant owns its right of way in fee of the width of 100 feet. It is impossible for relator to reach the main track of defendant, as now located, for shipping its coal, except by side track and switch connection therewith constructed, in part at least, upon defendant's right of way. In June, 1907, negotiations were begun between relator and defendant for side track privileges, and on June 25, 1907, the defendant's general manager wrote the relator's attorney, referring to the negotiations begun, saying: "I at that time advised you the freight rate was ten cents per ton. This I beg to confirm. Since looking over the records, I find the rate is ten cents per ton from the mines operating on this line, and, as the Mt. Hope Coal Co. have such a small area and the shipments from that area will be limited, we could not agree to furnish them a side track at our expense. We will, however, if they are willing to do the grading, pay for rails, ties, fastenings and switch connections, and labor in laying track, permit them to tap our main line and we will handle the coal from their operation on the basis of ten cents per ton of coal, distributing the cars on the branch in proportion to the capacity of the mine. It being also understood that this switch connection is made for the purpose of shipping coal and in default of at any time shipping less than one carload of freight per annum for every lineal foot of track the White Oak Railway Company reserves to itself the right to remove the switch connection. This for the purpose of preventing dead switches on their main line." After this letter was received, the relator began and completed the building of its tipple, extending the same out over the defendant's right of way, some 50 feet, so as to reach the proposed side track, and also did the work of grading, furnished ties, steel rails, frogs, etc., for switch connection and other material for the purpose of completing said side track and making the proper connection with defendant's main track, expending therein, and in opening its mine, some \$17,000. It does

not clearly appear under what special contract or agreement with the defendant, if any, relator extended its tipple over on the defendant's right of way, other than such as may be implied from said letter of June 25, 1907, and the negotiations which seem to have led up to it; but it is alleged in the petition, and not denied, that the work of building and completing the tipple and of grading and providing rails, ties, and other materials for the side track was carried on by the relator with the knowledge and acquiescence of defendant, and with no objection thereto by it until in the latter part of December of that year, when defendant refused to connect up the switch with its main track except on condition that relator would enter into a contract with it embodying substantially the terms of the Norfolk & Western Railway Company contract. Pending these negotiations, however, a contract was drawn up by defendant's counsel which relator was willing to execute, but which the defendant refused. Relator also proposed a contract in the form required by the Chesapeake & Ohio Railway Company for operators along its line, but this defendant also refused to accept, and refused to make any contract except that proposed by it. Neither of the agreements proposed contained any provision relating to the relator's occupancy of defendant's right of way with its coal tipple; nor does it appear that any of the negotiations contemplated any special provision therefor. Having failed to come to an agreement for such side track and connections, the relator now seeks to compel defendant by mandamus, and by force of the statute, to make reasonable provision for the transportation of its coal offered for transportation. It conceives that reasonable provision to be, according to its petition and the alternative writ, to require defendant to connect the said side track constructed by relator, Mt. Hope Coal & Coke Company, at its mines, with the defendant's railway line, or to permit said relator to make such connection; to furnish relator its due and proper proportion of the railway cars and equipment available for coal shipments from the region in which petitioner's mine is located; and to place such cars upon said side track and remove the same when loaded in the usual way in which said cars are placed and removed for other shippers along said line; and that it desist from discriminations in favor of other corporations named.

The defendant challenges the sufficiency of the alternative writ, and moves to quash the same, and also files its return in writing thereto. The motion to quash is predicated upon three grounds: First, that the alleged right of relator is not based upon violation of any duty imposed upon defendant by law; second, that the alternative writ does not allege any facts or circumstances upon which it can be determined whether defendant has refused to discharge its legal duty

to relator; and, third, because the alleged rights of relator are based wholly upon a duty or obligation arising out of an alleged contract or agreement between relator and railway company, which the court by mandamus has no power to enforce.

The first and third grounds are evidently based upon the erroneous theory that relator rests its right to relief upon its negotiations for a contract, or upon the proposition contained in the defendant's letter of June 25, 1907. We do not so understand relator's position, but, on the contrary, that the right claimed is a statutory right. It is argued for defendant that, where the relator's rights rests wholly on a special contract involving no question of public trust or official duty, the writ will be refused. Merrill on Mandamus, § 16. Without contract a railroad company has a public duty to discharge. Our statute (section 2364, Code 1906) upon which relator especially relies provides that: "Every railroad corporation along whose line of railroad the industries of mining coal and manufacturing coke is carried on, shall without discrimination between or amongst shippers, and without unnecessary delay, make a reasonable provision for the transportation of all such coal and coke offered for transportation over its railroad, and no such railroad corporation shall discriminate in rates, distribution of cars or otherwise against or among shippers of coal or coke offered for shipment on its line or lines." Section 2366 imposes a penalty upon such railroad corporation, its officers, and agents who knowingly and willfully violate any of the provisions of that act. Because the negotiations for a contract failed, has the relator lost any of its statutory rights? We think not. The statute does not contemplate any agreement of the parties. The mandate of the statute is that the railroad company shall without any unnecessary delay make a reasonable provision for the transportation of all coal and coke offered for shipment, a command which the railroad company cannot neglect without incurring the penalty of the statute. What will constitute such reasonable provision will depend, of course, upon the facts and circumstances of each individual case. But the statute makes the industries of mining coal and manufacturing coke the special subject of railroad regulation. The extent and importance of these industries in this state in the judgment of the Legislature required this, and we think the statute should be given a construction broad enough to accomplish the purposes plainly intended. On the second ground of the motion, if we understand the purpose of relator in setting forth the prior negotiations for a contract, it was that they might serve as a substitute in part, at least, for allegations of fact necessary to show the reasonableness of the provision required by it, and we think they do serve such purpose. It might have

been better, and but for these recitals of the alternative writ it would have been necessary, no doubt, in order to show the reasonableness of such provisions, for relator to have alleged and proven the probable output of its mine, the number of cars it would likely require per day or per month, or per annum, the probable expense of making such provisions, and any other facts available, this for the purpose of showing the extent and nature of its operations and the reasonableness of its demand, for, as we construe our statute, provision that is reasonable must be made. The alternative writ recites relator's ownership of the mine, the preparation made by it for mining and shipping coal, the expenditures incurred by it therein, and that it is ready to mine and ship coal; also, the acreage owned by it, and its readiness to provide the material and pay for the labor of construction of such side track and switch, in view of which it is alleged defendant was willing to have such side track and switch connection made, if only the relator would agree to the terms of a contract which the relator conceived to be unjust and onerous. These recitals of the alternative writ we think present a prima facie case entitling relator to relief.

On the merits the return of defendant admits all the facts which we deem material; and in the brief of counsel they say that they are ready to admit that under our statute defendant would be required to make a reasonable provision for the transportation of coal and coke, and under certain circumstances such reasonable provision would require the putting in of switch connections, but they say that, before defendant can be required to make switch connections with a private side track for relator, it must be alleged and proven that relator has sufficient product to offer for transportation to justify defendant in maintaining and operating such side track and switch, that they can be made and operated safely on a practicable grade, and that relator has made provisions upon its own property to load the product of its mine. As we have said, we think the alternative writ sufficient in this particular.

The defenses relied upon by defendant in its return are, first, that relator seeks to compel defendant to enter into a contract with it, for the use and occupation by it, of a part of the defendant's right of way, with its coal tipples and a side track; second, that, if the first proposition be not involved, another object of the writ is to compel the defendant against its will and discretion to construct or permit relator to construct on its private right of way a side track for the private use of the relator, and this without showing that such side track can be constructed at the point indicated so as to be safely and profitably operated by the defendant; and, third, that there is no warrant of law therefor, and that the court is with-

out jurisdiction to compel by mandamus performance by the defendant of either of said acts. It is conceded, however, that relator has the right to compel defendant to make suitable provision for shipping of its coal, but that it has not a clear legal right to have this done in the way and manner required, because it involves the taking of its private property for private use, which is not due process of law, and violative of the provisions of article 14 of the amendment of the Constitution of the United States. In its first proposition we think the defendant wholly misconceives the purposes of the writ. While the writ recites the things done and negotiations had between the parties in the vain endeavor to come to an agreement, it contains no command that defendant enter into any agreement with the relator. The issues presented upon the writ and return do not call upon us to decide, and we do not decide, whether as an original proposition the relator could compel defendant by mandamus to permit it to occupy, with its coal tipple, a part of the defendant's right of way. This the relator has already accomplished, if not by express agreement, at least, by the acquiescence and consent of the defendant. The evidence shows that such occupancy by other coal operators has in many instances been permitted in the same coal field by the Chesapeake & Ohio Railway Company. And in its return to the writ in this case defendant makes no real objection to such occupancy of its right of way by relator, either with its coal tipple or with the proposed switch and side track, if only relator will accept the terms of the contract proposed by it in relation thereto, a condition not suggested or required by it in its proposition of June 25, 1907.

The only question of merit presented here is the legal one, covered by the second and third defenses, namely, whether under our statute defendant can be compelled by mandamus, under the facts and circumstances of this case, and upon the conditions proposed by relator, to construct, or permit relator to construct, the side track as proposed. It is conceded that reasonable provision may be commanded. Whether the proposed side track can be operated safely upon a proper grade or with profit to the defendant, and also the question whether the occupancy of a portion of the defendant's right of way therewith as required is reasonable, are questions which it seems to us were practically determined by the parties themselves prior to the issuance of the present writ; for the defendant is shown to have consented thereto, or at least acquiesced therein, and what the parties themselves had determined was such reasonable provision for the transportation of relator's coal we may it seems to us properly assume may reasonably be required by the mandate of the court, at least until a different showing be

made. The only way in which reasonable provision could be made for transportation of coal delivered from a tipple into cars would be by building a side track connected by a switch to the main track either upon the right of way of the defendant or upon the private lands of the relator. The parties determined between themselves that the proper place for the location of such switch was on defendant's right of way. The relator claims, and there is evidence to support its claim, that the only feasible and proper place for such side track is on defendant's right of way.

But has the court power by mandamus to compel defendant upon terms to construct and operate the proposed side track and switch connection on its right of way? We think it has. This question we do not conceive to be covered and concluded, as defendant contends, by *Missouri Pacific R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489. The question there was whether the railroad company could be compelled by mandamus to enter into a contract with relators, upon like terms and conditions contained in contracts with other private persons, permitting them to build and maintain a private and permanent warehouse upon the defendant's right of way. The state court construing the statute of Nebraska as conforming to the Constitution of the United States had required defendant to enter into such a contract. The Supreme Court conceded the right of the railroad company to permit its grounds to be occupied by others with structures convenient for the receipt and delivery of freight upon its railroad so long as a free and safe passage was left for the carriage of freight and passengers—citing *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356—but says: "But how far the railroad company can be compelled to do so against its will is a wholly different question." But the court says in that case: "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation without the owner's consent for the private use of another is not due process of law, and is a violation of the fourteenth article of amendment of the Constitution of the United States." Many cases are cited for this proposition. This, however, is not the proposition we have before us. Nor do we think *Northern Pacific R. Co. v. Washington*, 142 U. S. 492, 12 Sup. Ct. 285, 35 L. Ed. 1092, a case in point as defendant contends. The

particular point decided in that case was that without legislative action making it the plain duty of the railroad company the court was without jurisdiction to compel by mandamus the railroad company to build and maintain a railway station at the particular point commanded. In that case the court quotes extensively from *People v. New York, L. E. & W. R. R. Co.*, 104 N. Y. 58, 66, 67, 9 N. E. 856, 58 Am. Rep. 484. The question in the New York case was whether without legislative requirement the defendant company could be compelled by mandamus to build a station house at the particular point commanded by the writ. The statutes of New York permitted railway companies for public use in the conveyance of passengers, persons, and property to erect and maintain all necessary and convenient buildings and stations for the accommodation and use of their passengers, freight, and business. But the court said, contrary to the finding of the railroad commissioners, that: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station house or the enlargement of one. * * * As to that the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage its affairs," etc. After that decision in New York the Legislature (Laws 1892, p. 1382, c. 676) amended the statute, giving the railroad commissioners general supervision over all railroads, and empowering them to require additional terminal facilities, and the courts power and authority to enforce their just and reasonable decisions and recommendations by mandamus, subject to appeal. It may be proper to note that Justices Brewer, Field, and Harlan dissented in *Northern Pacific R. Co. v. Washington*. Justice Brewer says in his dissenting opinion: "A railroad corporation has a public duty to perform, as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the state of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but, in the absence of a specific direction from the Leg-

islature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts." As we have said, the purpose of the present writ is not to command a contract for the building of a permanent structure by the relator on the right of way. The writ contemplates no such object. It commands a reasonable provision for the transportation of relator's coal offered for shipment, which the statute authorizes. Such reasonable provision does not involve the permanent maintenance of the proposed switch and side track. Nor does the writ command defendant to continue the same indefinitely as a permanent structure. *Jones v. Newport News, etc., Co.*, 65 Fed. 739, 13 C. C. A. 95, 31 U. S. App. 92; *Detroit, etc., Ry. v. Interstate Commerce Commissioners*, 43 U. S. App. 308, 74 Fed. 803, 21 C. C. A. 103. In *Missouri Pacific R. Co. v. Nebraska*, supra, the court emphasizes the fact that the "order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way." In *Jones v. Newport News, etc., Co.*, supra, referring to the latest Illinois case relied upon, says: "The Supreme Court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years"; but, says the court, "this is very far from holding that there is any common-law liability to maintain a side track forever after it has once been established." And, referring to other Illinois cases, the same court says: "They depended on statutory obligations, and were not based upon the common law." In *Missouri Pacific R. Co. v. Nebraska* the court says of that case: "Nor does it present any question as to the power of the Legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public, or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use from time to time of those tracks, for the purpose of shipping or receiving grain or other freight, as in *Rhodes v. Northern P. R. Co.*, 34 Minn. 87, 24 N. W. 347, in *Chicago & N. W. R. Co. v. People*, 56 Ill. 366, 8 Am. Rep. 690, and in *Hoyt v. Chicago, B. & Q. R. Co.*, 93 Ill. 601." We quote from these decisions for the purpose of showing how differently the courts view the subject where there is a demand for the erection of permanent structures for private use on a railroad right of way, and where, as in this case, the demand relates to a temporary structure to be placed thereon under the direction and control of the railroad company.

We are of opinion, on the authority of these cases, that our statute requiring that reasonable provision to be made justifies in part the writ in this case, and that, unless we give this statute such construction, it will not accomplish the purposes intended by the Legislature, and leave the subject entirely within the control and discretion of railroad companies.

But is relator entitled to all the relief commanded by the mandamus nisi? It commands, first, "that you connect the side track constructed by relator, Mt. Hope Coal & Coke Company, at its mines, with your railway line, or permit said relator to make said connection"; second, "that you furnish to said relator, Mt. Hope Coal & Coke Company, its due and proper proportion of the railroad cars, and equipment available for coal shipments from the region in which the mines of said relator is located, and place such cars upon said side track and remove the same when loaded in the usual way in which such cars are placed and removed for other shippers upon your railroad line"; and, third, "that you cease and desist from discriminating against said relator, Mt. Hope Coal & Coke Company, and in favor of the Sherwood Coal & Coke Company and the Price-Hill Colliery Company, in the matter of switch connections, distribution of cars, and other facilities." We find on the pleadings and proofs the relator entitled to only such relief as is covered by the first command of the writ. It is not alleged or proven that the relator has ever demanded of the defendant or that the defendant has ever refused to furnish a due and proper proportion of the cars; nor do we think it is sufficiently alleged, and it is not proven, that the defendant has discriminated against the relator in favor of the other companies mentioned in the matter of switch connection, distribution of cars, and other facilities. On the contrary, the return and the evidence show that there is no such company as the Sherwood Coal & Coke Company; that the Price-Hill Colliery Company is not a producer of coal at all, but that the Price-Hill Fuel Company, the owner and operator of two coal mines, known as the Sherwood and Price-Hill mines, has tipples and side tracks upon its own land and premises, and that said Price-Hill Fuel Company has entered into a contract embodying the same terms offered relator, and which it refused to accept; and that, in fact, there has been no discrimination against the relator in this respect. What, then, is the proper disposition to make of the case? The old and rigid rule, still adhered to in some jurisdictions, was that the peremptory writ of mandamus must strictly follow the command of the alternative writ; and that, if all that is asked in the alternative writ cannot be granted, nothing that is asked can be granted. This rule is referred to, and recognized, in our own cases of *Fisher v. Charleston*, 17

W. Va. 628, 640, *Doolittle v. County Court*, 28 W. Va. 158, and *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187. See, also, 28 Cyc. 490, 491, and cases cited in notes. But this rule in the later cases has been very much relaxed, and in those states where either by statute or by the prevailing rules of practice the right of amendment of pleadings has been extended to writs of mandamus the practice now is to direct the mandate of the alternative writ to be so amended as to conform to the command of the peremptory writ. In *Fisher v. Charleston*, supra, the practice followed on writ of error was to set aside the order of judgment awarding the peremptory writ, and remand the case to the lower court with directions to issue a new alternative writ commanding that to be done which was justified by the pleading and proofs, in legal effect an amendment of the original writ. In this state the rules, including the rules relating to amendments of pleadings, are applicable to mandamus, and, if the alternative writ be amended after service, it need not be then served in its amended form. *Fisher v. Charleston*, 17 W. Va. 628; *Town of Mason v. Railroad Co.*, 51 W. Va. 183, 189, 41 S. E. 418. The mandate of the writ is peculiarly within the control of the court. It need not in the first instance conform to the prayer of the petition. The court may fashion it to suit the case made by the petition. *Fisher v. Charleston*, supra, 630. If the court may thus control the writ at the time of directing it, there is no good reason why it may not control it afterwards by amendment, so as to make it conform to the mandate of the peremptory writ. This practice is fully justified by modern decisions and text-writers, and we are of opinion it is the proper practice, and should be followed in this state, although resulting in a modification to some extent of the rule heretofore recognized and followed. 2 *Dillon, Mun. Corp.* (4th Ed.) § 879; *High on Extraordinary Legal Rem.* (3d Ed.) § 519; *State ex rel. v. Crites*, 48 Ohio St. 142, 173, 26 N. E. 1052; *State ex rel. v. Acting Board of Aldermen*, 1 S. C. 30; *State ex rel. v. Baggott*, 96 Mo. 63, 71, 8 S. W. 737; *United States ex rel. v. Union Pac. R. Co.*, 4 *Dillon*, 479 (syl. 5), *Fed. Cas. No. 16,601*; 28 Cyc. 490, 491.

The pleadings and proofs we think entitle the relator to a peremptory writ of mandamus directed to defendant, commanding it, on condition that, before beginning the work, the relator shall pay or secure to be paid to it the cost and expense thereof, to commence forthwith and to complete as soon as practicable a safe and suitable side track, connecting the same by a switch with relator's mines, using the location graded and prepared by the relator, and the ties, rails, and other materials furnished by it, as far as consistent with proper side track and switch construction, or permit relator to do said work in accordance with said specifications. It

will therefore be so ordered; and also that the alternative writ be so amended as to conform in all respects to the peremptory writ directed thereby.

(65 W. Va. 493)

BERRY v. COLBORN et al.

(Supreme Court of Appeals of West Virginia.
April 20, 1909.)

1. APPEAL AND ERROR (§ 987*)—REVIEW—QUESTIONS OF FACT—FINDING BY TRIAL COURT.

The rule giving great weight in the appellate court to the finding of the trial court on a question of fact lays no restraint upon the power of the former to ascertain by full and careful investigation and analysis of the evidence what the facts and circumstances are, and whether the general finding is consistent therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.*]

2. EVIDENCE (§ 587*)—SUFFICIENCY—INTENT.

Flat contradiction in oral testimony as to intent and purpose, obscuring the truth and rendering it impossible to ascertain the same from such evidence with reasonable certainty, justifies resort to the circumstances as the safer guide, and their value and weight are determined by their intrinsic character and tendency to produce mental conviction rather than their number.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2436; Dec. Dig. § 587.*]

3. JOINT ADVENTURES (§ 4*)—MUTUAL RIGHTS AND LIABILITIES—GOOD FAITH.

Two or more persons associated together in a joint enterprise, contemplating pecuniary gain and advantages, under an agreement to combine their energies or means, or both, for the accomplishment thereof, stand in a relation of confidence analogous to that subsisting between partners, and each must observe toward the others the utmost good faith.

[Ed. Note.—For other cases, see Joint Adventures, Dec. Dig. § 4.*]

4. JOINT ADVENTURES (§ 4*)—MUTUAL RIGHTS AND LIABILITIES—SECRET PROFIT.

One of such persons cannot, consistently with equity and conscience, take to himself a secret profit produced by the joint effort or work, and all such gain must be accounted for in the settlement of the social business and distribution of assets if demanded of him.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 3; Dec. Dig. § 4.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Marshall County.

Bill by J. W. Berry against C. B. Colborn and others. Decree for defendants, and complainant appeals. Reversed and remanded.

J. A. Ewing and C. C. Newman, for appellant. J. B. Sommerville and Hubbard & Hubbard, for appellees.

POFFENBARGER, J. A bill filed in the circuit court of Ohio county by J. W. Berry to obtain a share in a commission of \$10,000, which the Mound Coal Company agreed to pay as compensation for the negotiation of

a lease of its coal property to one J. E. Hedding, with the privilege of purchasing the same at any time before January 1, 1911, for the sum of \$150,000, was dismissed after a hearing on the merits, and Berry has appealed.

One Charles D. Ames was made a defendant as an associate of Hedding in the purchase. J. C. McKinley, president of the Mound Coal Company, was made a defendant in his individual capacity; he having been active in procuring the services of the agents. The real defendant, however, is C. B. Colborn, a real estate broker or agent, who claims the entire commission. Berry's bill proceeds upon the theory of his association as agent with Colborn. The lease was executed on the 19th day of October, 1905, and Colborn, admitting that he had been previously associated with Berry in an effort to sell the property, claims this relationship had ceased at the time of the execution of the lease, and denies the right of Berry to participate in the commission arising therefrom. On the 9th day of May, 1905, the coal company executed and delivered a written instrument by which it authorized Berry, one Simon Kline, and the firm of Colborn and Robinson to present a buyer for its property, and agreed to pay them a commission of \$5,000 in case a "sale, trade, or deal or exchange" of the property should be made directly or indirectly through the instrumentality of the parties named. The right thus given was made exclusive until May 30, 1905. Under this arrangement, efforts to sell the property were made, in which Colborn seems to have been more active and influential than any of the others. He conducted the correspondence with parties in Pennsylvania and met them personally, while Berry furnished him information concerning the property, acquired from McKinley, which he calls "data," and stood ready to take prospective purchasers through the mine and show them the qualities and advantages of the property. His claim is founded upon an alleged agreement with Colborn for a share in the commission and the rendition of services of the kind just indicated. While this right of sale was in force the agents consulted one another and were jointly interested. Notwithstanding the expiration, on May 30th, of the exclusive right of sale, this association and combination of effort continued without interruption until the 22d day of September, 1905, when the coal company, by letter, directed to Colborn and Colborn and Robinson, revoked the power given on the 9th day of May, 1905, and directed them to consider "all arrangements, negotiations and options canceled, effective at once." But, according to the testimony of McKinley, Berry, and others, the agents were verbally authorized on the next day, September 23, 1905, to continue their efforts to obtain a purchaser. The object of

this seems to have been to place beyond doubt or question the release or expiration of the exclusive right of sale originally given. Berry says he went to Colborn on the 23d day of September, and told him McKinley had authorized them to continue their efforts, and that Colborn agreed to do so. The latter had received the letter of revocation on that morning or the preceding evening, and, considering the matter at an end, had written a letter to some contemplated purchaser telling him so, but said he would destroy it and go on with the enterprise. This Colborn denies, but there was no cessation of his effort to dispose of the property. Admitting that Berry came in and saw him after the notice of revocation had been received, he says the conversation between them was exactly contrary to what Berry says it was. He says Berry expressed the opinion that McKinley would let them go on, and he replied that he would have nothing more to do with it, and says he told Berry he had written a letter to a contemplated purchaser telling him to come and look at the property, and thereupon tore it up. His claim is that subsequently the coal company authorized him to negotiate a lease, not a sale, of it, and that, although Berry had been interested in the original agreement and effort to sell, he had no part or interest in the new agreement for commission to arise from the negotiation of the lease thereof. The verbal authorization to Berry to continue his effort to procure a purchaser was never withdrawn. McKinley says he had personal and telephone communication with him concerning the prospects of sale after the 23d day of September, 1905, and furnished him a revised statement or memorandum of the property, both real and personal, as a means of aiding him in his negotiations or efforts. A copy of this statement is exhibited with McKinley's deposition. He says, however, that about a week after the 23d of September he met Colborn, who stopped him and asked him what was being done about the Mound Coal Company, and, being informed that nothing had been done, asked the privilege of negotiating a lease of it, which was granted. He saw nothing more of Colborn until after October 19th, but had a conversation with him over the telephone on that date. He furnished Colborn no information, but talked with Berry from time to time over the telephone about the property. Even after that date, the date of the agreement of the lease, McKinley conversed with Berry about the property, but gave him no information as to what had been done. He explains this by saying they did not want to make the matter public, as they were in doubt about its consummation, and they had been requested by Colborn not to mention it to Berry or anybody else. Berry was specifically named as one of the parties to whom it was not to be communicated. That McKinley kept Berry interested in the property after September 23d

is further shown by the testimony of Harry R. Jungling, an employé. He says McKinley called Berry up frequently and talked to him about the disposition of the property. He also heard conversations between Colborn and McKinley, or rather heard McKinley talk to Colborn over the telephone, and tell the latter Berry knew nothing of the leasing of the property, and ask him if he did not think Berry would be "hot" and ought to have something out of the transaction. Hedding and Ames, accompanied by Colborn, came to look at the property on the 18th or 19th of October, and Berry took them through the mine. Hedding says he had come to Wheeling to look at the Glendale coal property, but Colborn told him it had been sold, and suggested that he go to Moundsville and look at the Mound Coal Company property. He says he did not inform Berry that he contemplated purchasing the property, but admits having asked him about the condition of the mine. He says he had had previous correspondence with Colborn concerning the Glendale property, in which the latter had merely referred to the Mound Coal Company property, and that on the 18th day of October Colborn had shown him the "data" of that property. He thinks it was not the last paper. McKinley had given to Berry; his recollection being that it was not so full and complete as that paper, but he was unable to point out any particular difference between them. Berry says Colborn called him up by telephone some time after September 23d and asked him for the memorandum, and he thereupon called for McKinley, who was not then in, but who on the next morning called him up, and, on being told that Colborn needed the paper, promised to prepare it immediately. On the next morning he received it by mail and mailed it to Colborn, and on the next morning had called him up by telephone to know if he had received it, and he said he had. He heard nothing more from Colborn until the evening of October 17th, when he told him over the telephone he would be there the next day with some parties to examine the mine, and asked him to have everything in good shape. Colborn denies all this, but says he had some conversations and transactions with Berry during the period aforesaid concerning another piece of property lying on the Ohio side of the river and owned by Berry's brother. There is much contradictory evidence in the record concerning what took place between Berry and Colborn on September 23d; the former insisting that Colborn agreed to continue the relation previously subsisting between them and he as emphatically denying it. As to the substance of the conversation had on that day, Berry is sustained by the testimony of his brother and Colborn by one Brown, who occupied the office in which the conversation occurred jointly with Colborn; the latter having desk room in the office of which Brown had charge.

On the issue raised by the pleadings and

evidence, largely one of fact, the court below found in favor of the defendant, and he invokes the rule, so well known as to require no citation of authority, giving such finding weight in the appellate court. While this rule is to be respected and observed, no case is governed by it that does not fall within it. The exception to it is as well established as the rule itself, and the appellate court will always scrutinize the evidence and circumstances to enable it to determine whether the finding is contrary to the evidence or against conscience. We said in *Hursey v. Hursey*, 56 W. Va. 148, 155, 49 S. E. 367, 369, that the rule "lays no restraint upon the power of the court to make a full investigation, and careful analysis of the evidence with the view to ascertaining whether there is conflict and whether the decision rests upon findings of fact supported by substantial proof." Of course, no such finding should stand against the great weight and preponderance of the evidence. The verdict of a jury will be set aside if it is against the plain and unequivocal inferences arising from admitted or established facts. *Chapman v. Liverpool, etc., Co.*, 57 W. Va. 395, 50 S. E. 601; *Davidson v. Pittsburg, etc., R. Co.*, 41 W. Va. 407, 23 S. E. 593; *Manss-Bruning Shoe Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686. The court below proceeded upon the theory that an entirely new arrangement and contract was made between Colborn and the coal company after the 23d day of September, 1905, to which Berry was not a party, and its conclusion seems to be based almost wholly upon the deviation of the new arrangement from the old, or the fact that the new agreement was for the negotiation of a lease, while the old one was for the negotiation of a sale. His written opinion, incorporated in one of the briefs, indicates that he gives controlling effect to this circumstance. He says: "No new or different arrangement was ever made by Berry after that, and it is clear that this arrangement was never carried out. The purchaser was never produced, and the \$5,000 was never earned. Some time after this McKinley entered into a new agreement with Colborn, under which, if Colborn produced a person who would lease the mine upon certain conditions and pay a stipulated royalty, Colborn should receive a stipulated commission. This was clearly a new contract between Colborn and the coal company. Berry was not a party to it or included in it." He proceeds to point out then that Berry's contract or agreement for sale still subsisted and might be performed by him and the \$5,000 commission earned. The lease, however, it will be remembered, gave an option of purchase at a certain price, which put it beyond Berry's power to effect a sale of the property after the lease had been executed. This superseded the whole previous arrangement. Furthermore, the execution of the lease itself

put a new face on the whole situation. A piece of property subject to a 20-year lease is quite different from the same property free from lease as a commercial subject. If we could treat the two authorizations as independent, they were clearly not consistent. So regarded, they were contradictory and conflicting. But in our opinion they were not independent. Tested by the terms used, the so-called new arrangement or agreement, except as to the amount of the commission, was included in, and covered by, the authority originally given in writing and later verbally renewed in part—continued as a nonexclusive, instead of an exclusive, right. The original authorization was not limited to the production of a purchaser. Its terms were broader. It provided for the payment of a commission if a sale, trade, deal, or exchange should be directly or indirectly made through the instrumentality of the agents. It would be difficult to conceive a broader, more general power of disposition. The word "deal," used in this connection, seems to us to be amply sufficient in breadth and scope to cover the leasing of the property. The agreement to lease was new in a subsidiary sense only. It amounted to a resolution or decision to select, act upon, or follow one of the several modes of execution of the general plan of disposition included in the first authorization, and a stipulation for increased compensation. In all except the increase of compensation, it was a mere change of procedure or mode of execution, not constituting even a modification of the original agreement. All the circumstances combine in argument to sustain the position of Berry, and condemn that of Colborn. He says he told Berry he had quit, and would have nothing more to do with the property. In contradiction of this he secretly continued and effected the lease. He not only did that, but he used, in his subsequent efforts and operations, the papers and materials furnished him by Berry for the purpose of carrying out the original enterprise. It is strange that, if he decided to quit, he did not return to Berry the memoranda he had furnished him, showing the character and condition of the property; Berry having just told him he thought McKinley would let them go on and expressed a desire to do so. Is it possible he thought this memoranda would be useless to Berry, or that his decision not to prosecute further would necessarily put an end to the latter's efforts? If Colborn told Berry he had quit, the latter would naturally have demanded the papers back. His not having done so and Colborn's failure to offer them are circumstances strongly tending to support Berry. It is not likely that both forgot to mention the papers. It may be said Colborn does not admit having received memoranda from Berry. Where did he get the memorandum he showed Hedding? He does not say McKinley gave him any, and Berry proves acquisition of them from McKinley and says he delivered them to Col-

born, who admits that until September 22, 1905, he, in conjunction with Berry, was endeavoring to sell the property. Is it likely he was carrying on negotiations with Stofer and others without being able to give them any information about the property? He showed Hedding a memorandum. McKinley says he furnished him none, but did furnish Berry data. What is the plain inference in view of the previous association of these men? That Berry gave Colborn the data he got from McKinley. The circumstances clearly outweigh Colborn's protestations. That there was a verbal authorization to Berry after September 22d, and that he relied upon it and acted under it down to the moment of the execution of the lease to Hedding and even afterwards, and believed he was acting under it, when he showed Hedding and Ames through the mine and gave them information, are facts overwhelmingly established. They do not depend upon his testimony alone. That of McKinley proves them. It was intended that he should do so, and also that he should be kept in ignorance of the negotiations for a lease. The testimony of McKinley establishes this fact. Colborn does not pretend to have given Berry notice of the new contract or his independent action. He took Hedding and Ames to the mine, and turned them over to Berry precisely as he would have done had he been acting under the original arrangement. He says he asked Dr. Haning, one of the owners, on the morning of October 18th to arrange with Mr. Hubbard, another of them, for his going through the mine that day, and thereby intimates a supposition on his part, when he took Hedding and Ames down, that they had so arranged. Mr. Hubbard says nothing of it in his testimony, and Dr. Haning was not examined. Under such circumstances there is a presumption that the witnesses would not have said such a thing had occurred. An important question was whether Colborn made the arrangement direct with Berry. The latter says he did. He denies it, and says the company did it, and names the man whose testimony would sustain him if he is correct; but fails to put him on the stand. We must assume the witness, if called, would have testified adversely to him in respect to that matter. *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670. The agreement for a larger commission than that originally contemplated may well be regarded as a mere modification of the old arrangement. Colborn wanted more money and the exclusion of Berry. To procure the additional money, he no doubt intimated to McKinley intention to cease his efforts if the commission were not increased. The inducement or consideration for the increase is not explained by either Colborn or McKinley. A lease could have been of no greater value to the company than a sale. Colborn still needed Berry's services, for which reason he was not notified. The coal

company's object was to dispose of the property. Who should receive the commission was a matter of little or no consequence to it. It did not feel called upon either to aid or obstruct Colborn's effort to obtain Berry's services, and yet exclude him from participation in the commission. On the whole, the circumstances heavily outweigh the testimony of Colborn; so much, indeed, that we are bound to reverse the finding of the trial court. Deeming it applicable, we quote the following from *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221, concerning the weight to be given to circumstances when oral evidence, as to intent and purpose, is conflicting: "The flat contradiction of the direct and positive oral evidence, pro and con, brings into play the circumstances and necessarily gives them unusual prominence and force. To them the court must appeal for the truth, it having been effectually obscured by the testimony of the parties, and the duty of the court cannot be evaded or excused by the difficulty or painfulness of the task. Nor is its investigation or power to act limited by the mere number of the circumstances to be considered. Their intrinsic character and power to carry mental conviction as to the truth is always allowed to prevail."

Though the court below, denying the right to an accounting has not determined the basis thereof, that question should be settled here. As we have concluded the plaintiff is entitled to participate in the commission, we see no reason why we should not define and indicate the extent of the right of participation. The cause is to be remanded for an accounting, and, as a precaution against another appeal, in respect to a matter now before this court and susceptible of determination, we ought to state the principal governing its final disposition as far as we can safely do so. The relation originally subsisting between Berry and Colborn and never dissolved, as we have concluded, was one of partnership or joint agency. Strictly, it may not have been a partnership in all respects, but it was a joint enterprise, involving a community of interest and combination or union of effort, elements, features, or factors of a copartnership. Naturally, then, their rights ought to be determined by the principles governing copartnership as far as they are applicable. Between copartners, trustees, and cestuis que trustent and principal and agent the utmost good faith must be observed and practiced. One partner cannot speculate for his private interest upon the assets or business of the firm. Secret private advantages cannot be taken by the trustee at the expense of his cestui que trust or private profits directly taken from the trust in any way. The agent cannot use the agency as a means of secret self-aggrandizement. In all these cases the secret profits must be accounted for, if the associate or cestui que trust demands an accounting. As to the application of this principle

Among partners, see *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457, and *McMahon v. McClernan*, 10 W. Va. 419. As to its application between principal and agent, see *Dorr v. Camden*, 55 W. Va. 228, 48 S. E. 1014, 65 L. R. A. 348. The relation of trustee and cestui que trust being still closer and more confidential in its nature, no authority need be cited for the application of the doctrine between them. Applying it here, we hold that Berry is entitled to one-half of the commission earned after all expenses and proper charges thereon shall have been deducted. What expenses, if any, exist and are chargeable against the fund, is a matter for ascertainment in the court below.

From the principles and conclusions above stated, it results that the decree complained of must be reversed, the temporary injunction reinstated, and the cause remanded for further proceedings.

(65 W. Va. 59)

IGUANO LAND & MINING CO. v. JONES et al.

(Supreme Court of Appeals of West Virginia.
Feb. 2, 1909. Rehearing Denied
May 14, 1909.)

1. QUIETING TITLE (§ 8*)—GROUNDS OF RELIEF—CLOUD ON TITLE.

Equity will grant relief, by way of enjoining the commission of such acts as will constitute, when completed, a cloud upon title, in all cases where it would have jurisdiction to remove the cloud created by the completion of the acts which are sought to be enjoined.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 34, 35; Dec. Dig. § 8.*]

2. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF.

Before relief will be granted upon a bill to remove cloud from title, plaintiff must be in possession of the land, and must show that he has good title thereto; and, in order to claim successfully the benefit of a deed made to his remote grantor, which operates only as color of title, he must connect himself by proper conveyances with such remote grantor, and must show possession by himself, and those under whom he claims, for such length of time as will operate to ripen his color of title into a good and sufficient title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

3. JUDGMENT (§§ 562, 576*)—JUDGMENTS CONCLUSIVE—SERVICE OR APPEARANCE—JUDGMENT ON MERITS.

In order for a former adjudication, made by a court of record, to operate as a bar to another suit, the record of such former suit must show service of process upon, or appearance by, defendant, and judgment or decree upon the merits.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. §§ 562, 576.*]

4. JUDGMENT (§ 951*)—CONCLUSIVENESS—MATTERS IN ISSUE—PAROL EVIDENCE.

Parol evidence, when not inconsistent with the record, and not impugning its verity, is admissible to prove that a former suit or action, had in a court of record between the same parties or their privies, in which judgment was rendered on the merits, involved matters in issue in

the suit or action on trial, and were necessarily determined by the first judgment or decree.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1811; Dec. Dig. § 951.*]

5. CORPORATIONS (§ 514*)—ACTIONS—DENIAL OF CORPORATE EXISTENCE—SUFFICIENCY.

A mere recital, in the answer of a defendant, to a bill filed by a corporation, although the answer is sworn to, referring to plaintiff as "a pretended corporation," is not such a denial of the existence of the corporation, under section 41, c. 125, of the Code of 1899, of West Virginia (Code 1906, § 3861), as puts the matter in issue.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2058; Dec. Dig. § 514.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Putnam County.

Bill by the Iguano Land & Mining Company against R. A. Jones, Mary Patton Hudson, and others. Decree for complainant, and Mary Patton Hudson appeals. Reversed and rendered.

Simms, Enslow, Fitzpatrick & Baker, for appellant. J. H. Nash and Brown, Jackson & Knight, for appellee.

WILLIAMS, J. This is a suit in equity, brought in the circuit court of Putnam county by the Iguano Land & Mining Company, a corporation, against R. A. Jones and others for the purpose of removing, as a cloud upon plaintiff's title to a tract of 2,500 acres of land, the claim of title asserted by the defendants to a portion of said 2,500 acres, and for the purpose of enjoining said defendants from asserting title thereto, and from taking further steps to redeem their title, which is admitted to be forfeited, and to enjoin them, their agents, and employees from taking possession of, or cutting timber upon, any part of said 2,500 acres of land claimed by plaintiff. The defendants demurred to the bill, and the demurrer was overruled. Later they filed their answer, practically denying all the material allegations of plaintiff's bill. On the 23d day of August, 1899, a temporary injunction was awarded according to the prayer of the bill. A survey was made under order of court, and the report, accompanied by maps made of such surveying as was done by the surveyor, constitutes a part of the record. The deposition of Jas. L. McLean was taken on behalf of the plaintiff, and the cause came on to be finally heard on the 23d day of February, 1902, when a decree was made perpetuating the injunction. From this decree one of the defendants, Mary Patton Hudson, appealed.

The record discloses the following facts: That the plaintiff claims title mediately from Samuel Hollingsworth, who was the patentee of the commonwealth of Virginia of a tract of 100,000 acres of land situate on Pocatalico river, a tributary of the Kanawha river, in what was then Greenbrier county. This tract passed from Hollingsworth by deed to

Mathias Bruen, who devised the same to different persons, among whom were plaintiff's remote grantors. In 1850 this 100,000 acres of land was partitioned among Alexander McWhorter Bruen, Henry Whitehouse, and Frances D. Bruen and Mary S. Bruen, tenants in common, by which partition deed Alexander McWhorter Bruen became the owner in severalty of the 2,500 acres claimed by plaintiff. On the 2d day of March, 1855, Alexander McWhorter Bruen and wife conveyed this 2,500 acres to E. G. Tyler, and on the same date said Tyler executed a mortgage upon the same to the said Alexander McWhorter Bruen to secure the payment of \$22,500. On the 1st day of July, 1875, E. B. Knight, special commissioner, made a conveyance of this land to E. W. Bond and J. L. McLean, in the proportion of two-thirds to Bond and one-third to McLean. This deed recites that it was made pursuant to decrees made in the cause of A. M. Bruen against E. G. Tyler and others, in the circuit court of Putnam county, rendered on the 16th day of November, 1866, the 11th day of November, 1868, and the 11th day of June, 1869, the last-named decree confirming the sale, and a decree on the 3d day of April, 1875, appointing said commissioner to make the deed. Witness McLean states in his deposition that he produced for the inspection of the defendants' counsel, at the time of the taking of his deposition, a certified copy of the will of Mathias Bruen, certified copies of deeds to plaintiff, and also one original deed to E. G. Tyler, for the 2,500-acre tract; but this original and these copies do not appear in the record. McLean's deposition also proves that the plaintiff, and those under whom it claims, have been in actual and continuous possession of said 2,500 acres of land since 1865, and have paid all the state and other taxes charged and chargeable thereon since the year 1865.

Concerning the defendants' title to 1,137 acres of land, a small portion of which extends into the boundary of the 2,500 acres claimed by the plaintiff, it appears that in 1865 there was granted to H. O. Middleton by the state of West Virginia, by metes and bounds, a tract of 1,137 acres, all of which lies wholly within the bounds of the 100,000-acre Hollingsworth grant, and a small portion of which extends into plaintiff's 2,500-acre tract. The 100,000-acre Hollingsworth patent is an inclusive and exclusive grant, and from its operation certain small surveys, made by a man by the name of Lockhart, were expressly excepted; one tract being a 500-acre survey, another 400 acres, and still another 300 acres. It appears from the record that there was another small survey of 200 acres made by Lockhart which joins his 300-acre survey on the north, a small portion of which is included in the bounds of plaintiff's 2,500 acres. This survey is older than the patent under which plaintiff claims

title, but it is not one of the excepted surveys; it is not mentioned or referred to in the grant to Hollingsworth. These three excepted surveys, viz., 300, 400, and 500 acres, and also the Lockhart survey of 200 acres, were all, on the 22d day of July, 1784, granted by the commonwealth of Virginia to Henry Banks, the remote assignee of Lockhart. The Banks' title is admitted to have been forfeited to the state for nonentry on the land books and nonpayment of taxes before the date of the grant of the 1,137 acres was made to H. O. Middleton. Reference to these several grants to Banks will assist very materially in determining their relative location. It appears from the grant of the 500 acres that it adjoins the 400 acres, and from the grant of the 200 acres that it joins the 300 acres on the north; and the 400 acres is described as lying on the northwest branch of Pocatalico, a branch of the Great Kanawha, about three miles north of the mouth of the Pocatalico, and the 300 acres is described as lying on the northwest fork of the northwest branch of the Pocatalico, a branch of the Great Kanawha. The 500 acres is also described as lying on the northwest branch of the Pocatalico. The entry of the 300 acres recites that it is near his 400 acres. From these descriptions it appears that all four of these surveys lie in the same immediate vicinity, and that the 300 and 200 acre tracts join, and that the 400-acre and 500-acre tracts join, but are not all contiguous. It is claimed by the defendants that H. O. Middleton embraced these excepted surveys within the bounds of the 1,137 acres, for which he obtained a grant in 1865; but it appears, from the survey and map filed in this cause, that the 1,137 acres failed to include about half of the 500-acre survey, and also about half of the 300-acre survey. The 400 acres excepted is not located, nor does it appear from the record whether it is embraced within the bounds of the 1,137 acres or not. Middleton failed to enter his land on the land books of Putnam county, and failed to have the same assessed with taxes until the year 1874, when it first appears on the land books charged to Henry O. Middleton for the taxes of said year, and for the preceding years back to 1869, inclusive. But this back tax does not appear to have been paid. In 1875 and 1876 it appears on the land books in the name of Robert Patton, under whom the defendants to this suit claim, and was returned delinquent for the nonpayment of taxes for those years. On the 5th day of November, 1877, it was sold for such delinquent taxes, and purchased by the state. On the 10th day of November, 1879, it was again sold in the name of Robert Patton, and was again purchased by the state, and does not thereafter appear on the books of said county charged in the name of either Middleton, Patton, or any other person. In 1881 Nancy Patton, assignee of Rob-

ert Patton, was permitted to redeem by payment of back taxes between 1875 and 1881, inclusive; but she failed to enter it on the land books, and it again became forfeited.

It is not shown that the defendants, or those under whom they claim, are, or ever have been, in possession of any part of the 1,137 acres involved in this suit. It further appears from the map and surveys in this cause that the entire portion of the 1,137 acres lies within two contiguous tracts of 2,500 acres each, both being parts of the 100,000-acre Hollingsworth grant. About nine-tenths of this 1,137 acres, which is in the form of a triangle, lies within a tract of 2,500 acres now owned by W. F. Whitehouse and others; and, so far as the defendants' title to this much of the 1,137 acres is concerned, it was adjudicated and settled by this court in the suit of W. F. Whitehouse and others against these same defendants, and is reported in 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49. And the principles enunciated in that case are applicable, in a large measure, to this case, but do not necessarily control it, because the two suits are similar in many respects, and differ widely in other and material matters. The plaintiffs in that suit claimed under identically the same title, down to and including the partition deed made by Miller, commissioner, as the one under which the plaintiff in this case claims. The evidence in the two causes was nearly the same, and the pleadings in the one case are almost a fac simile of the pleadings in the other. The conclusions of the court were right in the other case; and, if the facts alleged in plaintiff's bill were sufficiently proven, the logic used by Brannon, J., in the Whitehouse Case would apply equally as well to this case. But, as we shall presently point out, there is a wide difference between the two cases on material points.

Proceeding, now, to the consideration of the points relied upon by defendants' counsel as errors committed by the lower court, it is noted that the first point raised is that the court erred in permitting the filing of plaintiff's bill while a proceeding was pending in the same court in the name of the state of West Virginia against the owners of the 1,137 acres, Middleton land, for the purpose of sale or redemption. It is insisted that the plaintiff to this suit should have come into that proceeding by petition. A complete answer, we think, to this objection is given by Brannon, J., in the Whitehouse Case above referred to, which is that said proceeding was instituted at the request of the defendants in the present suit; that it was very irregular; that there was no order of publication, as required by chapter 105, Code 1899 (sections 3513-3535, Code 1906); that the plaintiff to this bill was not made a party to that proceeding, either by name, or by general description as unknown claimants of the land, and that the petition or bill in said case, and

the order permitting defendants to redeem, were all had and completed in one day. Consequently there was no opportunity given this plaintiff to come into that suit before the final decree permitting redemption had been entered.

The second point insisted on is that the plaintiff had a plain and adequate remedy at law. This point is also settled by the Whitehouse Case, provided the plaintiff has shown sufficient title to the land claimed in its bill. How can it be said that plaintiff had an adequate remedy at law, if it has valid title and is in actual possession? It might be admitted that the irregular proceedings in the name of the state, had at the instance of the defendants, and for the purpose of permitting them to redeem from the state the forfeited Middleton title, could have no effect to divest the plaintiff of its title, and that such proceeding could not have the effect to disturb them in the peaceable enjoyment of their possession, still it must be admitted that such proceeding had the effect to create a cloud upon plaintiff's title, and very likely to materially affect its market value. Why, therefore, was not a court of equity open to give it relief by way of enjoining the defendants from any further proceedings, the effect of which was undoubtedly to becloud and discredit its title? We think equity clearly has jurisdiction in such a suit. This court has frequently held that, where a party is in possession of land, holding it under a good, legal title, equity will take jurisdiction of a suit by him to remove a cloud from his title. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682; *De Camp v. Carnahan*, 26 W. Va. 839; *Smith v. O'Keeffe*, 43 W. Va. 172, 27 S. E. 353; *Hitchcox v. Morrison*, 47 W. Va. 206, 34 S. E. 993; *Holderby v. Hagan*, 57 W. Va. 341, 50 S. E. 437; *Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49. No principle of equity jurisdiction seems to be any more firmly established by adjudications than this.

Will equity grant relief by means of injunction to stop or prevent acts which, if fully accomplished, would constitute a cloud on title? We think this question has also been answered in the affirmative by former decisions of this court. *Holderby v. Hagan*, supra, which was a suit to enjoin the prosecution of an ejectment suit, and *Moore v. McNutt*, supra. This last-named case was a suit by Moore, the owner of land, against McNutt, commissioner of school lands, to enjoin him from further proceeding to sell, as school lands, certain tracts of land that lay within the plaintiff's boundary, and claimed by the school commissioner to have been forfeited in the name of junior grantees, thus presenting a case very similar to the one now under review. The court in the syllabus says: "Equity will exercise jurisdiction in advance to prevent acts which will cast a cloud over title to real estate, on the same

principles on which it removes clouds already resting on such title." This doctrine of equity jurisdiction in such cases was again announced in *Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49. We think it correctly expresses the law. Why should equity withhold relief to prevent a thing which it can be clearly seen will, if accomplished, create a cloud which equity will remove? Why cannot equity be invoked to prevent that which it would certainly undo if allowed to be accomplished? There seems to be no valid reason why equity should not give relief by preventing a wrong in all cases wherein it has power to cancel the wrong if done; and we entertain no doubt on this point.

The defendants claim that the demurrer to the bill should have been sustained because the bill on its face, as counsel contend, shows that plaintiff's original claim to at least a part of the land in dispute was based upon the forfeiture of the senior patents for these small surveys, which were excepted from the 100,000-acre grant, and which forfeiture inured to the benefit of the junior patent, to wit, the Hollingsworth patent. We do not understand the plaintiff to make this claim in its bill. These smaller surveys, having been expressly excepted from the operation of the large grant, of course, did not fall into the lap of the larger grant upon their forfeiture. They were no part of the land granted to Hollingsworth. Consequently, if plaintiff claims title to any of the aforesaid excepted tracts, it will have to show title thereto derived from some source other than the Hollingsworth grant before it can obtain the relief prayed for as to those tracts. But, on the other hand, the defendants make no pretense of a claim to the land embraced in any of those excepted surveys by virtue of the grants therefor issued to said Banks. Their title starts with the grant made by the state of West Virginia to H. O. Middleton in 1865, which grant they supposed was intended to cover the land included in these smaller excepted surveys, although there is nothing in the record to show that such was Middleton's purpose in obtaining the grant. It is shown by the map filed in this cause that this Middleton grant covers only about half of the 500 acres, and about half of the 300 acres and the greater part of the 200 acres, which last-named survey, as before said, is not one of the excepted surveys. The Middleton survey calls for 1,137 acres. Consequently a very large portion of it is laid down upon land granted to Hollingsworth. The defendants' title is admittedly forfeited, and so much of their land as did not cover the excepted Lockhart tracts, and as lay within the bounds of plaintiff's 2,500 acres, was by the forfeiture vested either in the state, or in plaintiff. We have only, so far as concerns the present suit, to in-

quire into the status of the title to so much of the 1,137 acres as lies within this plaintiff's boundaries. What is the status of defendants as to this part of their land? As before stated, no part of the excepted Lockhart surveys extends into this plaintiff's boundary. But a small portion of the 1,137 acres does extend into it. Then, as to this part, the defendants' title, being a junior title, could not avail them as against plaintiff's older title, even if defendants' title were not forfeited, provided, however, the plaintiff has shown itself to be the rightful owner of the Hollingsworth title. The defendants do not claim ever to have been in possession of any part of the land which they seek to redeem; but, on the other hand, plaintiff proves possession, by itself and those under whom it claims, continuously since 1865, and also that it has paid all taxes on the 2,500 acres since that year. These circumstances are greatly in plaintiff's favor; and, if it had shown sufficient title to the land, they would determine the case in its favor. But has it proved such title as the law in such cases require?

So far we have proceeded upon the theory that plaintiff has established a good paper title, thereby connecting itself with the grant to Hollingsworth. But the defendants deny plaintiff's title, and contend that certain deeds referred to in plaintiff's bill, and relied upon as evidence of its title, do not operate to convey title. It, therefore, becomes the duty of plaintiff to establish title by proof. What, then, is the status of plaintiff in the event it has not shown a good unbroken chain of paper title going back to the commonwealth? The plaintiff presents two deeds in its chain of title made by commissioners of courts, and the only evidence found in the record of the authority of said commissioners to make such conveyances is the recitals contained in the deeds themselves. One is the partition deed made by S. A. Miller, commissioner, bearing date May 16, 1850, partitioning this land among the heirs and devisees of Mathias Bruen. The other is the deed made by E. P. Knight, special commissioner, to E. W. Bond and J. L. McLean, bearing date July 1, 1875. Defendants deny that these deeds conveyed any title. It is true these deeds are not accompanied by any part of the record of the suits in which the deeds recite that authority was conferred by decrees to make them, and their effect as conveyances, being denied by defendants, are therefore not proper evidence of title. *Waggoner v. Wolf*, 28 W. Va. 820; *McDodrill v. Pardee & Curtin Lumber Co.*, 40 W. Va. 564, 21 S. E. 878. Nevertheless, these deeds serve as color of title. They grant the lands by metes and bounds, and describe it by location. It may be also noted here that neither of these deeds makes any exception from the operation of the conveyance of any

land lying within the exterior boundaries of the 2,500 acres claimed by this plaintiff. And even if the plaintiff had no older title than that conferred by the deed of E. B. Knight in 1875, yet, having been in possession of a part of the land described therein, and having paid all the taxes charged and chargeable thereon since that time, these circumstances would put the plaintiff in the first class of persons described in section 3, art. 13, of the Constitution of West Virginia (Code 1906, p. lxxxiv), and would give it the benefit of the defendants' forfeited title. Such conditions would invest it with as good and as indefeasible a title as if its chain had been properly connected up with the grant to Hollingsworth, provided it has connected itself with this color of title. If it has done so, such a title will support its bill. But does plaintiff properly connect with the E. B. Knight deed?

Plaintiff alleges "that it is seised and possessed in fee" of the 2,500 acres; that title passed to it through the deed from Miller, special commissioner, to Alexander McWhorter Bruen, and from him to E. G. Tyler, and that it passed from him by a "regular chain of title to your orator." It does not allege by what deed, or deeds, it passed to plaintiff. The defendants in their answer deny that the deed made by Miller, commissioner, "could or did convey or vest any title in Alexander McWhorter Bruen, or any other person whomsoever, in or to the said 2,500 acres," or that "those pretending to claim under him [E. G. Tyler] or the complainants in this cause have never acquired any title whatsoever under or by virtue of such conveyance, or any other conveyance or means." This denial, while somewhat general, seems to be no more indefinite than plaintiff's allegation concerning its source of title, and is certainly a sufficient denial to put plaintiff upon proof of its title. Has it proved it? It exhibits no deed, or certified copy of deed, conveying title to it, from any person. Plaintiff took the deposition of J. L. McLean, but no deed or certified copy conveying title to plaintiff is filed with his deposition, and none appears in the record. At the taking of this deposition witness was asked to produce for the inspection of counsel, but to be retained by witness "subject to the order of the court," any deeds, or certified copies of deeds, conveying the 2,500 acres of land to the plaintiff. In answer to this request he says, after naming other papers produced: "I have produced * * * certified copies of deeds conveying title to another 2,500 acres, part of said 100,000 acres, to the Iguano Land & Mining Company." Witness does not so much as name the grantors in said deeds, nor does it anywhere appear in the record who were the grantors to plaintiff. These deeds were only certified copies. Presumably they were from the records of Put-

nam county, where the land lies, and where witness was at the time he was testifying. Why, then, did not plaintiff have witness to file them and make them a part of the record? If afterwards lost, they could have been easily supplied. Was it because of some fatal defect in them, or was it simply because plaintiff thought it unnecessary to file them? We do not know. How could the court know that they were properly executed, or that they had been properly acknowledged for recordation, so as to permit a certified copy as evidence in place of the original, without having seen them? The court was the judge, in this case, of the sufficiency of the evidence, and it could not pass on this question without inspecting the deeds. The notary had no power to pass upon the sufficiency of the deeds; and, certified copies having been shown to exist, it was necessary to make them parts of the record in order to prove title. Parol evidence on this point was secondary, and therefore inadmissible, evidence; no reason being shown making it necessary to resort to it.

Plaintiff having claimed to have title by deed, the deeds themselves, or, under our statute, certified copies thereof, were the best evidence to the title. 1 Greenleaf on Evidence, § 81 (h); *Id.* § 84; 2 Wigmore on Evidence, § 1172; *Id.* § 1192; 17 Cyc. 465; *Id.* 485; *Millers v. Catlett*, 10 Grat. (Va.) 477; *Hubbard v. Kelley*, 8 W. Va. 46; *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132; *Cain v. Busby*, 30 Ga. 714; *Reich v. Berdel*, 120 Ill. 499, 11 N. E. 912; *Griffith v. Huston*, 7 J. J. Marsh. (Ky.) 385; *Brakett v. Evans*, 55 Mass. 79; *Thompson v. Richards*, 14 Mich. 172. But it may be thought that, inasmuch as no exception was taken to this mode of proof, and because no order of court appears in the record requiring such certified copies to be filed, it is now too late to raise the objection. But we do not think so. This parol evidence is insufficient. It fails to prove material facts. It does not state who the grantors were in those deeds. It is not known whether they were privies in estate with the Alexander McWhorter Bruen heirs or not; nor is it even shown that the deeds were properly executed so as to make them good as conveyances. Plaintiff having alleged that it claims title under the commissioner's deeds, hereinbefore referred to, it became necessary to connect itself with this title by proper conveyances. It was a fatal omission not to do so. The record fails to show any privity of estate between the plaintiff and the grantor through whom it alleges to have title.

It is assigned as error that the defendants were enjoined from redeeming that part of their land which counsel say lies wholly without the boundary of the land claimed by the plaintiff company. But as to this assignment counsel are clearly under a misapprehension as to the fact, because the survey

and report made in this case show that the whole of the Middleton survey lies within the boundaries of the two contiguous 2,500-acre tracts; the one claimed by this plaintiff, and the other by the Whitehouses, and both being parts of the Hollingsworth 100,000-acre grant.

Plaintiff pleads, in bar of defendants' title, an action of ejectment brought by Robert Patton and others against Russell Landers, Albert Dean, and others, in which a verdict and judgment was rendered for the defendants in the year 1883 by the circuit court of Putnam county. The record of this ejectment suit is made an exhibit with plaintiff's bill. A bill of exceptions was taken in that case, and was made a part of that record. But no writ of error was ever granted to that judgment. The bill of exceptions is only a skeleton in form, and simply refers to many deeds and papers that were used as evidence at the trial, but does not contain them. Enough, however, is contained in the skeleton bill of exceptions to show that the same titles were involved in that suit that are in issue in this one, and that the land described in the declaration is the same identical land described in the Middleton grant of 1865. The defendants in this suit are privies in estate to the plaintiffs in the ejectment suit. But, so far as that suit concerns the title of the plaintiff in this suit to the 2,500 acres claimed by it, it seems to lack one of the essential elements necessary to constitute *res judicata*.

The appellant assigns as error that the lower court permitted oral proof in explanation of the record in the ejectment suit. Was it error? Under the law of this state the only plea permissible to ejectment is "not guilty." This plea is very general in its nature, and comprehensive in its scope, and matters are often put in issue under it which, in other forms of action, would have to be pleaded specially. In such cases the record, unaided by any explanatory evidence, rarely discloses the real matters that were involved in the issue, and for this reason evidence is admissible in explanation of, but not in contravention or contradiction of, the record, for the purpose of explaining what were the real matters litigated. 2 Black on Judg. § 614; *Id.* § 624; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980; *Dunlap v. Glidden*, 34 Me. 517; *Rogers v. Libby*, 35 Me. 200; *Gage v. Holmes*, 12 Gray (Mass.) 428; *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422; *Whitehurst v. Rogers*, 38 Md. 503; *Botterff v. Wirst*, 53 Ind. 32; *Leopold v. City of Chicago*, 150 Ill. 568, 37 N. E. 892. Consequently, on the theory of plaintiff that the judgment in ejectment was *res judicata* as to the defendants in this suit, it was proper to admit the oral testimony of witness McLean to prove the map used as evidence at

that trial for the purpose of identifying the land in controversy, to prove which one, or ones, if any, of the defendants in the ejectment suit were in possession of the 2,500 acres now claimed by this plaintiff, and to prove the fact that the plaintiffs in the ejectment suit then claimed the land by the same title by which the defendants, their privies in estate, now claim it. Such testimony is only in aid of the record. But the fact that the land involved in both suits is identical is also shown by a comparison of the two descriptions given of it in the declaration, and in the answer to the bill; and the fact that defendants' grantors claimed under the same source of title in the ejectment suit that defendants themselves now claim under is also fully established by a comparison of the bill of exceptions taken at the ejectment trial with the allegations contained in defendants' answer. The identity of both the corpus of the land and the title by which it was claimed being thus established by the record, the admission of the testimony of witness McLean on this point, even if it could be regarded as error at all, would not be prejudicial to defendants.

This brings us to a consideration of the question of *res judicata*. Does it apply in this case? This court applied it in the Whitehouse Case. Are the facts in the two suits the same? We think not. While they are similar in very many respects, and identical in others, yet there is an essential and material difference upon a vital point which prevents the application of the principle here. This difference is the entire want of an issue between the plaintiffs in the ejectment suit and any person claiming any part of the 2,500 acres of land now claimed by the Igiano Land & Mining Company. The ejectment suit must have involved the same matters now in issue, must have been between the same parties, or their privies, and there must have been a final adjudication upon the merits, before it could operate as a bar to defendants here. Looking to the record in that suit, we find that the plaintiffs declared against a number of persons who were alleged to be in possession of the land covered by the Middleton grant; but, by reference to the testimony of J. L. McLean, it is found that only one of those defendants, to wit, Albert Dean, was in possession of any part of the 2,500 acres claimed by plaintiff. The others were on the 2,500 acres owned by the Whitehouses. It will be remembered that the partition of the 100,000 acres among the Bruen heirs and devisees had been made long before that suit. The record further discloses that Albert Dean was not served with notice; that he did not appear and plead; nor does it appear that his lessors were substituted in his stead as defendants. It is true that witness McLean says that he (McLean) appeared and defended the action. But so far as this testimony is intended to show that there was an issue between those

plaintiffs and any one representing the title to the 2,500 acres claimed by the plaintiff in this suit, it is in contravention of the record, and is therefore inadmissible. It, therefore, follows that the principle of *res judicata* does not apply in this case. This does not conflict with the opinion on the subject expressed by the court in the *Whitehouse* Case, because in that case the record in the ejectment suit shows that the parties who were in possession of the other 2,500-acre tract were served with notice and pleaded, and, furthermore, that the *Whitehouses* were, by the order of the court, substituted as defendants. It is assigned as error that the deposition of J. L. McLean was read as evidence over the objection of defendants, because the time of the notice was too short to enable clients to communicate with their counsel. It does not appear how far counsel resided from clients, or that the time given was unreasonably short. Notice to take the depositions was accepted by counsel for defendants on the 25th day of March, and the taking was commenced on the 28th, and concluded on the 30th day of March, 1901. A complete answer to this objection, however, is found in the fact that another one of counsel for defendants appeared, and is noted as counsel for Mary P. Hudson and some others of the defendants, and cross-examined the witness on the 28th of March. Mary P. Hudson being the only one who appeals, it matters not whether or not he appeared for all the defendants.

Exceptions were noted to a number of questions and answers, some of which may have been irrelevant, immaterial, and even improper, evidence. But this court will not presume that the circuit court considered such parts of the evidence as were improper if there is sufficient proper evidence to sustain his conclusion.

Counsel in their brief insist that the answer denies that the plaintiff is a corporation, and that the record furnishes no proof of its existence. The only allegation in the answer that has any bearing on this point is the following: "That it is not true that the so-called Iguano Land & Mining Company, a pretended corporation, either as a corporation or any of its members, assignors, or vendors, are or ever were possessed, in fee simple or otherwise, of a certain tract of land consisting of 2,500 acres," etc. We do not think this amounts to such a denial of the plaintiff's existence as a corporation as the statute requires. So far as it refers to the plaintiff not being a corporation it is a mere recital, and not a denial. It is not sufficient to raise an issue on this question, under chapter 125, § 41, Code W. Va. 1899 (section 3861, Code 1906).

For the reasons herein stated, the decree, rendered in this cause by the circuit court of Putnam county on the 23d day of September,

1902, is reversed, and this court will render such decree as the lower court should have rendered, dissolving the injunction and dismissing plaintiff's bill.

(132 Ga. 451)

DOANE v. BLACK et al.

(Supreme Court of Georgia. April 16, 1909.)

1. HUSBAND AND WIFE (§§ 9, 13*)—RIGHT OF HUSBAND IN WIFE'S LAND—REDUCTION TO POSSESSION—NECESSITY.

The first item of the will of John D. Swift, who died in 1841, was: "It is my will that my wife * * * and my children [naming them, six in number] shall share an equal proportion of my estate, after my wife and [four named children] shall have a sufficient sum of money or property out of my estate to make them equal to the amount willed [to the other two children] by their grandfather; * * * it being my desire to place them all on an equality." The second item was: "It is my will that my wife remain on the place of residence where I now reside during her life or widowhood, and, in case she marries, for her to receive a child's part." The widow, who never remarried, lived on the land mentioned in the second item until 1848. Subsequently it was occupied by her tenants till 1852, when she sold her interest therein. She died in 1907. Eliza R. Swift, one of the testator's daughters named in the will, married E. H. Gillespie in 1851. In November, 1853, a one-sixth interest in the land mentioned in the second item of the will was sold at sheriff's sale, as the property of E. H. Gillespie, under a judgment against him on a debt contracted in 1852, and was purchased by Allen B. Johnson, who took the sheriff's deed to the same. Johnson died in 1854, leaving as his only heirs at law two children, Dannie C. Doane and T. A. Johnson. In 1880 T. A. Johnson conveyed his interest in the land to Dannie C. Doane. E. H. Gillespie died in the fall of 1853, leaving his widow and one child, who died in infancy. Neither Gillespie nor his wife, during coverture, occupied the land mentioned in the second item of the will, or any part thereof, or collected rents, or exercised any act of ownership over the land, or any interest therein. *Held*, that Dannie C. Doane acquired no interest in such land, for the reason that under numerous decisions of this court it is well settled that "prior to the Code of 1863, the marital rights of a husband did not attach to the real estate, either owned by the wife at the time of the marriage or acquired by her during coverture, unless she was in possession of the same, or it was reduced to possession by the husband during coverture." *Arnold v. Limeburger*, 122 Ga. 72, 49 S. E. 812; *Sterling v. Sims*, 72 Ga. 51; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *Hudgins v. Chupp*, 103 Ga. 484, 30 S. E. 301; *Callaway v. Irvin*, 123 Ga. 344, 51 S. E. 477; and the numerous authorities cited in these cases, especially in *De Vaughn v. McLeroy*. The vested remainder of Gillespie's wife being upon the same footing as a chose in action (*McGinnis v. Foster*, 4 Ga. 377; *De Vaughn v. McLeroy*, supra), and he having died, she surviving, before she acquired the right of possession, was not subject to his debts, and Johnson, the purchaser at the sheriff's sale, took no title.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 30, 37, 68-70; Dec. Dig. §§ 9, 13.*]

2. OTHER DECISIONS REVIEWED.

The case of *Prescott v. Jones*, 29 Ga. 58, was considered and explained in *Sterling v.*

Sims, De Vaughn v. McLeroy, and Hudgins v. Chupp, supra; and the cases of *Shipp v. Wingfield*, 46 Ga. 593, *Rogers v. Cunningham*, 51 Ga. 40, and *Findley v. Sasser*, 62 Ga. 177, were analyzed and explained in *De Vaughn v. McLeroy*.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action between D. C. Doane and M. L. Black and others. From the judgment, Doane brings error. Affirmed.

Westmoreland Bros., for plaintiff in error. F. M. Johnson, Cobb & Erwin, M. C. Few, S. H. Sibley, and O. L. Williford, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(132 Ga. 453)

BLACK et al. v. NOLAN et al.

(Supreme Court of Georgia. April 16, 1909.)

WILLS (§ 615*)—CONSTRUCTION—NATURE OF ESTATES AND INTERESTS CREATED.

The first item of the will of a testator, who died in 1841, was: "It is my will that my wife * * * and my children [naming them, six in number] shall share an equal proportion of my estate, after my wife and [four named children] shall have a sufficient sum of money or property out of my estate to make them equal to the amount willed [to the other two children] by their grandfather; * * * it being my desire to place them all on an equality." The second item was: "It is my will that my wife remain on the place of residence where I now reside, during her life or widowhood, and, in case she marries, for her to receive a child's part." The widow never remarried, and continued in possession of the premises referred to in the second item till 1852, when she sold and conveyed her interest therein. She died in 1907. Held that, construing the two items together, the intention of the testator was, after an equalization, to give to the widow and to each of his six children a one-seventh interest in his estate, including the land mentioned in the second item, and to the widow, in addition to a one-seventh interest, the privilege of remaining on the place referred to in the second item during her life or widowhood.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1417; Dec. Dig. § 615.*]

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. J. Lewis, Judge.

Action for partition by Mary L. Black, in her own right and as guardian for her children, against J. A. Nolan and others. From a judgment in their favor, plaintiffs bring error. Affirmed.

F. M. Johnson and Cobb & Erwin, for plaintiffs in error. O. L. Williford, S. H. Sibley, Westmoreland Bros., and M. C. Few, for defendants in error.

FISH, C. J. Mary L. Black, in her own right and as guardian for her children, Kathleen and Elizabeth B. Black, filed a petition

for partition against J. A. Nolan and Mattie E. Nolan. John T. Wilcox and Dannie C. Doane were made parties to the proceeding. The question at issue was as to the interest that Eliza R. Swift had in the land in controversy under the will of her father, John D. Swift. The trial judge held that it was a one-seventh interest, and that petitioner and her two children, the descendants of Eliza R. Swift, were entitled to such one-seventh interest, whereupon petitioner, who claimed that the interest of Eliza R. Swift in the land in question was an undivided one-sixth, excepted.

The will of John D. Swift, who died in 1841, in so far as is here material, was as follows:

"Item 1. It is my will that my wife, Mary Ann Swift, and my children, namely, Eudoxus S. Swift, Virginia A. Swift, John Augustin Swift, Eliza R. Swift, Caroline E. Swift, and Susan Young Swift, shall share an equal proportion of my estate, after my wife, Mary Ann Swift and John A. Swift, Eliza R. Swift, Caroline E. Swift, and Susan Young Swift shall have a sufficient sum of money or property out of my estate to make them equal to the amount willed Eudoxus S. Swift and Virginia Ann Swift by their grandfather, Maj. John Floyd, deceased, after said property shall be appraised, left Eudoxus S. Swift and Virginia Ann Swift by John Floyd, deceased: it being my desire to place them all on an equality.

"Item 2. It is my will that my wife remain on the place of residence where I now reside during her life or widowhood, and, in case she marries, for her to receive a child's part."

The land mentioned in item 2 is that for which a partition was sought. The testator's widow, who never remarried, lived on the land until about 1848, and her tenants thereafter occupied it until 1852, when she conveyed all her interest in the land to William H. Brooks. She died in 1907. The respondents claim under Mary Ann Swift, the widow of the testator, and his children mentioned in the first item of the will, other than Eliza R. Swift. Mary L. Black and her children, as descendants of Eliza R. Swift, claim only the share of Eliza R. in the land, and respondents do not claim this share, nor any part of the same. So the question is: Did Eliza R., under the will of her father, John D. Swift, take a one-sixth or a one-seventh interest in the land in question? The answer to that question depends upon what interest the will gave to the widow in this land. It is quite clear, from the first item of the will, that the intention of the testator was that his widow and his six named children should each have an equal share or interest in his whole estate, after the widow and four named children should each receive therefrom an amount in money or property equal to that which each of the other two children had

received from their grandfather's estate. Under this item it was the evident purpose of the testator to dispose of the whole of his estate. The difficulty arises as to the proper construction of the second item of the will, in which there was an apparent departure from the scheme of exact equality between the widow and each of the children contained in the first item, as in the second item the widow was given the right to remain on the land in question during her life or widowhood.

Construing the two items together, we are of the opinion that the intention of the testator was to give to the widow and to each of his six children a one-seventh interest in his estate, including the land in question; the widow, however, being given the right to occupy such land during her life or widowhood, and, in the event of her remarriage, then there was to be an immediate division of this land, and, upon her death without having remarried, each of the testator's children was to take a one-seventh interest in this land, the other one-seventh interest being in the estate of the widow, or in her assignee in the event of its having been sold by her. We do not think that the second item created merely a life estate in the widow, with remainder to the children. Remainder is not mentioned therein, nor is it therein provided what disposition should be made of the land upon the death of the widow. Nor do we think that the effect of the second item was to so take the land from under the operation of the first item as to make an intestacy as to the land, after the interest therein given to the widow should expire. The natural and reasonable presumption is, that, when so solemn and important an instrument as a will is executed, the testator intends to dispose of his whole estate, and does not intend to die intestate as to any part of his property, which presumption is overcome only where the intention of the testator to do otherwise is plain and unambiguous, or is necessarily implied. 30 Am. & Eng. Enc. Law, 668. As already noted, it seems clear that the testator in this case intended to dispose of his whole estate.

The contention is made in behalf of the plaintiffs in error that several of the deeds under which defendants in error hold recognize the interest of each of the testator's children in the land as being a one-sixth, and that the deeds which placed the title in the defendants in error finally described their interest as a five-sixths interest and the widow's life interest, and that "the recital in these deeds by the predecessors in title of the Nolans amounted to a disclaimer of all interest except one-sixth, and this disclaimer binds all persons claiming under the deed." All of the deeds in the chain of title of defendants in error do not, however, treat the title in remainder as belonging to the six

children only; and if the recitals in some of the deeds in such a chain of title are any evidence at all of the true title of Eliza R. Swift, under whom plaintiffs in error claim, they are certainly not sufficient to overturn the will itself. If the immediate grantor of the defendants in error had a six-sevenths interest, instead of a five-sixths interest, in the land, and the difference between these two interests was not conveyed, it would remain in such grantor or his heirs at law, and would not revert to Eliza R. Swift, under whom plaintiffs in error claim.

Judgment affirmed. All the Justices concur.

(132 Ga. 567)

WHITE, Tax Collector, v. HIXON.

(Supreme Court of Georgia. May 12, 1909.)

ATTORNEY AND CLIENT (§ 28*)—OCCUPATION TAX.

A lawyer, who was a citizen of the state of Tennessee during the whole of the year 1906, and for about six months of that year practiced law in that state, and during the remainder of the year maintained a law office, or place of business, in the state of Georgia and practiced his profession in this state, was liable to the professional tax imposed by the general tax act for the fiscal year 1906 "upon every practitioner of law * * * doing business in this state."

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 41; Dec. Dig. § 28.*]

(Syllabus by the Court.)

Error from Superior Court, Tallahassee County; J. N. Worley, Judge.

Action between F. H. White, Tax Collector, and J. W. Hixon. From the judgment, White brings error. Reversed.

Hawes Cloud, for plaintiff in error. F. H. Colley and J. A. Beazley, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(132 Ga. 568)

FLUKER et al. v. CITY OF UNION POINT et al.

(Supreme Court of Georgia. May 12, 1909.)

1. MUNICIPAL CORPORATIONS (§ 126*)—NIGHT WATCHMAN—CREATION OF OFFICE.

The mayor and council of the city of Union Point have no authority, under its charter, by ordinance to create the office of "night watchman" of said city, and to provide that the person holding such office shall serve until the ordinance is repealed, "shall go on duty at 6 p. m. and remain till 6 a. m.," and "shall protect the persons and property of said city," and "to that end * * * shall apprehend and arrest any persons violating the laws and ordinances of said city," and that he shall be paid by the city a stated sum per night as his salary.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 126.*]

2. MUNICIPAL CORPORATIONS (§ 995*)—ACTION BY TAXPAYERS—INJUNCTION.

Consequently a court of equity will, at the instance of citizens and taxpayers of the city, prevent by injunction the payment of such salary by the city to the incumbent of such office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2163; Dec. Dig. § 995.*]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by O. E. Fluker and others against the City of Union Point and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Park & Park, for plaintiffs in error. Samuel H. Sibley, for defendants in error.

FISH, C. J. Only one point is presented for adjudication by the record in this case, and that is whether the city of Union Point can, under its charter, elect a night marshal, or watchman, and pay him a salary for his services from its treasury. The charter of the city in section 7 provides that the "mayor and councilmen" of such city "have the power, should they see fit to do so, to elect a mayor pro tem., a clerk of council, a city treasurer, * * * and a city marshal, to hold their offices for the term of one year, or until removed by the mayor and council, and to receive such compensation, if any, as may be fixed by the mayor and council. * * * That mayor and council may also appoint special police for special emergencies." Acts 1904, p. 678. Section 14 of the charter provides: "That the said mayor and council shall have full power and authority to enact and enforce all ordinances, by-laws, rules and regulations necessary for the good government of said city; and to protect * * * and promote peace and good order in said city." The mayor and council enacted the following ordinance: "In order to protect and promote peace and good order in the city of Union Point, a night watchman is hereby employed for said city of Union Point, at a salary of \$1 per night. Said watchman shall go on duty at 6 p. m. and remain till 6 a. m. Said night watchman shall serve until this ordinance is repealed. Said night watchman shall protect the persons and property of said city. To that end he shall apprehend and arrest any persons violating the laws and ordinances of said city of Union Point." In pursuance of this ordinance, at a regular council meeting, "W. H. Gentry was elected night watchman, his salary to be \$1 per night." Plaintiffs in error contend that as a municipal corporation has no power except that expressly or by necessary implication conferred upon it in its charter, and as the charter of Union Point conferred upon it authority to elect one marshal and to pay him a salary, the power of the city was restricted to the elec-

tion of one marshal and to the payment of his salary, except in case of special emergencies, when authority was granted to appoint special police. The defendants in error contend that, under the general authority conferred by the charter upon the mayor and council to enact and enforce all ordinances and regulations necessary for the good government of the city, and to promote and protect the peace and good order thereof, the city was authorized, under its charter, to employ a night watchman, at \$1 per night, to protect the persons and property of the city.

1. In our opinion the contention of the plaintiffs in error should prevail. Considering the ordinance as passed by the mayor and council and their action thereunder, we do not think that this is a case where merely an individual was employed to perform certain services for a specified time for the protection of the city and its citizens. The ordinance provided for the employment of a night watchman at a given salary, who was to go on duty at 6 p. m. and remain on duty until 6 a. m., and who was to serve until the ordinance should be repealed, and, for the purpose of protecting the persons and property of the city, the duty was imposed upon him of apprehending and arresting all persons violating the laws and ordinances of the city, and to fill the position so created Gentry "was elected night watchman, his salary to be \$1 per night." Usually mere employes of a city are not elected and they do not receive salaries. Moreover, the night watchman provided for by the ordinance, in protecting the persons and property of the city, was to perform the duties of a regular marshal or policeman; for it was explicitly made his duty, in this respect, to arrest all persons violating the laws and ordinances of the city. The fact that the ordinance designated him a night watchman and provided that he should be "employed" does not keep him from being a police officer. See, in this connection, *Collier v. Elliott*, 100 Ga. 363, 28 S. E. 117. His duties, as prescribed by the ordinance, make him a night marshal or policeman; and we think it clear that the city, under its charter, has no authority to create such an office, fill it by election, and pay a salary to the incumbent thereof from the city treasury. It is clear that the action of the city authorities in this matter was not authorized by the provision in section 7 of the charter, authorizing them to "appoint special police for special emergencies." On the contrary, the presence of this provision in the charter indicates that it is only "in special emergencies" that "special police" can be employed. It seems apparent that the purpose of this section of the ordinance, in so far as the power of the mayor and council to elect or appoint police officers is concerned, was to deal exhaustively

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with the subject; for it provides only for the election of a city marshal, and then limits the power of the mayor and council, as to the employment of policemen other than the city marshal, to the authority to "appoint special police for special emergencies." There is nothing whatever in the ordinance in question which even suggests the existence of any special emergency requiring the employment of a night policeman. On the contrary, the ordinance indicates that the night watchman was to be elected and employed because, in the opinion of the mayor and council, it was necessary for the city to have a policeman on duty by night as well as one on duty by day, not to meet a special temporary emergency, but regularly, night after night, and for an indefinite period of time.

2. It being well established that taxpayers may enjoin municipal corporations and their officers from making an unauthorized appropriation of the corporate funds or an illegal disposition of the corporate property, it follows from the foregoing that the court below erred in refusing to grant the injunction prayed for by the plaintiffs in error.

Judgment reversed. All the Justices concur.

(132 Ga. 529)

COOPER v. NATIONAL FERTILIZER CO.
et al.

(Supreme Court of Georgia. April 14, 1909.
Rehearing Denied May 12, 1909.)

1. PLEDGES (§ 56*)—ENFORCEMENT—SALE OF GOODS.

Where a vendee gives to his vendor a negotiable note for the purchase price of goods, and the note is discounted before maturity to an innocent purchaser by the payee, who indorses the same, and after default in payment at maturity the maker agrees in writing with the payee that, in consideration of the payee procuring from the holder an extension of time of payment, he will secure the payee's indorsement by an hypothecation of stock with power of sale, equity will not stay the sale of the stock under the provisions of the agreement for extension because of an alleged partial failure of consideration resulting from a defect known to the maker when he entered into the contract for the extension of time of payment, although the payee be a nonresident without property in this state.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 56.*]

2. SALES (§ 288*)—BREACH OF WARRANTY—LIABILITY OF SELLER.

Where a manufacturer sells goods for the purpose of resale by his vendee, and delivers some of them in a defective condition, and the vendee, with knowledge of such defects, resells them to his customers, the manufacturer is not liable on his breach of warranty for an injury to the vendee's business entailed by the latter's resale of the goods with a knowledge of their defective condition.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 818; Dec. Dig. § 288.*]

3. AGRICULTURE (§ 7*)—FERTILIZERS—GUARANTY OF VALUE.

Section 3 of the act approved December 18, 1901 (Acts 1901, p. 65), recognizes a variance of less than 3 per cent. between the total commercial value of the fertilizing ingredients as guaranteed and printed on the sacks, and that found by official analysis, as immaterial, relatively to the rights and liability provided by this act.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 7.*]

4. PRINCIPAL AND SURETY (§ 179*)—RIGHTS OF SURETY—ACTION IN EQUITY TO ENFORCE PAYMENT.

A surety is entitled to proceed in equity against his principal at any time after the debt has fallen due to compel payment, although he may not have been sued.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 512; Dec. Dig. § 179.*]

5. APPEAL AND ERROR (§ 170*)—QUESTIONS NOT RAISED BELOW—CONSTITUTIONAL QUESTIONS.

Constitutional questions which were not raised by the pleadings, nor passed upon in the trial court, cannot be raised for the first time in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1037; Dec. Dig. § 170.*]

(Syllabus by the Court.)

Error from Superior Court, Clarke County; J. N. Worley, Judge.

Suit by J. C. Cooper against the National Fertilizer Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

John R. Cooper and E. K. Lumpkin, for plaintiff in error. Cobb & Erwin, for defendants in error.

EVANS, P. J. In January, 1907, J. C. Cooper purchased 1,504 tons of fertilizers from the National Fertilizer Company of Nashville, Tenn. The contract was in writing, and provided that the fertilizer company agreed to sell to Cooper certain brands of fertilizers at stated prices, which were to contain a certain percentage of fertilizer ingredients, and that Cooper was to sell the fertilizer, take notes from the purchasers, payable to the company, and deliver to the company these notes as collateral for the notes which Cooper was to give to the company. Agreeably to the contract, the fertilizer was shipped to Cooper, and Cooper executed to the company seven notes, aggregating \$31,728.60, and delivered to the company the notes of the persons to whom he had sold the fertilizer, aggregating \$30,544.24, as collateral to his own notes. Before the maturity of the notes of Cooper to the company, the latter discounted them with the American National Bank of Nashville, Tenn., indorsing each note. On September 9, 1907, the company returned the collateral notes to Cooper for collection for the account of the company, the proceeds to be applied to the payment of his notes. Cooper paid his note of \$4,000, maturing November 1, 1907, and wrote the

bank that, because of poor collections, he could not meet the other notes at maturity, and asked indulgence. On January 9, 1908, after repeated demands from the company, Cooper surrendered some of the collateral notes upon which there was due about \$6,300. On January 16, 1908, Cooper and the company entered into a written agreement, the purport of which was that Cooper deposited with the company 202 shares of the stock of the Oconee Oil & Refining Company to secure the company against loss on its indorsements of Cooper's notes held by the bank, and the company agreed to secure an extension on the notes, so that Cooper could pay the balance, aggregating \$27,328.60 in five installments, beginning in January and ending in June, 1908, each of the installments being for \$5,000, except the last, which was to be the balance then due on the debt. Upon the payment of \$10,000 Cooper was to have the right to withdraw 100 shares of the hypothecated stock, and, upon failure to pay any installment within 10 days after it was due, the company was authorized to sell the stock after publication of time and place of sale. Cooper paid \$10,000 and withdrew 100 shares of the stock; but, he having failed to pay the installment due in May, 1908, the company gave notice of its intention to sell 192 shares of stock, and advertised the same as provided in the contract. Cooper then filed his petition to enjoin the sale, alleging that the company and the bank were foreign corporations owning no property in Georgia; that the bank was not an innocent purchaser, and the company was liable to him in the sum of \$6,000 or other large sum on account of some of the fertilizer being shipped in defective sacks, and being short in quantity; and that because of these deficiencies, and because two of the brands did not come up to the guaranteed analysis as printed on the sack, he lost many of his customers, and his business was seriously injured. The prayer was that the bank be required to bring in the notes, that an accounting be had, and the amount of his damage be ascertained and credited on his notes, and the company be restrained from selling the stock hypothecated until the final hearing. No service was had on the bank, and it never appeared or answered. The company filed an answer denying that Cooper was entitled to any deduction on the notes by way of damages or otherwise, and also an answer in the nature of a cross-bill, in which it was alleged that the Oconee Oil & Refining Company had sold the most valuable part of its property, and what remained was worth much less than the capital stock; that this company was indebted to Cooper for salary and otherwise; that Cooper had no visible property except about \$600 worth of personal property, and it was apprehensive that the 192 shares of stock was insufficient to pay the balance due of the debt, and by way of equitable garnishment it prayed that Cooper be enjoined from collect-

ing any debt due by the Oconee Company to him, and the Oconee Company be enjoined from paying such debts to Cooper. On the interlocutory hearing the court refused to enjoin the sale of the hypothecated stock, and did enjoin the Oconee Oil & Refining Company and J. C. Cooper as prayed in the cross-bill. Cooper excepted.

1-3. We will first notice the phase of the case presented by the application of the plaintiff in error to enjoin the National Fertilizer Company from selling the stock of the Oconee Oil & Refining Company, hypothecated to secure the payment of his notes to it, pursuant to the agreement of January 16, 1908. Briefly stated, the plaintiff's contention is that he has suffered damage by the fertilizer company's breach of contract; that the fertilizer company is a nonresident without property in this state, and the sale of the collateral should be stayed until an accounting can be had, and the exact amount of the plaintiff's indebtedness ascertained, which amount the plaintiff avers his willingness to pay. The basis of damage is alleged to be (1) loss in weight in the fertilizers shipped; (2) cost of resacking fertilizers received in damaged sacks; and (3) injury to his business as a dealer in fertilizers, resulting from the fertilizers being shipped in bad and inferior sacks, and from a shortage in weight, and because the actual and official analysis of two of the brands fell below the guaranteed analysis printed on the sacks. With reference to the first and second elements of damage, there was practically no dispute that at the time Cooper signed the agreement of January 16, 1908, by means of which he procured an extension of the time of payment of his notes, he had knowledge of these deficiencies in the fertilizers. When the plaintiff with such knowledge entered into an agreement, and secured an extension of time of payment of his notes, he waived his right to plead these matters as a defense to his notes. *Am. Car. Co. v. Atlanta St. Ry. Co.*, 100 Ga. 254, 28 S. E. 40; *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496; *Montfort v. Americus Guano Co.*, 108 Ga. 12, 33 S. E. 636. On the interlocutory hearing the plaintiff testified, and it was not denied by the defendant, that at the time the agreement of January 16, 1908, was signed the plaintiff did not know that some of the fertilizer ingredients fell below the percentage contained in the guaranteed analysis as printed on the sacks. In his petition the plaintiff alleged that by reason of the fertilizers "being shipped in bad and inferior bags, and difficult to handle, and shortage in fertilizer ingredients, and failure to come up to the guaranteed analysis hereinbefore set forth, and short weights, each and all of which was due to the failure of the said National Fertilizer Company to comply with their agreement as aforesaid, he was injured and damaged in the sum of five thousand dollars (\$5,000), in that he lost many of his good and valuable

customers, and his fertilizer business was seriously injured, and the said goods so sacked by the said defendant under the brands and name of the petitioner and not coming up to representation, his business was seriously injured thereby; that his fertilizer business dropped from twenty-four hundred (2,400) tons of last year to only some seven hundred (700) tons this year; and that said injury to his said business is serious and permanent, and that it was directly due and caused by the failure of the said defendant to comply with their said contract in shipping inferior goods, short weights, and in inferior and improper bags as aforesaid, and that they are liable to him therefor." There was ample proof before the judge to authorize a finding that, at the time the plaintiff received the fertilizers and sold them to his customers, he had knowledge of the deficiency in weight and defective sacks, of which he now complains. Having knowledge of such condition of the fertilizers when he sold them, if any injury to his business accrued from their sale on this account, he could not hold the fertilizer company responsible therefor, for the reason that the proximate cause of the injury was his own voluntary act in selling fertilizers which were known to be of short weight and defectively sacked. *Henderson Elevator Co. v. North Ga. Milling Co.*, 126 Ga. 279, 55 S. E. 50 (5).

Is the fertilizer company liable on its breach of warranty for injury to the plaintiff's business because the quantity of one of the ingredients of two brands of the fertilizer fell slightly below the seller's guaranty under all the circumstances of the case? One of the brands of the fertilizer was guaranteed to contain phosphoric acid 9 per cent., nitrogen 2.47 per cent., and potash 3 per cent. The fertilizing ingredients actually found by the state chemist were phosphoric acid 10.55 per cent., nitrogen 2.10 per cent., and potash 3.25 per cent. The commercial value of this brand as claimed by the manufacturer was \$21.13, and as actually found by official analysis was \$21.09; the difference in commercial value being 4 cents per ton. Another brand was shown to be deficient in phosphoric acid .75 per cent. and in commercial value 23 cents per ton. Of the 1,504 tons purchased 117 tons were shown to be deficient in commercial value 4 cents per ton, and 75 tons were shown to be deficient in commercial value 23 cents per ton; the deficiency in neither brand amounting to as much as 3 per cent. of the commercial value. Section 3 of the act approved December 18, 1901 (Acts 1901, p. 65), is as follows: "If any commercial fertilizer or fertilizer material offered for sale in this state, shall, upon official analysis, prove deficient in any of its ingredients as guaranteed and branded upon the sacks or packages, and if by reason of such deficiency the commercial value thereof shall fall three per cent. below the guaranteed total commercial value of such fertilizer or fertilizer ma-

terial, then any note or obligation given in payment thereof shall be collectible by law only for the amount of actual total commercial value as ascertained by said official analysis, and any person or corporation selling the same shall be liable to the consumer, by reason of such deficiency, for such damages, if any, as may be proven and obtained by him on trial before a jury in any court of competent jurisdiction in this state." There is no common-law duty to brand sacks of fertilizer. This is purely a statutory requirement. The act of 1901 provides that certain things shall be done, and that certain rights and liabilities shall result from a failure to comply with its terms. Possibly from a recognition of the difficulty of mixing the ingredients into a perfectly uniform composition of great bulk, and that, however earnest an effort might be made to do so, there might be slight variances in the different parts of a large quantity of the fertilizer, and consequently slight variances in different analyses made of samples taken from such parts, the Legislature made provision to cover such variances as they deemed reasonable. Had they said in terms that the manufacturer should brand on the sacks or packages an analysis which should be within at least 3 per cent. of that of the state chemist, or that the requirement of branding should be deemed sufficiently complied with if this branded analysis came within 3 per cent. of that of the state chemist, the intention would have been plain. Is the case materially different where the act provides that if there is a deficiency in any of the ingredients, and "by reason of such deficiency the commercial value thereof shall fall 3 per cent. below the guaranteed total commercial value of such fertilizer or fertilizer material," certain rights and liabilities should follow, making the official analysis the test of the reasonableness of the variance in the commercial value? Is not the negative pregnant plain that such results do not follow a variance of less than 3 per cent? *Spinks v. Rome Guano Co.*, 108 Ga. 614, 33 S. E. 906; *Sutherland v. Sou. Pac. Guano Co.*, 108 Ga. 742, 33 S. E. 811. The plaintiff's case as to this feature does not rest on the alleged violation of any common-law duty by the defendants, but upon a failure to comply with the statute. Were it otherwise, the damages which he could recover for a breach of contract would only be such as "may fairly and reasonably be considered either arising naturally (i. e., according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it." *Hadley v. Baxendale*, 9 Exch. 341; *Ga. R. v. Hayden*, 71 Ga. 522, 51 Am. Rep. 274; *Randall v. Raper*, El. Bl. & El. 84; *Civ. Code* 1895, §§ 3912, 3913.

There is no contention by the plaintiff

that his customers refused to pay for fertilizers because of the variance in the percentage of a fertilizing ingredient, or that the variance between the guaranteed and official analysis was such as to essentially or materially change the constituency of the fertilizer or render it unsuited for use as a fertilizer of the grade and character represented by the guaranteed analysis. Nor is there any contention that the fertilizer company knew of any deficiency in the guaranteed analysis. In his sworn petition, and also in his affidavit, submitted on the hearing, the plaintiff arrived at the amount of his damages which he claimed resulted to his business by estimating his prospective profits per ton on the difference in tonnage between the sales of the years 1907 and 1908. A plaintiff who seeks reparation in damages to his business from a breach of contract is limited to the recovery of damages which are the natural and material consequence of the act from which the damage flows. Loss of prospective profits is ordinarily too remote for recovery. The profits of a commercial business are dependent on so many hazards and chances that unless the anticipated profits are capable of ascertainment, and the loss of them traceable directly to the defendant's wrongful act, they are too speculative to afford a basis for the computation of damages. Where no fact is pleaded to reduce the recovery on a note for fertilizers other than a variance in fertilizer ingredient between the guaranteed and official analysis, and it appears that the total commercial value of the ingredients as ascertained by official analysis comes within 3 per cent. of the commercial value of the ingredients as guaranteed and branded on the sacks, the vendor may recover the contract price. The law as embodied in the act of 1901 becomes a part of the contract of sale, and such a small discrepancy is declared by the Legislature as unavailing to impair the contract of sale. In view, therefore, of the facts before the judge, he was authorized to find that the alleged damages to the defendant's business were neither contemplated by the parties in the sale and purchase of the fertilizers, nor were they the legal consequence of the immaterial variance between the guaranteed and official analysis of two brands of the fertilizer, that, if the plaintiff's business was injured, the proximate cause was the sale knowingly made by Cooper of fertilizer of short weight and in defective sacks.

4. We will next consider the phase of the case presented by the cross-petition, the essential purpose of which is to protect the fertilizer company from loss on account of its indorsement of the notes of Cooper held by the American National Bank by impounding whatever funds or effects the Oconee Oil Refining Company may be due to Cooper on account of claims for salary or otherwise.

The evidence as to the insolvency of Cooper was conflicting. It appeared that he was a salaried officer of the Oconee Company. The court enjoined the Oconee Company from paying over any money to Cooper until the final decree in the case. The cross-petition partakes of the nature of an equitable garnishment, and the right to the relief prayed is predicated on the absence of any common-law remedy, and the equitable right of an indorsee to compel the payment of the notes. It is undisputed that the notes of Cooper which the Fertilizer indorsed are held by an innocent purchaser for value before maturity, and at the time of this proceeding were past due. Under the agreement of January 16, 1908, relatively to Cooper, the fertilizer company sustained the relation of surety. Our Code does not give to a surety or indorser who has not paid the debt the remedy of garnishment. But equity affords a remedy by entertaining a petition at the instance of the surety against his principal at any time after the debt has fallen due to compel payment, although he may not have been sued. Bispham's Eq. § 331; 16 Enc. Pl. & Pr. 951; Sanford v. United States Fidelity Co., 116 Ga. 689, 43 S. E. 61. Under the averments of the cross-petition and the evidence submitted the court did not abuse its discretion in restraining Cooper from collecting any debt which might be due him by the Oconee Oil & Refining Company.

5. The judgment complained of is alleged to be erroneous, because its effect is to deprive the plaintiff in error of certain constitutional rights and guaranties, viz., the right of trial by jury, the right of appeal to the courts, the right to appear in the courts by person or attorney, due process of law, and protection of person and property, and that its effect is also to violate the fundamental principle that, where there is a right, there is a remedy. None of these constitutional questions were raised in the pleadings, nor does the record disclose that such were passed upon by the trial judge.

Judgment affirmed. All the Justices concur.

(132 Ga. 546)

JACKSON v. STATE.

(Supreme Court of Georgia. May 12, 1909.)

1. CRIMINAL LAW (§§ 785, 807*) — INSTRUCTIONS.

The court charged the jury in part as follows: "From the peculiar character of rape and assault with intent to rape, care is to be used in regard to them. The injured female is usually a competent witness in such cases; but the degree of credit to be given to her evidence depends more or less upon the concurrence of the circumstances of the fact with her testimony. For instance, if she be of good fame, if she presently discovered the offense, made pursuit after the offender, showed circumstances and signs of the injury, if the place where the fact was done was remote from the people, inhabitants, or passengers, or if the offender fled, these

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But if she concealed the injury for any length of time after she had an opportunity to complain, if the place where the fact was supposed to be done, when and where it is probable that she might be heard by others, these and like circumstances carry a strong presumption that her testimony is false or feigned. Such is the care that the law uses in scrutinizing allegations of the crime of rape." *Held*, that the excerpt from the charge above quoted was not open to the criticism "that it is argumentative in favor of the prosecutor, the woman alleged to have been raped, that its effect is to lend undue weight to the testimony of the prosecutor and to influence the jury in believing that her testimony was to be believed in preference to the other testimony, if it chanced to coincide with the language used in the first portion of said charge."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 785, 807.*]

2. RAPE (§ 51*)—SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 51.*]

3. RAPE (§ 59*)—INSTRUCTIONS—DEGREE OF OFFENSE.

The evidence in the case requiring a finding that the defendant was guilty of the offense of rape, if guilty of any offense, it was not error for the court to refuse to submit to the jury the question of whether the defendant was guilty of the assault with intent to commit a rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 99; Dec. Dig. § 59.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

William Jackson was convicted of rape, and he brings error. Affirmed.

Shelby Myrick, for plaintiff in error. W. W. Osborn, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

BECK, J. William Jackson was indicted for rape; it being alleged that he committed the offense upon the person of Louisa Talley. Upon the trial the jury rendered a verdict of guilty, with a recommendation. The defendant made a motion for a new trial, which was overruled, and to this judgment he excepted.

1. The court in part charged the jury as follows: "From the peculiar character of rape and assault with intent to rape, care is to be used in regard to them. The injured female is usually a competent witness in such cases; but the degree of credit to be given to her evidence depends more or less upon the concurrence of the circumstances of the fact with her testimony. For instance, if she be of good fame, if she presently discovered the offense, made pursuit after the offender, showed circumstances and signs of the injury, if the place where the fact was done was remote from the people, inhabitants, or passengers, or if the offender fled, these and the like are concur-

ring evidences to give greater probability to her testimony, when proved by others as well as herself. But if she concealed the injury for any length of time after she had an opportunity to complain, if the place where the fact was supposed to be done, when and where it is probable that she might be heard by others, these and like circumstances carry a strong presumption that her testimony is false or feigned. Such is the care that the law uses in scrutinizing allegations of the crime of rape." The charge quoted was excepted to on the ground "that it is argumentative in favor of the prosecutor, the woman alleged to have been raped, that its effect is to lend undue weight to the testimony of the prosecutor, and to influence the jury in believing that her testimony was to be believed in preference to the other testimony, if it chanced to coincide with the language used in the first portion of said charge." We do not think that the portion of the charge above set forth is open to the criticism made upon it. It is certainly not an argument tending to influence the jury to form any conclusion adverse to the defendant independently of the evidence, but was cautionary in its character, impressing upon the minds of the jurors the duty of carefully considering and scrutinizing the facts and circumstances of the case which tended to throw light upon the main issue in the case.

2. The second and third grounds of the amended motion are as follows: "(2) Because the testimony in said case fails to show that the offense of rape was committed by the defendant beyond a reasonable doubt. (3) Because the testimony touching the offense for which the defendant was indicted and found guilty does not constitute or make out the offense of rape as defined by the law of Georgia." It is apparent that the two grounds of the motion set forth immediately above are but restatements, with some variation in form, of the general ground that the verdict is without evidence to support it. An examination of the testimony contained in the record discloses that the woman upon whose person it is alleged in the indictment the crime was committed identified the prisoner at the bar as her assailant. Besides her testimony as to the identity of the accused with the person who committed the offense, this witness was corroborated by proved facts and circumstances. The victim of the offense of which the defendant was convicted, after testifying as to the assault upon her, the threats and menaces used by the assailant to intimidate her, after having described the place at which the crime was committed, her efforts to prevent the consummation of the offense, her outcries after it had been consummated, and her efforts to have the as-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sailant apprehended, and after having repeated with particularity the details of the circumstances of the assault, used the following language: "That man [the accused] followed me, threatened to kill me, and assaulted me. * * * I went home crying, and told him [her husband] a man had assaulted me and attempted to kill me. * * * It was a bright moonshiny night; and I tried to catch a glimpse of his face, so I would know him if he didn't kill me. * * * The road was muddy. It had been raining, and was very muddy, and I was thrown into the water. He dragged me from about where I am sitting to the extent of this room. He carried me to the right of Mr. Schwarz's vegetable garden, and on the other side is broom straw. It was between 10 and 11 o'clock as near as I can judge. * * * He assaulted me. He entered my person. He accomplished his purpose." It is insisted that, even if we accept as true the testimony of the prosecutor, still the offense with which the defendant is charged is not made out beyond a reasonable doubt. The language used by the witness clearly means, and could not mean anything else, than that the accused forcibly and against her will had carnal knowledge of her, and under the evidence in the case the jury were authorized so to find.

3. Under the evidence in the case the jury were authorized to find the defendant guilty of the offense of rape. There is nothing in the testimony of the prosecutrix which would have supported a finding that the accused was guilty merely of an assault with intent to commit rape. That being true, the court below did not err in not submitting to the jury the question as to whether or not the defendant was guilty of an assault with intent to commit rape.

Judgment affirmed. All the Justices concur.

(132 Ga. 671)

NATIONAL FIRE INS. CO. v. VAN GIESEN.

(Supreme Court of Georgia. May 15, 1909.)

1. APPEAL AND ERROR (§ 635*)—REVIEW—GROUNDS FOR NEW TRIAL.

It does not appear, from the bill of exceptions or the record, that any of the grounds of the original motion for a new trial, or of the amendment thereto, were approved, and therefore such grounds cannot be considered, except those which complain that the verdict is contrary to law and the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 635.*]

2. REVIEW ON ERROR.

There was sufficient evidence to support the verdict, and the court did not abuse its discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between G. A. Van Giesen and the National Fire Insurance Company. From the judgment, the insurance company brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. Osborne & Lawrence, for defendant in error.

HOLDEN, J. Judgment affirmed.

(132 Ga. 460)

LOCKWOOD v. MUHLBERG.

(Supreme Court of Georgia. April 17, 1909.)

1. APPEAL AND ERROR (§ 302*)—GROUND OF MOTION FOR NEW TRIAL—SUFFICIENCY TO RAISE QUESTION.

The only ground of the motion for a new trial relied on was as follows: "The court erred in refusing to permit plaintiff to introduce in evidence the fact that on the first trial of the case, after the conclusion of the plaintiff's evidence, the defendant introduced an ordinance of the city of Savannah allowing pawnbrokers to charge 10 per cent. per month interest on the dollar on sums less than \$25, whereupon the court, on motion of the defendant, directed a verdict; said refusal to permit this evidence to be introduced being error, in that it eliminated from the consideration of the jury a legitimate means of throwing light upon the interpretation of the word 'charges' as used in the contract, and thus assist them to determine whether the use of that word was a blind for usury or interest, and was merely a ruse or device to evade the usury laws, said meaning of the word 'charges,' and the bona fides of its use in the contract, being a material issue in the case, and the fact that on the previous trial, under the same facts, the defendant confessed the word to mean 'interest,' and sought to escape under the ordinance, was material assistance to the jury, and its exclusion was error, prejudicial to the plaintiff." Held that, under previous rulings of this court, such ground did not raise with sufficient distinctness a question for determination by a reviewing court; it being merely stated that the presiding judge refused to allow the movant to introduce "a fact" in evidence, without stating that any evidence was offered for the purpose of proving such fact, or of what such evidence consisted, or whether it was oral or documentary, or both, or that any particular evidence was offered and excluded. Hendrick v. Davis, 27 Ga. 167, 73 Am. Dec. 726; Atlanta Consolidated Street Railroad Co. v. Bagwell, 107 Ga. 158, 33 S. E. 191 (8); Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712; Allen v. Kessler, 120 Ga. 319, 47 S. E. 900; Bowden v. Bowden, 125 Ga. 107, 53 S. E. 806; Morris v. State, 129 Ga. 434, 59 S. E. 223; Sims v. Sims, 131 Ga. 262, 62 S. E. 192; Sanders v. Cen. Ry. Co., 123 Ga. 763, 51 S. E. 728.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 302.*]

2. APPEAL AND ERROR (§ 588*)—BRIEF OF EVIDENCE — RECITALS — EFFECT — PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.

While there are incorporated in the brief of evidence, in connection with the cross-examination of a witness, certain recitals as to the witness being interrogated on the subject of the occurrences at the last trial, objections to the evidence, arguments of counsel, and the ruling of the court, such recitals form no proper part of the brief of the evidence, and cannot be considered as authenticating the facts stated.

The motion for a new trial, not the brief of evidence, must show the ruling of the court of which complaint is made. *Central of Georgia Ry. Co. v. McClifford*, 120 Ga. 90, 47 S. E. 590; *McComb v. Hines*, 123 Ga. 246, 51 S. E. 300.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 588.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action between B. P. Lockwood and E. Muhlberg, executor. From the judgment, Lockwood brings error. Affirmed.

Twiggs & Gazan, for plaintiff in error. Osborne & Lawrence, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 586)

TAYLOR et al. v. WRIGHT.

(Supreme Court of Georgia. May 13, 1909.)

1. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

By agreement of counsel for both parties this case was submitted to the trial judge, "to decide on the law and the facts without intervention of a jury." After the conclusion of the evidence the judge rendered a decision in favor of the defendant, disposing of the same upon the law and the facts, the only exception to which is in the following words: "To which finding and judgment of his honor, the judge, the plaintiff in error excepted and now excepts, and assigns the same as error." Held, that such assignment of error is too general to raise any question for determination by this court; and, there being no other assignment of error which can, under the judge's certificate to the bill of exceptions, be considered, the writ of error is, upon motion, dismissed. *Lyndon v. Georgia Ry. & Elec. Co.*, 129 Ga. 353, 58 S. E. 1058.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 731.*]

2. APPEAL AND ERROR (§ 748*)—ASSIGNMENTS OF ERROR—AMENDMENT.

Assignments of error which are too vague and general to be considered cannot be made specific by amending the bill of exceptions after it reaches this court. *Stewart v. Marietta Trust Co.*, 129 Ga. 418, 59 S. E. 231.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3059; Dec. Dig. § 748.*]

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action between John Taylor and others and J. A. Wright. From the judgment, Taylor and others bring error. Dismissed.

F. C. Foster, Sr., for plaintiffs in error. Middlebrook, Rogers & Knox, for defendant in error.

BECK, J. In addition to the general exception stated in the headnote, there were specific exceptions to the rulings of the court upon the question of the admissibility of certain oral testimony; but the judge, in his certificate to the bill of exceptions, states

that this evidence was rejected by him and was not considered in reaching his finding and judgment as rendered, leaving as the only question to be considered the judgment which disposed of the case upon the law and the facts. And, as we have ruled in the headnote, that assignment was too general to raise any question for consideration or determination here. *Smith v. Marshall*, 127 Ga. 374, 56 S. E. 416.

Writ of error dismissed. All the Justices concur.

(132 Ga. 570)

JACKSON v. STATE.

(Supreme Court of Georgia. May 12, 1909.)

1. HOMICIDE (§ 309*)—VOLUNTARY MANSLAUGHTER—INSTRUCTIONS.

There was evidence from which the jury might infer that the killing was without premeditation, upon a sudden impulse of passion, aroused not only by words, but also by an attempted indecent exposure of the person of the deceased in the presence of defendant's wife, and by the commission upon the defendant of an assault by the deceased; and an appropriate instruction on the law of voluntary manslaughter should have been given to the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

2. HOMICIDE (§ 169*)—EVIDENCE.

The cause of the separation of the deceased from his wife was irrelevant to any issue in the case, and evidence relating thereto was properly excluded.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 169.*]

3. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REASONABLE DOUBT.

The words "reasonable doubt" are of such obvious significance that an omission to define them, in the absence of an appropriate written request, will not require a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2000; Dec. Dig. § 824.*]

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Henry Jackson was convicted of murder, and brings error. Reversed.

M. C. Edwards, for plaintiff in error. J. A. Laing, Sol. Gen., by R. R. Arnold, and John C. Hart, Atty. Gen., for the State.

EVANS, P. J. Henry Jackson was convicted of the murder of Henry Shine, and recommended to mercy. The court refused him a new trial, and he excepts.

1. Several of the exceptions go to the point that the court erred in instructing the jury that the defendant was either guilty of murder, or not guilty, and in failing to give an appropriate charge on the law of voluntary manslaughter. The defendant and the deceased had married sisters. About two months prior to the homicide the wife of the deceased separated from him, and had since resided with the defendant and his wife. The defendant lived in a house containing three

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

rooms. The front of the house had two rooms, separated by a hall five or six feet wide. The homicide occurred in the hall of the house, between 8 and 10 o'clock at night. The only persons in the house at the time of the homicide were the defendant and the deceased and their wives. The wife of the defendant was incompetent to testify, and the wife of the deceased gave substantially this account of the tragedy: About 8 o'clock at night the deceased came to the house of the defendant and requested permission to spend the night with the witness. She declined the request, and the deceased said he was going to stay anyway, and commenced stripping off his clothes in the presence of herself, her sister, and the defendant. Whereupon the defendant said, "Don't be undressing here before my wife, you go on home," to which the deceased replied that "he didn't give a God damn, he was going to stay all night." The defendant then said, "You go on home; I don't want you here undressing before my wife that way," and the deceased pulled up his pants and said, "By God, he was going to stay all night." The defendant got his gun and commanded the deceased to leave the house. At this stage of the colloquy the witness says she apprehended a difficulty and jumped behind the bed. She heard the defendant say, "Don't come on me, cutting at me; I will shoot you," and about that time the gun fired and the witness ran from the house. The witness did not see any knife in her husband's hand, nor did she see an open knife on the floor near his hand. The next morning an open knife was picked up from the floor under the hand of the deceased before the body of the deceased had been removed. There was a conflict in the evidence as to whether this knife belonged to the defendant or the deceased. An unopened knife belonging to the deceased was taken from his pocket after his death.

We think this testimony demanded a charge on the law of voluntary manslaughter. The jury could infer from it that the killing was without premeditation, upon a sudden violent impulse of passion, aroused, not alone by words, but also by an attempted exhibition of the person of the deceased in the presence of the defendant's wife, and by the commission upon the defendant of an assault by the deceased. It is true that the wife of the deceased did not testify that she saw the deceased make a knife thrust at the defendant; but she did say that, while hiding behind the bed, she heard the defendant warn the deceased not to cut him, simultaneously with the discharge of the gun. An open knife was found by the body of the deceased. The defendant's contention was that it was the knife with which the deceased assaulted him. The State contended, under the evidence that the open knife belonged to the defendant, and was placed by the body of the

deceased after death by the defendant to give color to the claim of self-defense. The solution of these contentions could only be made by the jury. We think the jury might infer that an assault was made by the deceased upon the defendant with a knife. If the intent of the deceased in making the assault was not to commit a felony, but only a serious personal injury, such as a stabbing, and the defendant killed under the impulse of passion because of such attempt, the homicide would be voluntary manslaughter. *Rumsey v. State*, 126 Ga. 423, 55 S. E. 167; *Jenkins v. State*, 123 Ga. 523, 51 S. E. 598; *Gann v. State*, 30 Ga. 67.

2. Counsel for the defendant propounded the following question on cross-examination to the wife of the deceased, a witness for the state: "Why did you separate from him?" (the deceased). The answer would have been: "I couldn't get along with him. He beat me and fought me all the time." The court excluded the answer. It is insisted that this testimony was admissible as tending to show that the defendant had nothing to do with the separation or reconciliation of the deceased with his wife. There was nothing in the testimony which rendered this testimony relevant. There was no contention that the defendant was concerned, either with the separation of the witness from her husband, or any effort at reconciliation of the estranged spouses. The rejected testimony was irrelevant.

3. It is complained that the court failed in his instructions to the jury to define a "reasonable doubt." It has been held that, in the absence of a written request, it is not error for the judge to omit to define such words as "ordinary care," or "extraordinary care and diligence," which have an obvious meaning. *Savannah Electric Co. v. Bennett*, 130 Ga. 597, 61 S. E. 529. For the same reason there is no error in failing to define the words "reasonable doubt," where a properly worded written request is not made. *Battle v. State*, 103 Ga. 53, 29 S. E. 491; *Nelms v. State*, 123 Ga. 575, 51 S. E. 588.

Than as indicated in the first division of this opinion, no error is made to appear.

Judgment reversed. All the Justices concur.

(132 Ga. 584)

MERCHANTS' & FARMERS' BANK v. McMULLEN.

(Supreme Court of Georgia. May 13, 1909.)
HUSBAND AND WIFE (§ 232*) — ACTION AGAINST WIFE — PAYMENT OF HUSBAND'S DEBT—EVIDENCE.

The evidence did not authorize the verdict, and the court committed error in refusing a new trial.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 848; Dec. Dig. § 232.*]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by the Merchants' & Farmers' Bank against Rachael McMullen. Judgment for defendant, and plaintiff brings error. Reversed.

W. A. Covington, J. G. & J. F. McCall, and Stanley S. Bennet, for plaintiff in error. Shipp & Kline and Edwin L. Bryan, for defendant in error.

HOLDEN, J. The plaintiff, a banking corporation, brought suit against the defendant on a negotiable promissory note for \$980.36, principal. The defendant filed a defense wherein she contended, for reasons therein alleged, that she was not liable on such note, and further contended that prior to the execution of this note she had given several other notes to the plaintiff for her husband's debt, and had paid the same, and prayed judgment against the plaintiff for the amount thus paid. Upon the trial the jury found a verdict in favor of the defendant for \$1,405.82, and to the order of the court overruling the plaintiff's motion for a new trial exceptions were filed. The following facts appear from the evidence: The defendant gave to the plaintiff a note, dated January 1, 1897, for \$1,405.82, which she contended was given in settlement of her husband's debt. Other notes were given in renewal of this note, and the amount appearing to be due was finally paid by the defendant. It was for such payments that the defendant sought a recovery against the plaintiff. On January 1, 1897, the plaintiff held a note against John and W. S. McMullen, and the note of the defendant, above referred to, was given to take up this note.

Upon the trial of the case the husband of the defendant testified that the note for \$1,405.82, given by his wife, the defendant, to the plaintiff, was given under the following circumstances: "He bought some mules from Mr. Groover, and it fell due, and he sent John and W. S. McMullen to John McCall to get him to pay it for witness, and he paid it and took their notes." It does not appear when the note of John and W. S. McMullen was given to the bank. The testimony would seem to indicate that John McCall was the attorney for and a director for the bank at the time this note was given. The testimony shows that he had no authority, at the time the note of John and W. S. McMullen was given, to make loans for the bank, or to do anything except to draw papers for the bank as its attorney. There is no evidence to show that the official of the bank who advanced the money on the John and W. S. McMullen note knew that the note was being given for the debt of the defendant's husband; and, if they did know it, there is no evidence that, when the defend-

ant gave her note to the bank to take up the John and W. S. McMullen note, the bank looked to the husband for the payment of the debt represented by the John and W. S. McMullen note, or that the bank had any right to collect such debt out of him. The defendant's husband says that John McCall looked to him for the debt; but it does not appear to have been owing to McCall, or that McCall had any right to collect the debt out of the defendant's husband, nor does it appear that McCall was in any way liable to the bank by reason of the transaction. Defendant's husband said that he did not know to whom the bank looked for the payment; but, in the absence of evidence to the contrary, it will be presumed that the bank looked for payment to the parties whose note it held, and to no one else. There was no evidence to authorize the jury to believe that the bank held any claim against the husband of the defendant when she gave her note to the bank to take up the John and W. S. McMullen note held by and payable to the bank. The mere fact that the bank, on the notes of John and W. S. McMullen, loaned them money to pay the debt of the husband of the defendant, would not of itself authorize the finding that the bank had any right to collect out of the husband the debt represented by the note. There is no evidence that the defendant's husband ever agreed to pay the bank or McCall the money advanced John and W. S. McMullen to pay the husband's debt, or that the bank held the note as collateral security for any debt. The evidence was not sufficient to authorize a recovery by the defendant against the plaintiff for any payments made by her to the plaintiff, on the theory that such payments were made in settlement of her husband's debt.

It is unnecessary to discuss the evidence on the other issues in the case. We think it proper, under all the evidence in the case, that a new trial should be granted; and the judgment of the court overruling the motion for a new trial is reversed. All the Justices concur.

(122 Ga. 581)

MILLER et al. v. LUCKEY.

(Supreme Court of Georgia. May 13, 1909.)

1. INFANTS (§ 89*)—ACTIONS AGAINST—PERSONAL SERVICE.

Where a suit is brought against a minor, and he is not personally served, a plea in abatement setting up the want of personal service should be sustained.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 258; Dec. Dig. § 89.*]

2. EVIDENCE (§ 488*)—OPINION EVIDENCE—VALUE.

Where the question of the amount of damages resulting from a trespass on property is a relevant issue, a witness, although not an expert, if he has knowledge of facts upon which to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

base his opinion, may give his opinion as to what was the market value of such property at the time of the alleged trespass and its market value immediately thereafter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2273; Dec. Dig. § 488.*]

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action by S. B. Luckey against J. B. Miller and others. Judgment for plaintiff, and defendants bring error. Reversed.

R. J. Bacon, for plaintiffs in error. Pope & Bennet, for defendant in error.

HOLDEN, J. 1. The defendant in error, Luckey, brought suit against Miller & Larrimore as a copartnership, and against the individual members thereof, for damages alleged to have resulted from acts of trespass claimed to have been committed by the defendants in cutting and boxing, for turpentine purposes, certain trees on the lands of the plaintiff. Upon the trial of the case, a general verdict was rendered in favor of the plaintiff, and the defendants made a motion for a new trial, which was overruled. To the order of the court overruling the motion for a new trial the defendant Miller alone excepted; but by amendment in this court the partnership of Miller & Larrimore, and Larrimore as an individual, were made parties plaintiff with Miller in the bill of exceptions. Before pleading to the merits, Miller filed a special plea in abatement, alleging that he was a minor, 20 years of age, and that the service upon him, not being personal, was insufficient. Upon a hearing had upon this special plea, the court overruled the same, and Miller filed exceptions pendente lite, which were duly certified, and error on this ruling is assigned in the bill of exceptions. It appears from the recitals in the exceptions pendente lite that service was not had on Miller personally, and that "he was a member of the turpentine firm of Miller & Larrimore at that time, and doing business for himself as such member."

We think the court committed error in overruling this plea in abatement. In order to perfect service on a minor over 14 years of age in a suit against him, it is necessary, under Civ. Code 1895, § 4987, to serve such minor personally and appoint a guardian ad litem for him. Under the provisions of this section, until personal service on him is made and a guardian ad litem appointed, he is no party to the suit. In this connection, see *Welch v. Agar*, 84 Ga. 583, 586, 11 S. E. 149, 20 Am. St. Rep. 380; *Burnett v. Summerlin*, 110 Ga. 349, 35 S. E. 655; *Maryland Casualty Co. v. Lanham*, 124 Ga. 859, 53 S. E. 395; *Douglas v. Johnson*, 130 Ga. 472, 60 S. E. 1041. If an infant, by permission of his parent or guardian, engages in any busi-

ness as an adult, and becomes bound for all contracts connected with such business, as provided in Civ. Code, 1895, § 3650, this fact would not, while he was so engaged in business, dispense with the necessity of making service on him in the regular method provided for in suits against minors. The provisions of such section relate to liability for his contracts, and have no reference to the method of service upon him in a suit against him.

Nor would the fact that "infancy is no defense to an action for a tort, provided the defendant has arrived at those years of discretion and accountability prescribed by this Code for criminal offenses," as declared by Civ. Code 1895, § 3904, obviate the necessity for the usual service on minors. As stated in *Maryland Casualty Co. v. Lanham*, supra, on page 860 of 124 Ga., page 396 of 53 S. E.: "This rule refers to the liability of an infant for his torts, and not to the proper manner of bringing suit against him therefor. So, likewise, the rule that the exemption of an infant generally from liability on his contracts is a personal privilege (Civ. Code 1895, § 3649) does not affect the proper method of suing and serving an infant." The court committed error in refusing to sustain the plea in abatement.

2. It appears from one ground of the amendment to the motion for a new trial that a witness for the plaintiff, on direct examination, gave an estimate of the damages resulting from the alleged trespass, and immediately thereafter, on cross-examination, he said that it was impossible for him "to make any proper calculation on the market value before and after it [the timber] was cut," and that "the calculation was just my own judgment." We think the court should have sustained the motion of defendants to rule out this testimony. The opinion of a witness as to the value he places on property might be entirely different from his opinion as to its market value. Where a trespass is committed, resulting in the destruction of growing timber, the measure of damages is the difference between the market value of the tract of land before the trespass and after such trespass. Where such timber is destroyed, and by reason thereof there is a depreciation in the market value of the land, the measure of damages is "the value of the timber destroyed in its then state as attached to the land on which it grew." *Western & Atlantic R. Co. v. Tate*, 129 Ga. 526, 59 S. E. 266. See, also, *Central R. & B. Co. v. Murray*, 93 Ga. 256, 20 S. E. 129, where it was held: "Timber injured by the fire, but not destroyed, is to be dealt with on the same basis, to the extent of the difference between its value as it was before the fire and as the fire left it."

There were other assignments of error re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing in the amendment to the motion 24 special assignments of error. The view that this court takes of the merits of this case makes immaterial any of the errors specially complained of in the motion for a new trial, and we will consider only the grounds of demurrer which we deem meritorious, and will decide the case on the uncontroverted facts as they appear in the brief of evidence.

1, 2. The evidence, briefly stated, shows the following case: Plaintiff was the owner and was in possession of the mule in controversy, which he had bought from Henry Paul English, in Early county, this state, on September 2, 1907, paying therefor \$150, and had placed the mule in his stable. English had previously bought this mule in Early county from one C. C. White, who had the mule in his possession at the time of the sale. On February 6, 1908, the agent or agents of the defendants, at night, entered the lot and stable of the plaintiff, tore down his lot fence, and seized and carried away his mule to the state of Alabama. After discovering the loss of the mule, the plaintiff traced it to Columbia, Ala., and located it in the possession of the defendants, in their stable. The defendants attempted to justify their seizure of the mule on the ground that they held a mortgage to the mule, executed by its then owner, C. C. White, to whom they had sold the mule in Alabama, the mortgage being for the balance of the purchase money, and claimed that under the law of the state of Alabama they held an absolute title to the mule, under this mortgage, which was properly recorded in Alabama. They also set up that they held the mule in controversy under a valid claim of right and title, namely, that on or about February 6, 1908, said property was in the lawful custody of J. R. Baker, deputy sheriff of Houston county, Ala., said Baker having taken possession of the same for and in behalf of the plaintiff, they subsequently having recovered possession of the property from Baker under an action of detinue, brought in the circuit court of Houston county, Ala.; a certified copy of the detinue proceedings and the judgment thereon being attached as an exhibit to this special plea. A certified copy of the mortgage from C. C. White to the defendants was also attached as an exhibit to the plea. The evidence further shows that the mule had been delivered into the possession of J. R. Baker, deputy sheriff of Houston county, Ala., by the agents of the defendants after they had seized it in Georgia, and had taken it from the stable of the plaintiff, and carried it into the state of Alabama. These facts, which are not controverted, in our opinion, demanded a verdict for the plaintiff for the value of the mule when wrongfully seized and taken from the possession of the plaintiff by the agent or agents of the defendants.

The voluminous assignments of error merely tend to obscure the simplicity of the real

issue in this case; and if the ingenuity of learned counsel has discovered any error of law committed by the court in the trial, such error, in view of the facts, is immaterial and in no wise tends to invalidate the verdict on the essential facts and the law applicable thereto. The defense made was wholly insufficient to justify the unlawful, forcible, and wrongful seizure of the mule by the agents of the defendants while in the possession of the plaintiff. This seizure, under the facts and the law, simply amounts to trespass to personality. Conceding that the defendants held a mortgage on the mule executed by one C. C. White, who at the date of the mortgage was the owner thereof, and that under the law of Alabama this mortgage placed in them the legal title to the mule, yet, after this mortgage was executed in Alabama, the mule was brought into the state of Georgia and here sold to English, who subsequently sold it to the plaintiff. There is no pretense that this mortgage was recorded in the county of Early, to which the mule was brought by White, and where the plaintiff bought it. "A mortgage executed in another state on personality and subsequently brought into this state, but not recorded in the county where the property is brought within the six months provided by Civ. Code 1895, § 2726, is postponed to a purchase of the same property made in good faith and without notice of the mortgage." *Armitage-Herschell Co. v. Muscogee Real Estate Co.*, 119 Ga. 552, 46 S. E. 634. It is not pretended that the plaintiff, when he purchased the mule, had any notice whatever of the mortgage held by the defendants, or that his purchase was not made in absolute good faith. His title to the mule was therefore good, under the law of this state, as against any title which defendants had to the mule under the law of Alabama. The defendants not having recorded their mortgage within the six months as provided by our statute section, supra, and the plaintiff having bought the mule in good faith in the state of Georgia from one who had possession of it and who claimed title thereto, must be protected as an innocent purchaser without notice.

Of course, the proceedings in detinue, instituted in Alabama, after the mule had been wrongfully taken from the possession of the plaintiff in Georgia, and taken by their agent to the state of Alabama, and there delivered to the deputy sheriff, and any judgment rendered by the court in such proceedings in favor of the defendants, could not affect the right of the plaintiff in this case, as he was not a party to such proceedings. These proceedings seem merely to have been instituted for the purpose of giving some legal coloring to the wholly illegal and wrongful possession of the mule by the defendants. We conclude by stating that we are clear that the plaintiff was entitled to a verdict for \$200, which was the proven value of the

mule when wrongfully seized and taken out of his possession by the defendants through their agents.

3. It is also earnestly insisted by learned counsel that the wrongful conduct complained of was not that of the firm of Grant & Malone, but only the wrongful conduct of a member of the firm, and that the partnership is not responsible for this tort of a member of the firm; and in support of this position they cite section 2658 of the Civil Code of 1895. We do not think this section applicable to the facts of this case. Here the undisputed evidence is that the mule was seized and wrongfully taken from the possession of the plaintiff by the agent of the partnership, and under the terms of the section of the Code just cited a partnership is responsible for torts of its agents or servants under like rules as individuals. Here the defendants as a firm claimed title to the mule under their mortgage. The mule, after having been seized by the agents of the firm, was by those agents delivered into the possession of the firm, and was found in the stable of the firm by the plaintiff. In other words, everything that was done in reference to the mule in question and the trespass to the personal property of the plaintiff, under the evidence, was committed in furtherance of the firm's interest, and under the direct authority of its members, and the case on the facts falls squarely within the terms of the decisions of the Supreme Court of this state in the cases of *Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144, *Martin v. Simpkins Co.*, 116 Ga. 256, 42 S. E. 483, and *Hendricks v. Middlebrooks*, 118 Ga. 136, 44 S. E. 835.

4. It is insisted by counsel for plaintiffs in error that this suit, under the allegations of the petition, was in assumpsit, and that as there was no allegation that the mule had been sold or otherwise disposed of by the defendants, the plaintiff could not recover the value of the mule as for money had and received to his use; that to entitle him to recover the value of the mule he would be required to institute a suit in tort. We do not agree with this view. In our opinion the suit, both in form and in substance, is one sounding in tort, and is not an action ex contractu. Strictly speaking, the allegations make it an action for trespass to personal property other than the statutory remedy of trover. Civ. Code 1895, § 3885. See opinion on rehearing in *Southern Express Co. v. Pope*, 5 Ga. App. —, 63 S. E. 809.

5. We think, however, that the special demurrers directed to paragraphs 8, 9, and 10 of the petition should have been sustained by the court. The allegations of these paragraphs are not sufficient upon which to base a recovery for the items of damages therein

set out, to wit, lost time and expenses incurred in going to Blakely and Columbia and attorney's fees in bringing this suit. It is not necessary now to decide whether under any allegations these items would be recoverable under the law, but we are certain that the allegations as made are insufficient for the purpose.

We therefore hold that the judgment refusing a new trial in this case will be reversed, unless the plaintiff will write off from his verdict and judgment, within 10 days from the date of the filing of the remittitur, the amount of the verdict and judgment embracing these items of cost, expenses, and attorney's fees, and reduce the amount of the verdict and judgment in his favor to \$200, the proven value of the mule when taken from his possession on February 6, 1908, with interest on this amount at 7 per cent. per annum from that date. If these amounts are written off in pursuance of this judgment, then the judgment refusing a new trial will stand affirmed.

Judgment affirmed, with direction.

(6 Ga. App. 241)

HARVEY et al. v. STATE. (No. 1,826.)

(Court of Appeals of Georgia. May 18, 1909.)

TRESPASS (§ 76*)—CRIMINAL TRESPASS—INTENT—NEGLIGENCE.

Where the undisputed evidence clearly shows that in the commission of an alleged criminal act there did not exist either criminal intent or criminal negligence a conviction was unauthorized.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 76.*]

Powell, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Sylvester; J. B. Williamson, Judge.

Will Harvey and others were convicted of criminal trespass, and bring error. Reversed.

Claude Payton, for plaintiffs in error. J. H. Tipton, Sol., for the State.

HILL, C. J. The plaintiffs in error were convicted of criminal trespass, and their motion for a new trial was overruled. The evidence, briefly stated, is as follows: The plaintiffs in error are two negro boys, who were employed by a contractor to haul sand to be used in his work of erecting buildings. They had on previous occasions hauled sand from the land of the prosecutor without any objection from him. On the occasion for which they were indicted for committing a trespass, they hauled about 30 loads of sand from uninclosed land which was in the possession of the prosecutor. On their way with their wagons to get the sand, they met the son of the prosecutor, told him their purpose, and asked permission from him to

bond in attachment is made payable to the Atlantic Coast Line R. R. Co. The attachment is against the Atlantic Coast Line R. R. Co. The levy is made of the attachment on the property (as stated in the levy) of the Atlantic Coast Line Railway Co. The replevin bond is made by the Atlantic Coast Line Railroad Company. The declaration in attachment is brought against the Atlantic Coast Line Railroad or Railway Company. The verdict is written on the attachment. The judgment is against the Atlantic Coast Line Railway Company, as principal, and J. J. Parramore, as security. The execution is against the Atlantic Coast Line Railway Company, principal, and J. J. Parramore, security." The third ground of the affidavit of illegality is as follows: "Because the declaration is against the Atlantic Coast Line Railroad or Railway Company, the verdict is not certain, the judgment is against the Atlantic Coast Line Railway Company, the execution is against the Atlantic Coast Line Railway Company, and no legal verdict or judgment could be rendered or entered against this deponent, as security for any principal except the Atlantic Coast Line Railroad Company."

We do not think that the use of the word "Railway" in one place and "Railroad" in another, in referring to the corporation, was a substantial and material change in its name, in view of the fact that there was no allegation or proof that there was a corporation by the name of the Atlantic Coast Line Railroad Company and another by the name of the Atlantic Coast Line Railway Company. It nowhere appears in the affidavit of illegality, nor in the proof upon the hearing before the judge who heard the case without a jury, that there were two separate and distinct corporations. If a bond is given in an attachment proceeding, a judgment in such proceeding on such bond is not binding on the surety if it is against a principal who is a different person from the principal named in the bond. But it is not made to appear that such is the case here. On the contrary, the absence of any showing that the principal in the bond and the principal in the judgment were different corporations, the slight variation in the name as above set forth, will raise no presumption that they are different corporations. The bond was given by the Atlantic Coast Line "Railroad" Company, as principal, because of the levy of the attachment on property which the entry of levy states was the property of the Atlantic Coast Line "Railway" Company. This would seem to be an admission that the Atlantic Coast Line Railroad Company and the Atlantic Coast Line Railway Company were one and the same corporation.

In the case of *Davis v. State*, 105 Ga. 808, 32 S. E. 158, it was held: "Where, on the trial of an indictment for burglary which charged the accused with breaking and entering the depot of the 'Chattanooga Southern Railroad Company,' proof was made by

the state that the depot of the company named was burglariously entered as charged, testimony offered in behalf of the defendant to the effect that the corporate name of the owner of the depot was 'Chattanooga Southern Railway Company,' even if admitted, would not establish a material variance between the allegations in the indictment and the proof." On pages 810, 811, of 105 Ga., and page 159 of 32 S. E., it was said by Mr. Justice Lewis, in delivering the opinion: "Even if the proof had shown that the name of the corporation owning the depot was improperly stated by its being called a 'railroad' instead of a 'railway' company, we do not think such a slight variance between the allegation and proof would have been fatal. * * * The words 'railway' and 'railroad' have identically the same meaning, and we think the identification of the owner of the depot in this case was sufficiently clear from the description in the indictment, notwithstanding there may have been a slight error made in the use of a wrong word, identical in meaning and similar in sound to the particular term used in the charter." In this connection, see *Palatine Ins. Co. v. Dickenson*, 116 Ga. 794, 43 S. E. 52; *Maddox v. Central of Ga. Ry. Co.*, 110 Ga. 301, 34 S. E. 1038; *Commissioners v. Aiken Canning Co.*, 123 Ga. 647, 51 S. E. 585; *Rhodes v. City of Louisville*, 121 Ga. 553, 49 S. E. 681; *Shaver v. McLendon*, 26 Ga. 228; *Thompson v. Hall*, 67 Ga. 627; *Johnson v. Central Railroad*, 74 Ga. 397; *Richardson, Ex'r, v. Allen*, 74 Ga. 719, 722; *Chattanooga, etc., R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109; *Rome Railroad Co. v. Sullivan*, 14 Ga. 277; *Steers Co. v. Morgan*, 66 Ga. 552; *Hicks v. Riley*, 83 Ga. 332, 9 S. E. 771; *Timberlake v. State*, 100 Ga. 66, 27 S. E. 158; *Banks v. Lee*, 73 Ga. 25; *Roberson v. Downing Co.*, 120 Ga. 833, 48 S. E. 429, 102 Am. St. Rep. 128; 1 *Thomp. Corp.* § 291; 3 *Thomp. Corp.* § 3729; 6 *Thomp. Corp.* § 7608; 7 *A. & E. Enc. Law*, 689.

In *Hicks v. Riley*, 83 Ga. 332, 9 S. E. 771, it was ruled: "The law does not regard the middle name or initial of a person as material, unless it be shown that there are two persons of the same first name and surname. Hence, where the declaration was in the name of George S. Riley, and the verdict was for George S. Riley, but the judgment was in the name of George R. Riley, the difference between the verdict and execution and the judgment was immaterial. And the passage of an order amending the judgment from George R. to George S. was an immaterial amendment, and did not vitiate the levy." In this connection, see *Timberlake v. State*, 100 Ga. 66, 27 S. E. 158; *Banks v. Lee*, 73 Ga. 25; *Roberson v. Downing Co.*, 120 Ga. 833, 48 S. E. 429, 102 Am. St. 128.

The variance in the two names was slight and in words having practically the same meaning and frequently used interchangeably. The difference between the names of the "At-

Atlantic Coast Line Railroad Company" and the "Atlantic Coast Line Railway Company" is not a variance in substance. The names do not of themselves indicate that they are of different corporations, and, if it is not made to appear that there are two distinct corporations respectively bearing these different names, the conclusion must follow that the names given were of one and the same corporation.

We do not think there was any merit in either of the grounds of illegality above set forth, and the court was right in its judgment dismissing the affidavit of illegality.

Judgment affirmed.

(6 Ga. App. 120)

YANCEY v. WARNER ELEVATOR MFG. CO.

WARNER ELEVATOR MFG. CO. v. YANCEY.

(Nos. 1,890, 1,411.)

(Court of Appeals of Georgia. May 4, 1909.)

SALES (§ 347*)—FAILURE OF CONSIDERATION.

No error of law is complained of, except that the court erred in directing a verdict for the plaintiff, and the evidence demanded the verdict as directed.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 347.*]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by the Warner Elevator Manufacturing Company against Hamilton Yancey. Judgment for plaintiff, and defendant brings error, while plaintiff assigns cross-error. Cross-bill dismissed. Judgment affirmed.

Denny & Harris, for plaintiff. J. Branham and Jno. W. & G. E. Maddox, for defendant.

HILL, C. J. The Warner Elevator Manufacturing Company sued Hamilton Yancey for the price of an elevator which it had contracted to install and did install in the defendant's storehouse in Rome, Ga. A verdict was directed for the plaintiff, and the defendant's motion for a new trial, based on the general grounds and on error to the direction of the verdict, was overruled.

The contract for the elevator provided that the plaintiff was to erect in the defendant's building in Rome, "in a complete, workmanlike, and substantial manner," one of its "latest improved, direct acting, hydraulic passenger elevators," and the contract described specifically the constituent parts of the elevator, its size, finish, and material, and expressly warranted in every respect the elevator as described. The defendant filed a plea setting up a total failure of consideration, in that the plaintiff had failed to comply with its contract to install in his

building, in a complete, workmanlike, and substantial manner, the elevator described in the contract. He avers that the elevator described in the contract was a passenger elevator, but that the elevator put in by the plaintiff, under the most favorable circumstances, with the water pressure called for by the contract, required 17 seconds to ascend from the first to the second floor of the building, a distance of 14 feet and 3 inches, and that a passenger elevator, such as described in the contract, would reasonably ascend the distance named in not exceeding 5 seconds of time, and that in this respect the elevator installed by the plaintiff failed to meet the description of the passenger elevator which the plaintiff expressly warranted in the contract to furnish to defendant. He sets up other defects in the elevator which he claims constituted breaches of the express warranty of the contract. These defects are shown by the evidence to have been immaterial, not in any manner affecting the speed of the elevator, and, in fact, are shown to have been remedied by the plaintiff.

The entire defense is embraced in the averment made by the defendant that the plaintiff was to install a certain described passenger elevator, when in fact it did not install a passenger elevator such as was described in the contract, but, instead, an elevator which was entirely worthless for passenger service, because of insufficient speed. It is admitted that the contract was one of express warranty, specifically designating "one of our latest improved, direct acting, hydraulic passenger elevators," which, as to "capacity and travel," expressly warranted that the "platform will travel from first to second [story], a distance of about 14 feet and 3 inches, and lift a load of 1,200 pounds, exclusive of platform, with a water pressure of 80 pounds to the square inch at the operating valve." The contract further provided that the owner of the building was to supply the necessary water pressure for the operation of the elevator. There is nothing in the contract on the subject of speed. It being conceded that the contract is one of express warranty, any implied warranty as to rate of speed must be excluded.

It is claimed, however, by the defendant, that a passenger elevator, such as described in the contract, under the water pressure described, would ascend from the first to the second floor, a distance described, in about 5 seconds. Conceding this to be as claimed by the defendant, the burden would be on him to show that this elevator, with a water pressure of 80 pounds to the square inch at the operating valve, would not make the speed required for a passenger elevator. Now, the speed of an hydraulic elevator obviously depends upon the amount of the water pressure at the operating valve, and the defendant was to supply this water pressure.

His own evidence conclusively shows that he never did supply a sufficient quantity of water to produce a pressure of 80 pounds to the square inch at the operating valve, but that the water pressure did not at any time exceed the amount of 46 pounds to the square inch at the operating valve. It was admitted that, even with this amount of pressure, the elevator would ascend from the first floor to the second with any load placed on it, the amount of the load making no difference in the speed with which it would ascend, but that under this pressure it had not obtained a greater rate of speed than 10 seconds from the first to the second floor.

The conclusion is inevitable that the failure of the elevator on the question of speed was due, not to any defect in the elevator itself, but solely to insufficient water pressure, and that this insufficiency of water pressure was due entirely to the failure of the defendant to supply the amount of pressure designated by the contract. It would be as reasonable to claim that an engine was defective because it did not run, when no water was in the boiler to generate the steam, as to claim that a hydraulic elevator was defective because it did not have speed when there was no water pressure sufficient in volume to make speed. The contract showed, and the evidence is without conflict on this point, that the defendant, and not the plaintiff, was to furnish the water with which to make the speed, and it is obvious that every pound of water pressure would add to the speed of the elevator; and if, in the present case, a pressure of 46 pounds made this elevator rise from the first to the second floor in 17 seconds, with a pressure increased to 80 pounds, which is the amount designated in the contract, the rate of speed at which it would ascend would be proportionately increased, and this matter was wholly under the control of the defendant.

We think that the evidence in this case conclusively shows that the plaintiff complied with its contract in every respect, that it did install for the defendant the passenger elevator specifically described in the contract, that the defects alleged in the plea were immaterial variations, which did not affect the value of the elevator, and that the failure of the elevator to make the rate of speed desired by the defendant, and claimed by him to be the usual and customary speed of passenger elevators, was not caused by any defects in the elevator itself, but was due entirely to the failure of the defendant to supply the requisite water pressure which the contract made it his duty to supply.

The undisputed evidence shows that the elevator was accepted by the defendant, and after installation was used by his tenant from four to five months in the regular

business of conducting passengers and freight from the first to the second floor of the storehouse, and that the only complaint in connection with the elevator was its lack of speed, when only a water pressure nearly one-half less than that required by the contract was supplied by the defendant. Certainly it cannot be said, under this evidence, that a plea of total failure of consideration was sustained; and, while the plea of total failure of consideration includes any partial failure of consideration, there is no evidence of any reduction in the value of the elevator on account of the defects claimed. The evidence, in our judgment, demanded the verdict for the plaintiff which was directed by the court.

Judgment affirmed. Cross-bill dismissed.

(6 Ga. App. 114)

PENDLEY BRICK CO. v. HARDWICK & CO. (No. 1,328.)

(Court of Appeals of Georgia. May 4, 1909.)

1. FIXTURES (§§ 1, 35*)—PURPOSE OR USE FOR WHICH ANNEXATION IS MADE—QUESTIONS FOR JURY.

"Whether an article of personalty connected with or attached to realty becomes a part of the realty, and therefore such a fixture that it cannot be removed therefrom, depends upon the circumstances under which the article was placed upon the realty, the uses to which it is adapted, and the parties who are at issue as to whether such an article is realty or detachable personalty." *Wolff v. Sampson*, 123 Ga. 402, 51 S. E. 335. Where it is doubtful, under all the circumstances, whether the article in question is personalty or is a fixture, the doubt is to be solved by the jury. *Smith v. Odum*, 63 Ga. 503; *Harrell v. Americus Refrigerating Co.*, 92 Ga. 443, 17 S. E. 623.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 1-6, 76; Dec. Dig. §§ 1, 35.*]

2. CHARGE NOT ERRONEOUS.

The charge of the court, when viewed as a whole, was free from error, and certainly so as against the plaintiffs in error.

3. DAMAGES FOR DELAY.

The jury was authorized to find that the claim was filed for delay only. This court emphasizes its approval of the verdict in this respect by assessing, as damages for bringing the case to this court for further delay, 10 per cent. upon the amount found by the jury. *Clark v. Fee*, 86 Ga. 9, 12 S. E. 181.

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Action between the Pendley Brick Company and Hardwick & Co. From the judgment, the brick company brings error. Affirmed, with damages.

W. C. Martin and C. N. King, for plaintiff in error. W. E. Mann and F. K. McCutchen, for defendant in error.

POWELL, J. Judgment affirmed with damages.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(6 Ga. App. 123)

ATLANTIC COAST LINE R. CO. v. COOK.
(No. 1,434.)

(Court of Appeals of Georgia. May 4, 1909.)

1. PARTIES (§ 95*)—ADDING NEW PARTY.

An amendment to a petition filed against the "Atlantic Coast Line, owning and operating a railroad under the laws of Georgia," by adding the words "Railroad Company" after the word "Line" and before the word "owning," so as to make the name of the defendant the "Atlantic Coast Line Railroad Company," and thus giving its proper corporate name, was not adding a new party, but simply correcting a misnomer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160-166; Dec. Dig. § 95.*]

2. NO ERROR—SUFFICIENCY OF EVIDENCE.

The assignments of error are entirely without merit, and the verdict is supported by the evidence.

(Syllabus by the Court.)

3. RAILROADS (§ 439*)—KILLING STOCK—PETITION.

A petition alleging that defendant railroad negligently struck and killed a cow, which was at the time in such a position on the track as to be visible to the engineer for at least a half mile, and that it was in the daytime, is not subject to special demurrer on the ground that no specific act of negligence is charged, but only negligence in general terms.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1551-1559; Dec. Dig. § 439.*]

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by W. J. Cook against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet & Branch and Hendricks & Christian, for plaintiff in error. Bule & Knight, for defendant in error.

HILL, C. J. Cook brought suit in the county court to recover the value of a Jersey cow which he alleged was killed by the "Atlantic Coast Line, owning and operating a railroad under the laws of the state of Georgia, a corporation having an office and agent in said county." Process was directed to the defendant as the "Atlantic Coast Line Railway Company," and was served upon the defendant, the "Atlantic Coast Line Railroad Company," by serving its agent, F. B. Harris, in said county personally with a copy of the writ. The defendant, at the appearance term, in the name of the "Atlantic Coast Line Railroad Company," through its attorneys, filed a special demurrer to the suit, and also in the same name filed an answer of the general issue. After hearing the evidence, the court rendered a judgment for the sum of \$50 against the "Atlantic Coast Line Railroad Company," and the defendant, in the name of the "Atlantic Coast Line Railway Company," entered an appeal from this judgment to the superior court. When the appeal case was called in the superior court, the plaintiff asked leave to amend his

declaration as follows: "By adding the words 'Railroad Company' between the word 'Line' and 'owning' in the first line of the first paragraph of the petition, and in all other places where the words 'Atlantic Coast Line' appear, so that the petition as amended should read the 'Atlantic Coast Line Railroad Company, owning and operating a railroad under the laws of the state of Georgia,' etc. This amendment was objected to by the defendant, but was allowed by the court. The case then proceeded to trial, and a verdict was returned against the defendant in favor of the plaintiff for \$50. The defendant filed a motion for new trial on the general grounds, and on eight special grounds, which was overruled, and it excepted. Exceptions pendente lite were filed to the judgment overruling the demurrer, and to the allowance of the amendment.

1. The second and third grounds of special demurrer, that the petition was "defective in that it failed to allege what train or locomotive of the defendant company killed the plaintiff's cow, or in what direction the train or locomotive was moving when the plaintiff's cow was killed," if at all meritorious, were fully cured by appropriate amendment. The first ground of the demurrer, that no specific act of negligence was charged in the petition and that only negligence in general terms was charged, is not sustained by an inspection of the petition, it being distinctly alleged in the petition that the defendant "negligently and carelessly struck and killed the cow," because at the time she was killed "she was in such position on the railroad track as to be visible to the engineer at least one-half mile before the train reached her," and that it was in the daytime when the cow was killed. We think this is a sufficient allegation of negligence.

2. There was no error in allowing the plaintiff to amend his petition by adding to the words "the Atlantic Coast Line" the words "Railroad Company," so as to give the defendant its proper corporate name. This was not adding a new party, but only correcting a misnomer. This the plaintiff had the right to do, under section 5102 of the Civil Code of 1895 and under repeated rulings of the Supreme Court. See the following cases, exactly in point: *Johnson v. Central Railroad*, 74 Ga. 397; *Chattanooga, Rome & Columbus Railroad Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109, where a declaration against the Chattanooga, Rome & Carrollton Railroad Company was amended by substituting "Columbus" for "Carrollton," so as to give the defendant its proper corporate name. See, also, *Parish v. Davis*, 126 Ga. 840, 55 S. E. 1032; *Perkins Co. v. Shewmake*, 119 Ga. 617, 46 S. E. 832; *Coombs v. Lowe, R. M. Charit*, 395. While the plaintiff in the original petition sued the "Atlantic Coast Line," he alleged that the defendant

was a corporation operating a railroad under the laws of Georgia, with an office and place of business in Berrien county. He probably called the defendant by its popular name. This court will judicially know that the corporate name of the railroad in question is the "Atlantic Coast Line Railroad Company." It cannot be doubted, from an inspection of all the pleadings in this case, that this was the corporation which the plaintiff sued for negligence in killing his cow. Process was directed to the Atlantic Coast Line Railway Company, and was served on the Atlantic Coast Line Railroad Company. The defendant, as served, appeared by counsel and in its corporate name demurred to the petition, and in its corporate name filed an answer of the general issue. It would seem that the attorneys for the defendant fully recognized the fact that the true defendant had been sued and served, and that the amendment which was allowed by the court was simply correcting an obvious misnomer in its corporate name. Indeed, we think that the words "Atlantic Coast Line, owning and operating a railroad under the laws of the state of Georgia," is equivalent to saying the "Atlantic Coast Line Railroad Company."

3. There is no merit whatever in any of the grounds contained in the motion for a new trial, general or special, and the verdict is fully supported by the evidence.

Judgment affirmed.

(6 Ga. App. 123)

HORN v. MOUND CITY PAINT & COLOR CO. (No. 1,466.)

(Court of Appeals of Georgia. May 4, 1909.)

1. COURTS (§ 189*)—MUNICIPAL COURTS—ANSWER—RIGHT TO FILE AFTER DEFAULT.

Under section 36 of the act creating the city court of Bainbridge (Acts 1900, p. 112), the judge has the discretion, in a proper case, to open a default and allow a plea filed. But this default must be opened before final judgment, or, if a final judgment has been rendered in the case, this final judgment must be vacated. *Bass v. Doughty* (Ga. App.) 63 S. E. 516.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

2. JUDGMENT (§ 173*)—VACATION—ORDER—NECESSITY.

Where judgment was duly entered by default, and subsequently, during the same term, there was a docket entry as follows: "Default opened on motion June term, 1908"—but no order was taken vacating the judgment rendered on the default, this docket entry was not sufficient for that purpose. *Dixon v. Minnesota Lumber Co.* (Supreme Court of Georgia) 64 S. E. 71.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 173.*]

3. JUDGMENT (§ 126*)—DEFAULT—NECESSITY OF PROOF.

In a suit on account, where the defendant is in default, the plaintiff is not required to make out his case by proof. Civ. Code 1895, §

5078; *Norman v. Great Western Tailoring Co.*, 121 Ga. 813, 49 S. E. 782 (4).

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 126.*]

(Syllabus by the Court.)

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action between W. R. Horn and the Mound City Paint & Color Company. From the judgment, Horn brings error. Affirmed.

Donalson & Donalson, for plaintiff in error. Ricketson & Hale, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 114)

MALONE & GRANT CO. v. HAMMOND.

(No. 1,339.)

(Court of Appeals of Georgia. May 4, 1909.)

1. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR—DECISION CORRECT ON MERITS.

The evidence demanded a verdict for the value of the personal property which had been wrongfully taken from the possession of the plaintiff by the agents of the defendants; and, if any errors of law were committed by the trial court, they were for this reason immaterial and harmless. A righteous verdict under the facts should not be set aside because of trivial errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1023.*]

2. CHATTEL MORTGAGES (§ 153*)—PRIORITIES—MORTGAGE EXECUTED IN ANOTHER STATE—FAILURE TO RECORD.

"A mortgage executed in another state on personalty subsequently brought into this state, but not recorded in the county where the property is brought, within the six months provided by Civ. Code 1895, § 2726, is postponed to a purchase of the same property made in good faith and without notice" of the mortgage; and this is true, although the purchase was made before the expiration of the six months allowed by the statute for the record of the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 255-268; Dec. Dig. § 153.*]

3. PARTNERSHIP (§ 174*)—LIABILITY FOR TORTS—TRESPASS.

A partnership is liable as such in a suit to recover damages for a trespass to personalty, where the trespass was committed by the agent of the partnership in behalf of the partnership and by authority of its members, or where the trespass by the agent was expressly or by implication ratified by the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 306; Dec. Dig. § 174.*]

4. ACTION (§ 27*)—CONTRACT OR TORT—PETITION—CONSTRUCTION.

The suit in this case, under the allegations of the petition, is one to recover damages for trespass to personal property, and in form and substance is an action ex delicto, and not ex contractu.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.*]

5. TRESPASS (§ 40*)—TRESPASS TO PERSONALTY—PETITION—SUFFICIENCY.

The special demurrer to the paragraphs of the petition claiming damages for lost time, expenses, and attorney's fees should have been

sustained. The judgment refusing a new trial is affirmed, on condition that the plaintiff write off from the verdict and judgment these items of alleged damages; otherwise, the judgment is reversed and a new trial ordered.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 86-88; Dec. Dig. § 40.*]

(Syllabus by the Court.)

Error from City Court of Blakely; W. A. Jordan, Judge.

Attachment by C. Hammond against the Malone & Grant Company. Judgment for plaintiff, and defendant brings error. Affirmed, with direction.

Lee & Thompson and Pottle & Glessner, for plaintiff in error. Park & Collins, for defendant in error.

HILL, O. J. Hammond sued out an attachment against the Malone & Grant Company, a partnership composed of George Malone and A. G. Grant, residents of the state of Alabama. The attachment was levied by summons of garnishment on D. S. Sheffield. The declaration in attachment makes in substance the following case: On September 2, 1907, the petitioner purchased from Henry Paul English one bay horse mule named "Ed," the reasonable value of which on said date, and on February 6, 1908, was \$200. On February 6, 1908, this mule was "in the legal, lawful, rightful, and proper possession of the petitioner," and on that date the Malone & Grant Company, "without any authority whatsoever of law," and while petitioner was asleep at his home, sent an agent (whose name is unknown) to the petitioner's premises, who tore down petitioner's lot fence and seized and carried away the mule to Columbia, in the state of Alabama. Petitioner charges that by these acts of the defendants, through their agent, he was "illegally, unjustly, and wrongfully deprived of the possession of his mule," and that therefore the defendants have become indebted to him in the sum of \$200. Petitioner further charges defendants with having damaged him in the sum of \$15, "in causing him to lose his time while it was necessary for him to be cultivating his crop; said time being three days and being worth \$5 per day." The defendants "further endangered petitioner as aforesaid by forcing him to make three trips to Blakely, at an expense of \$1.50 each trip, and one trip to Columbia, Ala., at an expense of \$3," and that "by reason of the aforesaid wrongful acts of defendants he has been injured and damaged in the further sum of \$50 for attorney's fees incurred in the bringing of this suit." This aggregate indebtedness of \$300 the defendants have never paid, and refuse to pay, and petitioner prays for a judgment against the defendants, the Malone & Grant Company, on the attachment, and against the garnishee, in the sum of \$300, the summons of garnishment never having been answered,

and also a general judgment against the defendants, the Malone & Grant Company, for this sum.

The Malone & Grant Company appeared, filed a demurrer, and made answer to the suit. The demurrer was general and special, and the petition was amended to meet the special demurrer in certain respects. The grounds of special demurrer point out certain alleged defects in the petition as to which no amendments were offered; these defects being as follows: (1) From the second to the seventh paragraph of the declaration, both inclusive, the facts alleged do not support the plaintiff's claim that the defendants are indebted to him in the sum of \$300, or \$200, or in any other amount, and show that the plaintiff is not entitled to maintain any action of assumpsit; that his remedy, if any, is an action ex delicto, and not ex contractu. (2) The plaintiff does not state, in the eighth paragraph of his declaration, "when, how, or in what manner the defendants caused him to lose his time, or why it was necessary for him to do so." No facts are alleged in support of the bare assertion that his time was worth \$1.50 per day, or that his lost time amounted to \$15. "Plaintiff's 'lost time' is not an element of damage recoverable in this suit, considered as an action ex delicto, nor do the facts alleged support any implied promise made by the defendants to pay for his lost time in whole or in part." (3) The ninth paragraph of the petition is defective, in that it does not disclose "why, when, or in what manner, or for what purpose, the plaintiff was forced to make two trips to Blakely and one trip to Columbia, Ala.," nor is it stated when, how, or in what manner the expenses of these alleged trips were incurred, nor is there shown a necessity of incurring said expenses, or that the same were reasonable, or that the defendants are chargeable with any part of the same, and said expenses are not recoverable under the facts alleged in the declaration as a legitimate element of damages, nor is any implied promise on the part of these defendants to pay such expenses alleged. (4) The tenth paragraph of the declaration is specially demurred to because the facts therein alleged do not warrant a recovery in any amount for attorney's fees. The demurrer was renewed to the petition as amended, and was overruled by the court on each and every ground thereof, and the defendants filed exceptions pendente lite to this judgment.

The answer of the defendants denied that the plaintiff was entitled to the possession of the mule, and denied the wrongful acts and conduct alleged in the petition in reference to the seizure of the mule. On the trial of the case the jury returned a verdict for the plaintiff in the sum of \$279.65. The defendants filed a motion for a new trial, based upon the general grounds, and contain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing in the amendment to the motion 24 special assignments of error. The view that this court takes of the merits of this case makes immaterial any of the errors specially complained of in the motion for a new trial, and we will consider only the grounds of demurrer which we deem meritorious, and will decide the case on the uncontroverted facts as they appear in the brief of evidence.

1, 2. The evidence, briefly stated, shows the following case: Plaintiff was the owner and was in possession of the mule in controversy, which he had bought from Henry Paul English, in Early county, this state, on September 2, 1907, paying therefor \$150, and had placed the mule in his stable. English had previously bought this mule in Early county from one C. C. White, who had the mule in his possession at the time of the sale. On February 6, 1908, the agent or agents of the defendants, at night, entered the lot and stable of the plaintiff, tore down his lot fence, and seized and carried away his mule to the state of Alabama. After discovering the loss of the mule, the plaintiff traced it to Columbia, Ala., and located it in the possession of the defendants, in their stable. The defendants attempted to justify their seizure of the mule on the ground that they held a mortgage to the mule, executed by its then owner, C. C. White, to whom they had sold the mule in Alabama, the mortgage being for the balance of the purchase money, and claimed that under the law of the state of Alabama they held an absolute title to the mule, under this mortgage, which was properly recorded in Alabama. They also set up that they held the mule in controversy under a valid claim of right and title, namely, that on or about February 6, 1908, said property was in the lawful custody of J. R. Baker, deputy sheriff of Houston county, Ala., said Baker having taken possession of the same for and in behalf of the plaintiff, they subsequently having recovered possession of the property from Baker under an action of detinue, brought in the circuit court of Houston county, Ala.; a certified copy of the detinue proceedings and the judgment thereon being attached as an exhibit to this special plea. A certified copy of the mortgage from C. C. White to the defendants was also attached as an exhibit to the plea. The evidence further shows that the mule had been delivered into the possession of J. R. Baker, deputy sheriff of Houston county, Ala., by the agents of the defendants after they had seized it in Georgia, and had taken it from the stable of the plaintiff, and carried it into the state of Alabama. These facts, which are not controverted, in our opinion, demanded a verdict for the plaintiff for the value of the mule when wrongfully seized and taken from the possession of the plaintiff by the agent or agents of the defendants.

The voluminous assignments of error merely tend to obscure the simplicity of the real

issue in this case; and if the ingenuity of learned counsel has discovered any error of law committed by the court in the trial, such error, in view of the facts, is immaterial and in no wise tends to invalidate the verdict on the essential facts and the law applicable thereto. The defense made was wholly insufficient to justify the unlawful, forcible, and wrongful seizure of the mule by the agents of the defendants while in the possession of the plaintiff. This seizure, under the facts and the law, simply amounts to trespass to personality. Conceding that the defendants held a mortgage on the mule executed by one C. C. White, who at the date of the mortgage was the owner thereof, and that under the law of Alabama this mortgage placed in them the legal title to the mule, yet, after this mortgage was executed in Alabama, the mule was brought into the state of Georgia and here sold to English, who subsequently sold it to the plaintiff. There is no pretense that this mortgage was recorded in the county of Early, to which the mule was brought by White, and where the plaintiff bought it. "A mortgage executed in another state on personality and subsequently brought into this state, but not recorded in the county where the property is brought within the six months provided by Civ. Code 1895, § 2726, is postponed to a purchase of the same property made in good faith and without notice of the mortgage." *Armitage-Herschell Co. v. Muscogee Real Estate Co.*, 119 Ga. 552, 46 S. E. 634. It is not pretended that the plaintiff, when he purchased the mule, had any notice whatever of the mortgage held by the defendants, or that his purchase was not made in absolute good faith. His title to the mule was therefore good, under the law of this state, as against any title which defendants had to the mule under the law of Alabama. The defendants not having recorded their mortgage within the six months as provided by our statute section, supra, and the plaintiff having bought the mule in good faith in the state of Georgia from one who had possession of it and who claimed title thereto, must be protected as an innocent purchaser without notice.

Of course, the proceedings in detinue, instituted in Alabama, after the mule had been wrongfully taken from the possession of the plaintiff in Georgia, and taken by their agent to the state of Alabama, and there delivered to the deputy sheriff, and any judgment rendered by the court in such proceedings in favor of the defendants, could not affect the right of the plaintiff in this case, as he was not a party to such proceedings. These proceedings seem merely to have been instituted for the purpose of giving some legal coloring to the wholly illegal and wrongful possession of the mule by the defendants. We conclude by stating that we are clear that the plaintiff was entitled to a verdict for \$200, which was the proven value of the

mule when wrongfully seized and taken out of his possession by the defendants through their agents.

3. It is also earnestly insisted by learned counsel that the wrongful conduct complained of was not that of the firm of Grant & Malone, but only the wrongful conduct of a member of the firm, and that the partnership is not responsible for this tort of a member of the firm; and in support of this position they cite section 2658 of the Civil Code of 1895. We do not think this section applicable to the facts of this case. Here the undisputed evidence is that the mule was seized and wrongfully taken from the possession of the plaintiff by the agent of the partnership, and under the terms of the section of the Code just cited a partnership is responsible for torts of its agents or servants under like rules as individuals. Here the defendants as a firm claimed title to the mule under their mortgage. The mule, after having been seized by the agents of the firm, was by those agents delivered into the possession of the firm, and was found in the stable of the firm by the plaintiff. In other words, everything that was done in reference to the mule in question and the trespass to the personal property of the plaintiff, under the evidence, was committed in furtherance of the firm's interest, and under the direct authority of its members, and the case on the facts falls squarely within the terms of the decisions of the Supreme Court of this state in the cases of *Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144, *Martin v. Simpkins Co.*, 116 Ga. 256, 42 S. E. 483, and *Hendricks v. Middlebrooks*, 118 Ga. 136, 44 S. E. 835.

4. It is insisted by counsel for plaintiffs in error that this suit, under the allegations of the petition, was in assumpsit, and that as there was no allegation that the mule had been sold or otherwise disposed of by the defendants, the plaintiff could not recover the value of the mule as for money had and received to his use; that to entitle him to recover the value of the mule he would be required to institute a suit in tort. We do not agree with this view. In our opinion the suit, both in form and in substance, is one sounding in tort, and is not an action *ex contractu*. Strictly speaking, the allegations make it an action for trespass to personal property other than the statutory remedy of trover. Civ. Code 1895, § 3885. See opinion on rehearing in *Southern Express Co. v. Pope*, 5 Ga. App. —, 63 S. E. 809.

5. We think, however, that the special demurrers directed to paragraphs 8, 9, and 10 of the petition should have been sustained by the court. The allegations of these paragraphs are not sufficient upon which to base a recovery for the items of damages therein

set out, to wit, lost time and expenses incurred in going to Blakely and Columbia and attorney's fees in bringing this suit. It is not necessary now to decide whether under any allegations these items would be recoverable under the law, but we are certain that the allegations as made are insufficient for the purpose.

We therefore hold that the judgment refusing a new trial in this case will be reversed, unless the plaintiff will write off from his verdict and judgment, within 10 days from the date of the filing of the remittitur, the amount of the verdict and judgment embracing these items of cost, expenses, and attorney's fees, and reduce the amount of the verdict and judgment in his favor to \$200, the proven value of the mule when taken from his possession on February 6, 1908, with interest on this amount at 7 per cent. per annum from that date. If these amounts are written off in pursuance of this judgment, then the judgment refusing a new trial will stand affirmed.

Judgment affirmed, with direction.

(6 Ga. App. 241)

HARVEY et al. v. STATE. (No. 1,826.)
(Court of Appeals of Georgia. May 18, 1909.)
TRESPASS (§ 76*)—CRIMINAL TRESPASS—INTENT—NEGLIGENCE.

Where the undisputed evidence clearly shows that in the commission of an alleged criminal act there did not exist either criminal intent or criminal negligence a conviction was unauthorized.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 76.*]

Powell, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Sylvester; J. B. Williamson, Judge.

Will Harvey and others were convicted of criminal trespass, and bring error. Reversed.

Claude Payton, for plaintiffs in error. J. H. Tipton, Sol., for the State.

HILL, C. J. The plaintiffs in error were convicted of criminal trespass, and their motion for a new trial was overruled. The evidence, briefly stated, is as follows: The plaintiffs in error are two negro boys, who were employed by a contractor to haul sand to be used in his work of erecting buildings. They had on previous occasions hauled sand from the land of the prosecutor without any objection from him. On the occasion for which they were indicted for committing a trespass, they hauled about 30 loads of sand from uninclosed land which was in the possession of the prosecutor. On their way with their wagons to get the sand, they met the son of the prosecutor, told him their purpose, and asked permission from him to

get the sand from his father's land. This permission was given by the son. Thereupon the sand was hauled by the two negroes and delivered to their employer, and they were subsequently prosecuted for a criminal trespass in hauling this sand from the prosecutor's premises.

While it is not necessary that there should be in a case of trespass an animus furandi, yet in every criminal offense "there shall be a union or joint operation of act and intention, or criminal negligence." Pen. Code 1895, § 31. Under the facts of this case it seems perfectly clear that the defendants, in hauling the sand from the uninclosed land of the prosecutor, did not intend to commit the offense of trespass. While they did not have the consent of the prosecutor himself to haul the sand, yet the facts that they had previously gotten sand from this land without his objection, and that on the occasion in question they did have the consent of his son, would, in our opinion, be sufficient to cause them to assume that the prosecutor did not object. Especially would this seem to be the case where the hauling of the sand was in the daytime and without any surreptitious purpose or effort of concealment. Taking all the facts of the case, we think that the conviction was wholly unauthorized, and that a new trial should have been granted.

Judgment reversed.

POWELL, J. (dissenting). The exculpatory facts stated in the opinion appear only from the statements of the defendants. The jury had the right to disbelieve them entirely.

(6 Ga. App. 204)

DUDLEY v. DR. SHOOP FAMILY MEDICINE CO. (No. 1,650.)

(Court of Appeals of Georgia. May 18, 1909.)
AFFIRMANCE ON ERROR.

The evidence demanding the verdict, any consideration of the error of law assigned is immaterial.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Action between C. H. Dudley and the Dr. Shoop Family Medicine Company. From the judgment, Dudley brings error. Affirmed.

R. H. Lewis, for plaintiff in error. W. H. Burwell, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 211)

AUSTIN v. STATE. (No. 1,812.)

(Court of Appeals of Georgia. May 18, 1909.)

1. CRIMINAL LAW (§ 561*)—"TO A MORAL AND REASONABLE CERTAINTY"—"BEYOND A REASONABLE DOUBT."

The phrases "to a moral and reasonable certainty" and "beyond a reasonable doubt," as

applied to the quality of proof in a case, are identical in meaning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

For other definitions, see Words and Phrases, vol. 1, p. 770; vol. 5, pp. 4577-4578; vol. 8, p. 7724.]

2. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

The defendant was fairly tried and legally convicted, and none of the exceptions taken in the record are meritorious.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.*]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; Price Gilbert, Judge.

Carrie Austin was convicted of assault with intent to murder, and brings error. Affirmed.

Love & Fort and Wm. A. Little, for plaintiff in error. Geo. C. Palmer, for the State.

POWELL, J. Carrie Austin was convicted of assault with intent to murder, and to the overruling of her motion for a new trial brings error.

The judge, among other things, charged the jury as follows: "Mathematical certainty cannot be attained in legal investigations. All that the law requires is moral and reasonable certainty. Whenever you have arrived at that amount of mental conviction, you have then arrived at that stage where you believe that the defendant is guilty beyond a reasonable doubt." It should be stated in this connection that the judge also charged the jury that the evidence must be such as to show the defendant's guilt beyond a reasonable doubt before they would be authorized to convict her. Indeed, this general statement, that the proof must be such as to show the defendant's guilt beyond a reasonable doubt before accusation would be authorized appears in several places in the charge. The contention of the defendant's counsel is that there is a difference between proof of guilt to a moral and reasonable certainty and proof of guilt beyond a reasonable doubt. Neither in common parlance nor in legal vernacular is there any difference between the two expressions. The very definitions of the words show this. Certainty is the quality of being established beyond doubt. Reasonable certainty is, therefore, the quality of being established beyond a reasonable doubt. Moral certainty is defined by the Century Dictionary as "a probability sufficiently certain to justify action upon it; as, there is a moral certainty that the sun will rise tomorrow." Therefore reasonable and moral certainty may be said to be that degree of probability which exists with such strength as to justify human action upon it. Whatever exists to a moral and reasonable certainty of necessity exists beyond a reasonable doubt. The majority opinion of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Supreme Court in the case of *Bone v. State*, 102 Ga. 390, 30 S. E. 845, is in accord with what is ruled herein. See, also, *Warren v. State*, 123 Ga. 245, 51 S. E. 302; *Cole v. State*, 125 Ga. 277, 53 S. E. 958.

Another ground of the motion raises the point that the court erred in charging the jury as follows: "It is not necessary to define the words 'reasonable doubt,' because they define themselves. They are not the equivalents of any and all doubt. The doubt which serves to acquit should be a reasonable doubt, a doubt entertained by reasonable men thinking about the case in a reasonable way." The objection asserted against this charge is that it defines what a reasonable doubt "is not." An examination of the excerpt shows that it not only tells the jury what a reasonable doubt is not, but also what it is.

2. The other grounds of the motion object to the admission in evidence of certain physical facts and circumstances tending to corroborate the prosecutor's statement as to how the assault was made upon him. The objections are utterly without foundation or merit. Indeed we find from an examination of the record that the defendant was fairly tried and legally convicted.

Judgment affirmed.

(6 Ga. App. 250)

DEAN v. STATE. (No. 1,840.)

(Court of Appeals of Georgia. May 18, 1909.)

LARCENY (§ 55*)—EVIDENCE.

The evidence was sufficient to authorize the verdict of guilty, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 152, 164, 165, 167-169; Dec. Dig. § 55.*]

(Syllabus by the Court.)

Error from Superior Court, Miller County; W. O. Worrill, Judge.

Duncan Dean was convicted of larceny, and brings error. Affirmed.

W. I. Geer and W. D. Sheffield, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

RUSSELL, J. Two contentions are raised by the counsel for the plaintiff in error. He insists that the state failed to prove the venue and the identity of the steer alleged to have been stolen. The steer is described in the indictment as "one yellow-colored steer, with white spots on his body and a white spot in his forehead." It is true that all the witnesses except one swore that the steer that belonged to the prosecutor, which was afterwards found in the possession of Mr. Brinson, was a red steer, with white spots on his body and a white spot in his forehead. Even the prosecutor himself testified that he would not call the steer a yellow steer, but he denominated him as being of a dull red

color, though he further said that some people would call him a yellow-colored steer. The witness Powell, however, testified positively that he was a yellow steer, with a white spot in his forehead and white spots on his flanks; and this witness testified that he was with the prosecutor when the steer was found in Brinson's pasture. This testimony, when taken in connection with the statement of the prosecutor that some people might call the steer a yellow steer, was sufficient, if preferred by the jury, to fix the identity of the steer in question and establish it as the same steer described in the indictment; and when it is borne in mind that all the witnesses testified as to the white marks on the animal's side, and the spot in his forehead, the jury were authorized to find that the allegation of the indictment, descriptive of the animal stolen, was substantially proved.

The most that can be said as to the point that the venue was not shown is that the testimony of several of the witnesses upon that point is insufficient. But the testimony of Steve Ivy is positive and sufficient. He swore that he helped the defendant drive the steer in question to the defendant's home, and that they found the steer on Boykin's drain, in Miller county.

There was no error in refusing a new trial.

Judgment affirmed.

(6 Ga. App. 243)

HOLLOWAY v. STATE. (No. 1,829.)

(Court of Appeals of Georgia. May 18, 1909.)

MASTER AND SERVANT (§ 67*)—FRAUDULENTLY PROCURING MONEY ON LABOR CONTRACT—EVIDENCE.

The conviction in this case was wholly unauthorized.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 75; Dec. Dig. § 67.*]

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

George Holloway was convicted of fraudulently procuring money on a labor contract, and brings error. Reversed.

E. R. Bradfield, Jr., for plaintiff in error. Henry Reeves, Sol., for the State.

HILL, C. J. The plaintiff in error was convicted of a violation of the act of August 15, 1903 (Acts 1903, p. 90), making it a misdemeanor to fraudulently procure money on a labor contract. The evidence for the state conclusively shows that the conviction was wholly unauthorized, and the prosecution seems to have been for the purpose of collecting an old debt, rather than to punish the fraudulent procurement of money on a contract to perform labor.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On December 24, 1908, the defendant entered into a contract with the prosecutor to perform for him services as a laborer during the year 1909 at \$12.50 per month; the contract to begin on January 1, 1909. When the contract was made it seems that the defendant, according to the prosecutor, owed him an old debt of \$23.50, and this sum was to be charged against the defendant and to be taken up on his wages during the year. What time during the year this amount was to be deducted from his wages does not appear. The defendant began work under the contract on January 1, 1909, and worked until March 6, 1909, for which time his wages amounted to \$28, and the prosecutor had only paid him of this amount the sum of \$19.50. So far as the contract was concerned, therefore, the prosecutor was due the defendant, when he had him arrested and prosecuted, the sum of \$8.50, and this fact utterly precludes the conclusion that there was any loss to the prosecutor, growing out of the contract, but that there was a loss to the defendant of \$8.50 by reason of the failure of the prosecutor to pay him this amount of the wages which he had earned.

It was a misapplication of the law to treat the old debt which the defendant owed the prosecutor as money advanced on the contract. Of course, the defendant could agree to such application of his wages if he desired to do so; but such agreement could not possibly change its character as a debt, and make it money advanced on a contract, or make the defendant liable to a prosecution for a violation of the act of 1903, if subsequently he withdrew his consent for such application of his wages. This case is fully covered by previous decisions of this court, construing the act in question, notably the cases of *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022, *Fuller v. State*, 2 Ga. App. 696, 59 S. E. 1, and *Young v. State*, 3 Ga. App. 463, 60 S. E. 117.

Judgment reversed.

(6 Ga. App. 139)

MEETZE v. POTTS. (No. 1,589.)

(Court of Appeals of Georgia. May 18, 1909.)

1. **ESTOPPEL (§ 94*)—INNOCENT PURCHASER.**

Estoppel, under section 2823 of the Civil Code of 1895, operates only in favor of an innocent purchaser without notice. *Brown v. Tucker*, 47 Ga. 486.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 277; Dec. Dig. § 94.*]

2. **NEW TRIAL (§ 104*)—CUMULATIVE EVIDENCE.**

The alleged newly discovered testimony was merely cumulative.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 218-220, 223; Dec. Dig. § 104.*]

3. **INSTRUCTIONS.**

The charge of the court fairly submitted the issues, and the evidence was in conflict.

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Action between W. B. Meetze and Paul Potts. From the judgment, Meetze brings error. Affirmed.

A. H. Thompson, for plaintiff in error.
F. M. Longley and M. U. Mooty, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 132)

CENTRAL OF GEORGIA RY. CO. v. BOWEN. (No. 1,607.)

(Court of Appeals of Georgia. May 18, 1909.)

NEW TRIAL (§ 132*)—DISMISSAL—FAILURE TO PREPARE AND PRESENT BRIEFS OF EVIDENCE.

Where a motion for a new trial was filed in term, and the court set the hearing for a specified date, and gave the movant until the final hearing to prepare and present his brief of evidence, and where, on the date specified, the motion was not heard, but was continued to a later date, and the movant was given until this later date to prepare and present his brief of evidence, the dismissal of the motion for a new trial, on the ground that the movant failed to prepare and present his brief of evidence on the date last named, was not error. *Hinely v. State*, 1 Ga. App. 518, 57 S. E. 1021; *Brown v. Richards*, 114 Ga. 318, 40 S. E. 224.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 273-275; Dec. Dig. § 132.*]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by E. J. Bowen against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. S. Wimberly, for plaintiff in error
Hardeman, Jones & Johnston, for defendant in error.

HILL, C. J. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(132 Ga. 326)

KEHR et al. v. FLOYD & CO.

(Supreme Court of Georgia. May 13, 1909.)

1. LIFE ESTATES (§ 28*)—WASTE—FORFEITURES—ACTIONS FOR—PARTIES.

In a suit by remaindermen to forfeit the estate of the life tenant for waste, the life tenant is a necessary party.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 28.*]

2. LIFE ESTATES (§ 4*)—FORFEITURE—GROUNDS.

The estate of a life tenant is not impeachable by a destructive trespass of a stranger, which the life tenant neither licenses nor negligently suffers to be done. Accordingly a petition praying the forfeiture of the estate of the life tenant is demurrable, wherein the plaintiffs allege themselves to be remaindermen under a certain deed, and that the defendants have boxed for turpentine and felled and removed the trees on the tract of land conveyed to them by the deed under which they claim, without making the life tenant a party, and without alleging that such acts were committed by the defendants either by the permission of the life tenant or were consequent upon his failure to exercise the ordinary care of a prudent man for the preservation of the estate in remainder.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 9; Dec. Dig. § 4.*]

3. CANCELLATION OF INSTRUMENTS (§ 35*)—ACTIONS—PARTIES.

A court of equity is without jurisdiction to decree the cancellation of the record of a deed, where neither the grantor nor the grantee is a party to the case or otherwise represented.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 55-65; Dec. Dig. § 35.*]

(Syllabus by the Court.)

Error from Superior Court, Effingham County; Paul E. Seabrook, Judge.

Action by Eden Georgia Kehr and another, by next friend, against Floyd & Co. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. H. Smith and B. W. Sheppard, for plaintiffs in error. Travis & Travis and Wm. L. Gigulliat, for defendant in error.

EVANS, P. J. The exception is to the dismissal of the petition on demurrer. Eliminating immaterial verbiage, and stating the essential averments as alleged, the petition was as follows: The petition of Eden Georgia Kehr and Robert Edwin Kehr, by their next friend, shows the following cause of action against J. B. Floyd and T. B. Floyd, doing business in the firm name of J. B. Floyd & Co., in Effingham county, Ga.: The plaintiffs are nonresident minors, and the only living heirs of Herman E. Kehr and Ella Kehr. On May 20, 1891, Herman E. Kehr made and executed his certain deed of conveyance, whereby he conveyed a certain tract of land located in the Tenth district, G. M., of Effingham county, known as the "Eden Plantation," and containing 2,483 acres more or less "to his wife Ella Kehr, her lifetime, with remainder to his children born and unborn, the common off-

spring born to him by his said wife Ella Kehr, contingent nevertheless that should his said wife Ella Kehr depart this life before the said Herman E. Kehr, then in that event the lands were to revert to the said Herman E. Kehr in fee; but if the said Herman E. Kehr should die before his said wife Ella Kehr, then his said wife Ella Kehr should have a life estate in said lands and the same was to be held by her for life, with remainder in fee to their said children, and the children of their issue as tenants in common." On September 14, 1891, Ella Kehr and Herman E. Kehr conveyed by their deed of that date their reversionary, contingent, and life estates in the lands hereinbefore described to F. B. and S. S. Keller. The records in the ordinary's office in Effingham county show that on January 4, 1892, Ella Kehr was appointed guardian for "Eden G. Kehr, minor and orphan child of Ella and H. E. Kehr." The guardian book on file in the ordinary's office of that county, marked "1856," shows that on January 4, 1892, Ella Kehr gave bond as guardian for Eden Kehr in the sum of \$100, and that this bond was signed by J. G. & D. H. Clark as attorneys for Ella Kehr, and by Morgan as security. It nowhere appears from the records of that office that Ella Kehr ever took the oath or qualified as guardian of the person and property of Eden G. Kehr. The minutes of that court show that on March 7, 1892, Allen N. Kelffer, ordinary of Effingham county, granted an order authorizing Ella Kehr, as guardian for Eden G. Kehr, to sell the remainder interest of Eden G. Kehr in the "Eden Plantation," above described. The records of deeds and mortgages of the county in the office of the clerk of the superior court show that on July 7, 1892, Mrs. Ella Kehr conveyed to F. B. Keller and S. S. Keller, in consideration of \$5, all the remainder interest of Eden G. Kehr in the 2,483 acres of land known as the "Eden Plantation."

Petitioner avers that this sale of the remainder interest of Eden G. Kehr in these lands was illegal and void for the following reasons: (a) Because the bond given by Ella Kehr as guardian for Eden G. Kehr was not signed by her, but shows on its face that it was signed by her attorneys. (b) Because it appears from the records in the ordinary's office of Effingham county that Ella Kehr never took the oath or qualified as guardian of Eden G. Kehr. (c) Because the order granted by Allen N. Kelffer, ordinary, does not show for what purpose the remainder interest of the minor was to be sold, or that Eden G. Kehr or her nearest friend was ever served with notice of said application. (d) Because the records do not show that the sale of this remainder interest was approved and confirmed by the court. (e)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Because the ordinary was without jurisdiction to grant an order authorizing the sale of this remainder interest of Eden G. Kehr in these lands; Acts 1889, p. 156 (Civ. Code 1895, §§ 2545, 2546), vesting exclusive jurisdiction and authority in judges of the superior courts to authorize the sale of the estates of infants. Herman B. Kehr died on June 25, 1902. Petitioner avers that Floyd & Co. have possession of the lands, but are only entitled to the use, custody, possession, and control of the same as life tenants; that as life tenants they are only entitled to the reasonable use of the soil and premises exercised in such a manner as to work no harm or injury to the remainder interest of Eden G. Kehr and Robert Edwin Kehr; that defendants have no right to box the trees for turpentine or to cut and remove the timber, but have wantonly and willfully boxed the greater portion of the trees, to the plaintiff's damage of \$6,000, and have cut and removed sawmill timber of the value of \$1,000, and are preparing and threatening to cut and box the balance of the sawmill timber on the land; that Floyd & Co. as life tenants in and to such premises and lands as described have, by reason of the several acts hereinbefore related, committed voluntary waste in and upon the premises and lands, and are guilty thereof, and have forfeited all their rights as life tenants to a life estate in these lands. Waiving discovery, the plaintiffs pray for process, for an injunction to restrain the defendants from cutting and boxing the trees on the land, and that upon the final hearing a decree be granted to strike from the records of Effingham county of deeds and mortgages the deed made by Mrs. Ella G. Kehr to F. B. Keller and S. S. Keller under date of July 7, 1892, wherein she as guardian for Eden G. Kehr conveyed for a consideration of \$5 the remainder interest of Eden G. Kehr in the aforesaid premises; that petitioner recover a judgment for \$7,000 as compensation for the injury and damage committed to the remainder interest and estate of the remaindermen by reason of the several acts of waste complained of as committed by the defendants; that petitioner recover the lands and premises in question as forfeited to them by reason of the several acts of waste complained of, and as committed by the life tenants Floyd & Co. The defendants demurred to the petition, on the grounds, that their residence was not alleged, that the petition sets forth no cause of action, and that it misjoins a proceeding to stay waste by an alleged tenant for life brought by a remainderman with an action of damages.

The petition was rightly dismissed. Premitting a discussion or decision of the effect of a failure to allege the residence of

the defendants there were other potent reasons invoked by the demurrer why the petition should have been dismissed. The plaintiffs neither alleged title in themselves, nor title nor possession in their grantor, or that the defendants claimed title under a common propositus with them. However, it is made clearly to appear that they have no immediate right to the possession of the land, unless the precedent life estate of Mrs. Kehr or her grantees is forfeited for waste. Neither Mrs. Kehr nor her grantees are made parties; and it would be subversive of every fundamental principle of law to cancel and nullify their title, and forfeit their life estate, without giving the original life tenant or her grantees an opportunity to be heard in defense. Nor is there any allegation that Floyd & Co. claim either as direct or remote grantees of Mrs. Kehr, or claim authority from her or her grantees to cut the timber, or that Floyd & Co.'s acts are consequent upon the failure, either of herself or her grantees, to exercise prudence in the preservation of the estate in remainder. See Civ. Code 1895, § 3090. Again, the plaintiffs certainly would not be entitled to have expunged from the records the deed of Mrs. Kehr to G. B. & S. S. Keller without first making them parties to the proceeding to obtain this relief. Other reasons are advanced in support of the judgment of the court on demurrer, but we will forbear discussion of them, as those which we have stated are sufficient to uphold the dismissal of the petition.

Judgment affirmed. All the Justices concur.

(132 Ga. 563)

BREWER v. CARSWELL

(Supreme Court of Georgia. May 12, 1909.)

INNKEEPERS (§ 8*)—GUESTS—WHO ARE—LOSS OF PROPERTY.

Where an innkeeper provided a lot and stables in which his guests were permitted to keep their horses without charge, but it was customary to charge for feed for horses if furnished by the innkeeper, it was not sufficient evidence of the relation of innkeeper and guest that one drove into the lot, unhitched his mule from his buggy, and placed the mule in a stable pointed out by a boy in charge of the lot and stables, and then left the premises without entering the inn or having any agreement with the innkeeper or his authorized agent that he would be a guest, or that the innkeeper should furnish any feed for the mule, or doing anything further towards becoming a guest, though the owner stated to the boy that he would return and would himself feed his mule at dinner time, and though he testified that he intended to take dinner at the inn with another person who accompanied him, and who dined there, but did not do so because before the dinner hour he learned of the injury to the mule.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 12, 13, 17-40; Dec. Dig. § 8.*]

(Syllabus by the Court.)

2. INNKEEPERS (§ 8*)—"GUESTS."

All persons entertained for hire at an inn are guests.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 12, 13; Dec. Dig. § 8.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3188-3191; vol. 8, p. 7676.]

Error from Superior Court, Liberty County; Paul H. Seabrook, Judge.

Action by S. T. Brewer against J. M. Carswell. Judgment for defendant, and plaintiff brings error. Affirmed.

S. T. Brewer instituted suit in the superior court of Liberty county against J. M. Carswell for the recovery of \$150, the value of a mule, the property of the plaintiff, which was lodged by him in the stable of the defendant, and was stung by certain bees kept by the defendant behind the stable and in close proximity thereto, from the effects of which the mule died. In his own behalf the plaintiff testified, among other things, as follows: The defendant keeps a hotel or inn at Hinesville, and, in connection therewith, conducts this stable and lot. "On the day named in the declaration I came to Hinesville with Middleton. We drove my mule, and upon arrival in town drove into the lot of defendant. There was a boy in charge of the lot and stable who showed us a stall, the only one not occupied, in which we placed the mule. I instructed the boy that the mule was young and excited, and that I would come back at dinner and feed him. I had no feed in my buggy, and expected to get the feed from the stable. Mr. Middleton, who came with me, took a dinner at the hotel, and I expected to take dinner with him. Just on the outside of the stable and immediately against the rear of the stable in which my mule was placed was a row of beehives. I was notified after leaving the stable that my mule had been stung by the bees. I hurried down to the hotel, and found the mule covered with them. I began to doctor the mule, and did everything for him I could. This was about dinner time, and when dinner came on I was busy with attending to the mule, and could not stop to eat dinner. The mule died from the effects of the sting when I got home. The mule was four years old, and reasonably worth \$150. I did not know anything about the bees being at the back of the stall. If I had, I would not have allowed the mule to be placed in the stall. I did not make any contract with the boy as to the pay for keeping the mule, but expected to pay the usual charge. If the mule had not been stung, I would have taken dinner with Middleton at the hotel, and would have also fed my mule at the stable and expected to pay for it. I was prevented from taking dinner there because of the injury to the mule. I told Mr. Carswell's agent that I would come back at dinner, but did not tell him or any-

body else that I would come back and take dinner at the hotel." Martin, sworn for the plaintiff, testified: "Mr. Carswell keeps a hotel in Hinesville, and charges guests for stopping with him. He keeps no book for his guests to register in when stopping there." Lang testified that he had always paid for the feed of his horse when he stopped at the Carswell Hotel and placed his horse in the stables, but did not pay for stable room. Mr. Carswell never made any charge for a man who simply left his horse in the stable. The plaintiff closed, and, upon motion for nonsuit, the judge passed the following order: "After argument, * * * the plaintiff's counsel stating, 'The plaintiff does not rely for recovery upon section 3821 of the Civil Code of 1895,' it is ordered that said motion for nonsuit be and is hereby sustained, and said case is dismissed." The plaintiff excepted to the order granting the nonsuit, and assigned error thereon on the ground that the judgment was contrary to law and evidence. In his brief counsel for plaintiff in error took the position that the defendant was liable to the plaintiff only because the defendant was an innkeeper and the plaintiff was his guest, and the evidence was sufficient to carry the case to the jury on the question as to whether the relation of innkeeper and guest, and the consequent liability arising therefrom, existed.

Donald Fraser, for plaintiff in error. Garrard & Mildrin, Edwin A. Cohen, and Ben A. Way, for defendant in error.

ATKINSON, J. (after stating the facts as above). Under the contention of the plaintiff, the question is whether the defendant was liable as an innkeeper to the plaintiff as his guest. All persons entertained for hire at an inn are guests. Civ. Code 1895, § 2934. "It is not necessary to show actual delivery to the innkeeper. Depositing goods in a public room set apart for such articles or leaving them in the room of the guest, or placing a horse in the stable, is a delivery to the innkeeper. If, however, the guest delivers his goods to a servant under special charge to him to keep the same, the innkeeper is not liable therefor." Section 2936. The expressions, "depositing goods in a public room set apart for such articles," and "placing a horse in the stable," as used in the section of the Code last cited, are to be understood as relating to such acts of a guest as distinguished from such acts by a mere intruder or stranger having no relation of guest to the innkeeper, and at no time establishing such a relation. It was held in *Yorke v. Grindstone*, 1 Salk. 388 (*Yorke v. Grenough*, 2 Lord Raymond, 866), that, if a traveler leave his horse at an inn and lodge elsewhere, he is for the purpose of this rule to be deemed a guest, because, it was said, it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"must be fed, by which the innkeeper has gain; otherwise if he had left a trunk or a dead thing."

There has been some diversity of opinion as to when the relationship of innkeeper and guest was impliedly established by the mere leaving of a horse at the stable of an innkeeper, at least so far as affected the safekeeping of the horse and the liability for any injury to it. But the authorities which have held that the relation of innkeeper and guest was thus established have had, as their underlying reason, the existence of a state of facts "by which the innkeeper has gain," as it is expressed in the quotation above made; that is, that there should be such an express or implied contract between the person who leaves the horse and the innkeeper as would authorize a charge by the latter as such for the service. See note to *Calye's Case*, 1 Smith's Lead. Cas. (9th Ed.) 250; *Healey v. Gray*, 68 Me. 489, 28 Am. Rep. 80; *Ingallsbee v. Wood*, 33 N. Y. 577, 88 Am. Dec. 409; *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Id.*, 28 Vt. 387, 67 Am. Dec. 720; *Gelley v. Clark*, 3 Cro. Jac. 188; *Beale on Innkeepers and Hotels*, §§ 121-122, 131-132; *Strauss v. County Hotel*, L. R. 12 Q. B. Div. 27.

Here the plaintiff did not expressly or impliedly place his horse with the innkeeper or his servant to be fed and cared for. He stated to the latter that he intended to return at dinner time and feed the horse himself. He gave no intimation of any intention to obtain the feed from the innkeeper. The evidence showed that there was no custom to charge where a person provided his own feed for his mule. There was lacking, therefore, the establishment of any situation which created a right to profit on the part of the innkeeper. The plaintiff, though on the premises, did not go to the inn, or give any intimation to the proprietor of his presence or intention to become a guest or even of his expectation to return for dinner. He testified that his companion took dinner at the inn, and that he intended to take dinner with his comrade; but whether this was to be as the guest of the latter or as the guest of the innkeeper is not clear. At any rate, whatever was his private intention on this subject, it was in no way shown to have been communicated to the innkeeper or any authorized agent of his. The plaintiff left the premises. Where he went or how long he stayed does not appear. But, before the dinner hour had arrived, he heard that his mule had been stung by bees, and went to its relief. So that he never, in fact, took dinner at the inn, nor did anything else tending to establish the relation of innkeeper and guest. These facts were not sufficient to show that, when his mule was injured, he

was the guest of the inn, and that the defendant was liable as an innkeeper for such injury. This ruling does not in any way conflict with that in *Coskey v. Nagle*, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. Rep. 333, and similar cases, where a traveler delivered his baggage to a porter of an inn at a station for the purpose of having it carried to the inn where he was proceeding to become a guest, and did so become. See on the general subject *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930, 2 Am. & Eng. Ann. Cas. 345, and note.

Judgment affirmed. All the Justices concur.

(132 Ga. 573)

BRANTLEY v. STATE.

(Supreme Court of Georgia. May 12, 1909.)

CRIMINAL LAW (§§ 162, 193½*)—CONSTITUTIONAL LAW (§§ 250, 260*)—FORMER JEOPARDY—"NEW TRIAL"—CONSTITUTIONAL PROVISIONS—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS.

When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot successfully interpose a plea of former acquittal of the crime of murder or former jeopardy in regard thereto.

(a) This ruling is in accord with article 1, § 1, par. 8, of the Constitution of the state (Civ. Code 1895, § 5705), which provides that "no person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial."

(b) The fifth amendment of the Constitution of the United States, including the statement, "nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb, * * * nor be deprived of life, liberty, or property, without due process of law," was a limitation upon the power of the federal government, and not upon the individual states.

(c) If one has been indicted for murder and convicted of manslaughter, and under a provision of the state Constitution, to the effect that, if a new trial is granted to a convicted person on his own motion, it shall be another trial generally for the offense charged in the indictment, moves for a new trial and obtains it, thus voluntarily causing the verdict to be set aside, the clause of the fourteenth amendment of the Constitution of the United States, prohibiting any state from depriving a person of life, liberty, or property without due process of law or denying to any person the equal protection of the laws, does not prevent him from being again tried for murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 285, 394; Dec. Dig. §§ 162, 193½; * Constitutional Law, Cent. Dig. § 751; Dec. Dig. §§ 250, 260.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4783-4790.]

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Solomon Brantley was indicted for murder, and, from a judgment sustaining a demurrer

to a plea of former jeopardy, he brings error. Affirmed.

John R. Cooper, for plaintiff in error. Alfred Herrington, Sol. Gen., Hines & Jordan, and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Solomon Brantley was indicted in a single count for murder, and on the trial was convicted of voluntary manslaughter. He moved for a new trial, which was refused, and he carried his case to the Court of Appeals by writ of error, and there obtained a reversal. See 5 Ga. App. 457, 63 S. E. 519. When the case again came on for trial in the superior court, he filed a plea of former acquittal and former jeopardy, contending that the verdict finding him guilty of voluntary manslaughter had the legal effect of finding him not guilty of murder, and therefore he could not be again put on trial for murder, but only for manslaughter. The presiding judge sustained a demurrer to the plea. This is the only ruling of which complaint is now made.

In some states the Constitution or a statute declares that the granting of a new trial to one convicted of a crime places him in the same position as if no trial had been had, or contains provisions having that effect. In the absence of such constitutional or statutory provision, where one who has been indicted for murder and convicted of manslaughter moves for and obtains a new trial, the authorities are not in harmony as to whether he can be again placed on trial for murder or only for the lesser offense under the general prohibition contained in state Constitutions against putting a person twice in jeopardy for the same offense. The greater number of authorities take the view that a verdict of manslaughter involves an acquittal of murder, and that a new trial granted on motion of the accused after conviction of the lesser offense is not to be considered as a new trial for the greater offense of which he was acquitted, but must be confined to a retrial of the offense of which he was convicted, as the accused should not be deemed to have waived his right in so far as he was acquitted. The contrary view, which is held by other authorities, with the reasons therefor, may thus be stated: The defendant was found guilty of the lesser offense of manslaughter, included in the charge of murder. Had he permitted the verdict to stand, he could have claimed whatever legal results flowed from it, including the implication that, as he was found guilty of manslaughter, he was not guilty of the higher offense of murder, and that the affirmative finding that he was guilty of the lesser involved in it the exclusion of the greater. But the accused cannot both voluntarily set aside the verdict and also hold to it. A verdict cannot at the same time be of force and not of force. The verdict of guilty is single. He cannot divide it into that which pleases him and that which does not. The positive fact is the verdict of guilty of

one offense. The negative implication from that finding is not guilty of the other offense. It is not easy to see how the positive finding which furnishes the sole basis for the negative implication can be destroyed and set aside by the voluntary action of the accused, and yet leave the implication to stand alone without a basis. To sustain a plea of former acquittal, there must be a subsisting record of an acquittal. If the verdict of guilty of the lesser offense operates as a record of acquittal of the greater, when it is set aside at the instance of the accused, it is certainly no longer a subsisting record of conviction. Can it be said to stand as a subsisting record of acquittal? When, on motion of the accused, the verdict is set aside, no verdict is left. When he asks a new trial and it is granted, it is a complete new trial, not a partial one. The accused is tried on the indictment, not on it as limited by the results of a verdict which he himself has voluntarily caused to be set aside and rendered ineffective. This view was taken in the early case of *Bailey v. State*, 26 Ga. 579. That decision has never been overruled, although *Simmons, C. J.*, in view of other authorities, said that it involved a question of pleadings, and indicated some doubt as to what would be the ruling were it not for the express provision included in our present Constitution on the subject. *Waller v. State*, 104 Ga. 505, 30 S. E. 835. In *Small v. State*, 63 Ga. 386, the grant of a new trial was not under consideration, but the judgment on a verdict of guilt was arrested solely on the ground that the judge who presided at the trial was unauthorized by law to hold the court; and it was held that the prisoner could be again tried on the same indictment, whether the arrest of judgment or the setting aside of the verdict was erroneous or not, as he was concluded by a judgment rendered at his own instance, to which the state could not except.

If the question be argued from the standpoint of former jeopardy, rather than that of former acquittal, and the two be not the same within the meaning of the Constitution, as to the thing inhibited, the result must be the same. A court can grant a new trial to a person convicted of crime and retry him, or it cannot. On the first trial the accused has been placed in jeopardy as to the offense of which he was actually convicted quite as much as in respect to the offense of murder. If, under the Constitution, he could never be put in jeopardy again for any offense involved in the former trial, and could not waive such guaranty, and if he moved for and obtained a new trial, he could never be tried again at all. The grant of a new trial would be equivalent to a discharge. It is generally conceded that he could waive the constitutional protection against putting him twice in jeopardy by asking for a new trial and obtaining it at least as to the offense for which he was convicted. *United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300. If

so, then whether the waiver merely has the effect of allowing a new trial as to the lesser offense, or on the indictment as if there had been no previous trial, is a matter of degree and of construction of the extent of the waiver which the law declares the accused makes in asking for a new trial.

In those states where statutes have been passed declaring that, if on motion of the accused a new trial is granted, it shall be a complete new trial, we have found no instance in which such a statute has not been upheld. Enactments of that character are, in substance, merely legislative declarations or provisions that, when the accused moves for and obtains a new trial, he waives any right to set up former jeopardy to prevent a complete new trial, or estops himself from so doing. If the declaration that the accused cannot be put on trial for murder after he has caused a conviction of manslaughter to be set aside and a new trial to be granted to him is based on constitutional grounds, such legislative acts could not change the result. If the position be not based upon any strict constitutional inhibition against retrying the accused for murder after the grant of the new trial, but upon a question of what is the extent of the waiver which the accused makes when he applies for and obtains a new trial, we need not repeat what has already been said as to the inconsistency in permitting a person convicted of a crime to ask that the verdict of guilty of manslaughter be set aside and a new trial be granted to him, and that he be allowed to destroy the verdict in so far as it affirmatively affects him injuriously, but retain the benefit of all implications arising in his favor therefrom. We are aware of the contrary position which is taken by a number of decisions and some text-writers, but other courts have adopted views similar to those above expressed. In *Trono v. United States*, 199 U. S. 521, 533, 28 Sup. Ct. 121, 124, 50 L. Ed. 292, it was said, in the opinion delivered by Mr. Justice Peckham: "In our opinion the better doctrine is that which does not limit the court or jury upon a new trial to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been." See, also, *State v. Gillis*, 73 S. C. 318, 53 S. E. 487, 5 L. R. A. (N. S.) 571, 114 Am. St. Rep. 95, 6 Am. & Eng. Ann. Cas. 993; *Bohanan v. State*, 18 Neb. 57, 24 N. W. 390, 53 Am. Rep. 791; *State v. Kessler*, 15 Utah, 142, 49 Pac. 293, 62 Am. St. Rep. 911; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238; *United States v. Harding*, 1 Wall. Jr. (C. C.) 127, Fed. Cas. No. 15,301; *State v. Be Himer*, 20 Ohio St. 572; 2 Story, Const. § 1787. In states where statutes on the subject are referred to, see *Veatch v. State*, 60 Ind. 291; *Commonwealth v. Arnold*, 83 Ky. 1, 4 Am. St.

Rep. 114. As to the conflict of authority on the subject, see note to *Trono v. United States*, 4 Am. & Eng. Ann. Cas. 778.

If what has been said were not correct, some very peculiar results would follow in this state. Thus it has been held that where on the trial of one indicted for murder the evidence demands either a verdict of guilty of murder or an acquittal, and under no theory presented by the evidence or the statement of the defendant can he be properly convicted of voluntary manslaughter, it is error for the court to give to the jury a charge to the effect that he may be found guilty of that offense, and that a verdict finding him guilty of voluntary manslaughter is contrary to law, and a new trial will be granted to him on that ground. *Berry v. State*, 122 Ga. 429, 50 S. E. 845. In that case a new trial was granted to the accused on the ground that there was no element of voluntary manslaughter in the case, and that he should have been found guilty of murder or acquitted. In *Kelsey v. State*, 62 Ga. 558, the accused was indicted for rape, and was convicted of assault with intent to rape. He moved for a new trial, which was refused by the trial court, and exception was taken. The Supreme Court granted him a new trial, holding that "where the evidence is conclusive that the carnal knowledge was realized, and the only possible question is concerning the force and the consent, a verdict finding the prisoner guilty of an assault with intent to rape is contrary to law." Pen. Code 1895, § 19, declares that "no person shall be convicted of an assault with intent to commit a crime, or of any other attempt to commit any offense, when it shall appear that the crime intended, or the offense attempted, was actually perpetrated by such person at the time of such assault, or in pursuance of such attempt." Other similar cases might be cited. If the contention that on a new trial the accused could only be tried for the offense of which he had previously been convicted were sustained, then in such cases the defendant could set aside the verdict as unwarranted and obtain a new trial on the ground that the evidence proved him guilty of the greater offense, and not of the lesser; and, when again arraigned, could prevent a trial for the greater offense, and thus, in effect, could be set free by satisfying the reviewing court that he was, in fact, guilty of the greater offense instead of the lesser included in it. But, if it were otherwise in the absence of statutory or constitutional provision, the Constitution of the state (Civ. Code 1895, § 5705) expressly provides that "No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." A mistrial operates in this respect as no trial. A new trial, as used in the Constitution, means new trial generally. *Waller v. State*, 104 Ga. 505, 30 S. E. 835; *Yeates v. Roberson*, 4 Ga. App.

578, 62 S. E. 104. If the state affords a convicted person at his option the privilege of causing a verdict to be reviewed and set aside on account of error, he cannot say that his own conduct shall have no effect against him either as a waiver or estoppel or by virtue of the Constitution itself. He may waive a trial altogether, including the constitutional guaranty of trial by jury, and plead guilty. Former jeopardy is a matter which must be duly pleaded, or the defense will be treated as waived. *Hall v. State*, 103 Ga. 403, 29 S. E. 915; *State v. White*, 71 Kan. 356, 80 Pac. 589.

It was contended that to place the defendant on trial for murder, after he had been convicted of manslaughter, and had sought and obtained a new trial through a reversal granted by the Court of Appeals, would be violative of the clause of the fifth amendment of the Constitution of the United States in regard to former jeopardy. Such a contention is without merit. It is now well settled that the fifth amendment to the Constitution of the United States was intended to operate upon the federal government, and not to limit the powers of the states, in respect to their own people. *Barron v. Mayor, etc., of Baltimore*, 7 Pet. 242, 8 L. Ed. 672; *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. Ed. 223; *Spies v. Illinois*, 123 U. S. 131, 166, 8 Sup. Ct. 22, 31 L. Ed. 80.

It was also contended that to again place the accused on trial for murder would be violative of the provisions of the fourteenth amendment of the Constitution of the United States, in that he would thereby be deprived of due process of law and the equal protection of the laws. We think it requires no argument to show that those provisions have no application to the case. That amendment does not deal with the regulations established by state laws and state Constitutions under which a person convicted of crime may move for a new trial or carry his case to a reviewing court, or the extent of the new trial which will be granted to him if he elects of his own motion to invoke the aid of such statutory or constitutional provisions, provided only they furnish due process of law, and do not deny the equal protection of the laws. There is nothing in the Georgia Constitution or laws having any such effect as to the accused. He has been accorded a trial before a court of competent jurisdiction. No claim is made that he was not duly and regularly tried in accordance with the forms of law, nor is any other error assigned except on the point hereinbefore discussed. He has apparently fallen into the same error as did *Rawlins*, which is thus referred to by Mr. Justice Holmes: "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process

of law took up the special provisions of the state Constitution and laws into the fourteenth amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been complied with. This is a mistake. If the state Constitution and laws as construed by the state court are consistent with the fourteenth amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its Constitution in express terms." *Rawlins v. Georgia*, 201 U. S. 638, 26 Sup. Ct. 560, 50 L. Ed. 899. The fourteenth amendment did not radically change the whole theory of the relations of the state and the federal governments to each other, and of both governments to the people. In *re Kemmler*, 136 U. S. 436, 448, 10 Sup. Ct. 930, 34 L. Ed. 519; *Hurtado v. People of California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232. In *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225, it was said: "By the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Judgment affirmed. All the Justices concur.

(123 Ga. 648)

MINOR v. STATE.

(Supreme Court of Georgia. May 13, 1909.)
No ERROR.

There was no error in the charges complained of, nor in the failure or refusals to charge, and no other ruling, of which complaint is made, requiring a new trial. The evidence supported the verdict, and the court did not abuse its discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Robert Minor was convicted of a crime, and he brings error. Affirmed.

A. L. Franklin, for plaintiff in error. John M. Graham, J. S. Reynolds, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 647)

WIGGINS v. STATE

(Supreme Court of Georgia. May 13, 1909.)

SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and, no errors of law being complained of, the judgment of the court below refusing a new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Jim Wiggins was convicted of a crime, and he brings error. Affirmed.

W. V. Havard and Watts Powell, for plaintiff in error. W. F. George, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

(132 Ga. 641)

ALLEN v. TERRELL

(Supreme Court of Georgia. May 13, 1909.)

1. NEW TRIAL NOT REQUIRED BY INSTRUCTIONS.

While one or two expressions, when segregated from their context, may have been subject to criticism, when considered in the light of the entire charge, they do not require a new trial.

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; J. N. Worley, Judge.

Action between M. M. Allen and K. T. Terrell. From the judgment, Allen brings error. Affirmed.

O. A. Nix, for plaintiff in error. N. L. Hutchings, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 559)

SAVANNAH ELECTRIC CO. v. JACKSON.

(Supreme Court of Georgia. May 12, 1909.)

1. NEW TRIAL (§ 39*)—GROUNDS—INSUFFICIENCY OF INSTRUCTIONS.

Where, in a suit against a railway company on account of a personal injury, the charge of the court nowhere informed the jury what were the issues or contentions between the parties made by the pleadings or evidence, and the charge given consisted almost entirely of abstract principles of law, and they were not so accurately applied to the case as to render it probable that the jury apprehended what were the issues, or that the omission to instruct them on that subject was harmless, a new trial will be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 59; Dec. Dig. § 39.*]

2. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY FOR REQUEST.

In an action against a railway company to recover damages for a personal injury on

account of a negligent tort, the defense declared by Civ. Code 1895, § 2322, that no person shall recover damages from a railroad company for injury to himself or his property, where the same is caused by his own negligence, and that provided for in section 3830, which states that, if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover, are not identical; and, where the evidence is such as to present both defenses, the charge should include both, even in the absence of a request therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 630; Dec. Dig. § 255.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where there was no evidence to show willfulness, recklessness, and wantonness on the part of the employees of the defendant, the judge should not have referred thereto in his charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 598-612; Dec. Dig. § 252.*]

4. TRIAL (§§ 256, 260*)—DUTY TO REQUEST MORE SPECIFIC INSTRUCTIONS—OMISSION TO CHARGE.

If the substantial law covering the issues made by the pleadings and evidence is given in charge, and more specific instructions are desired by either party, appropriate requests for that purpose should be made.

(a) Where the presiding judge charged that, if the defendant were not guilty of negligence causing the injury, the plaintiff could not recover, an omission to charge, without request, that if the injury resulted from accident there could be no recovery, was not such a failure to charge in regard to a distinct substantive defense as will require the grant of a new trial.

(b) The case of Atlanta Railway & Power Co. v. Gaston, 118 Ga. 418, 45 S. E. 508, considered and disapproved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. 628-641, 651-659; Dec. Dig. §§ 256, 260.*]

5. NO ERROR.

Except as above indicated, none of the grounds of the motion for a new trial require a reversal.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by George Jackson against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Osborne & Lawrence, for plaintiff in error. Oliver & Oliver, for defendant in error.

ATKINSON, J. George Jackson brought suit against the Savannah Electric Company to recover damages for a personal injury caused by his being struck by a street car of defendant. He alleged that the car was running at a high, unlawful, and dangerous rate of speed along the public street; that the motorman did not have it under control when he saw the plaintiff, or in the exercise of proper care could have seen him, in time to avoid the collision; and that no bell was rung or signal given of the approach of the car, so that the plaintiff could avoid it. The defendant denied the substantial allega-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tions of the petition, and alleged that, if the plaintiff received any injury at all, it was due to his own negligence and want of care in not using and exercising ordinary care and diligence for his own safety, and was not due to any negligence or want of care upon the part of the defendant or its servants or agents. The jury found for the plaintiff \$150. The defendant moved for a new trial, which was refused, and it excepted.

1. The charge of the court nowhere stated to the jury what were the issues or contentions between the parties. It did not even refer them to the pleadings to ascertain the allegations of the parties, as has sometimes been done. *Central Ry. Co. v. McKinney*, 118 Ga. 535, 45 S. E. 430 (1); *Atlanta Ry. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191 (1). It made no reference to the pleadings, except that it commenced in these words: "When a railroad company, in the operation of its cars, injures the person of any one, that person is entitled to recover damages, unless the railroad company can show that, in the operation of its cars, its employes were in the exercise of ordinary and reasonable care and diligence; the presumption being against the railroad company, in the event the plaintiff proves his declaration as laid." This could hardly be taken as even referring the jury to the pleadings to ascertain the issues between the parties. The charge consists almost entirely of statements of abstract principles of law, and we cannot say that it was sufficiently explicit, in concretely applying the law to the case, to supply the omission of any statement to them as to what were the real contentions between the parties as presented by the pleadings and evidence. Where the judge informs the jury what the substantial contentions are and gives the law applicable to the case, although it may be somewhat generally stated, if parties desire more specific instructions given to the jury, they should make proper requests therefor. An omission to state in express terms the contentions of the parties may sometimes be cured by such a concrete application of the law to the facts of the case as that the jury would clearly understand the respective positions and the law applicable thereto. But a mere general statement of abstract rules of law will not suffice, in the absence of any statement whatever of the issues arising from the pleadings and evidence. The principle involved in *Atlanta Street Ry. Co. v. Hardage*, 93 Ga. 457, 21 S. E. 100 (4), is applicable here, although the omission to charge was more evidently erroneous there than in the present case.

2. In the case at bar the evidence for the plaintiff tended to show that he was injured by being struck by a car of the defendant, and that it was negligently operated by the company's servants. On the other

hand, the evidence for the defendant was to the effect that the plaintiff, while riding a bicycle and endeavoring to avoid a vehicle on the street, ran against the side of the car, thus causing his own injury, without any negligence on the part of the defendant's servants. There was also evidence tending to show that the plaintiff, by the use of ordinary care, might have avoided the consequences of the negligence of the defendant's employes, if there was any. Thus it will be seen that there was evidence to support either defense—that the plaintiff caused the injury by his own negligence, or that he could have avoided the consequences to himself of negligence on the part of the defendant. These two defenses are not identical. *Civ. Code* 1895, §§ 2322, 3830; *Ga. R. Co. v. Thomas*, 68 Ga. 744. And where the evidence is such as to present both defenses the charge should include both, even though no request be made therefor. *Central R. Co. v. Harris*, 76 Ga. 501. The court omitted in its charge any reference whatever to the defense that the plaintiff caused the injury by his own negligence.

3. The judge charged that "if the defendant was negligent, and the plaintiff did not exercise ordinary care to avoid the consequences of that negligence, unless it was willful, reckless, and wanton on the part of the defendant, still the plaintiff could not recover." There is no evidence in the record sufficient to show willfulness, recklessness, and wantonness on the part of the employes of the defendant; and the charge should have omitted any reference thereto, and the presiding judge should not in that connection have used the expressions above quoted.

4. Several of the grounds of the motion for a new trial complained of omissions of the presiding judge to give various charges. Except as above indicated, in so far as proper, the principles alleged to be omitted were elaborations of the charges as given; and, if the defendant desired such instructions, requests therefor should have been made. If the substantial law covering the issues made by the pleadings and evidence is given, and more specific instructions are desired by either party, they should prefer timely written requests for that purpose.

One ground of the motion for a new trial complains that the judge did not charge the jury that, if the injury was the result of an accident, there could be no recovery by the plaintiff. He did charge that, if the defendant was not guilty of negligence causing the injury, the plaintiff could not recover. The case of *Atlanta Ry. & Power Co. v. Gaston*, 118 Ga. 418, 45 S. E. 508, was relied on by counsel for plaintiff in error in this connection. The decision in that case was concurred in by five justices, and not by the entire bench, so that it is not binding authority until reviewed, under the statute.

We do not approve the reasoning there set out. An "accident," as the term is used in connection with cases of this character, means an injury which occurs without being caused by the negligence of either the plaintiff or the defendant. That the defendant itself is free from fault furnishes it a defense, not that the plaintiff is faultless. Where the judge instructs the jury that, if the defendant has used all ordinary care and diligence there can be no recovery, it cannot be said to add a distinct and substantive defense to also prove that the plaintiff is free from fault. A charge that if the injury resulted from an accident, and neither party was at fault, there can be no recovery, is in the nature of an elaboration or additional statement of the proposition that the defendant is not liable if it is without fault. It may be proper to give such a charge, if requested; but, being merely elaborative, it does not involve such a distinct defense as to make it error to fail to give it in the absence of a request. The case just cited was considered and differentiated in that of *Wrightsville R. Co. v. Gornito*, 129 Ga. 204, 213, 58 S. E. 769.

5. Except as above indicated, none of the grounds of the motion for a new trial require a reversal.

Judgment reversed. All the Justices concur.

(132 Ga. 593)

P. H. EMMETT & CO. et al. v. DEKLE et al.
(Supreme Court of Georgia. May 13, 1909.)

1. APPEARANCE (§ 20*)—WAIVER OF SERVICE—DEMURRER.

To demur generally to a petition as presenting no cause of action is to plead to the merits of the case; and it is not error for the court to refuse to dismiss a petition on a subsequent motion of the demurrants on the ground that they have not been served with process.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 92; Dec. Dig. § 20.*]

2. EXECUTORS AND ADMINISTRATORS (§ 444*)—ACTIONS AGAINST.

Where a petition alleges that it is brought against a defendant as administratrix of a certain deceased person, and alleges the death of her intestate, her qualification as such administratrix, and her consent to be sued within 12 months from her qualification, and prays the cancellation of certain mortgages executed by her intestate, and other relief against her as administratrix, and where service of a copy of the petition is acknowledged, and process, copy process and service thereof, and 12 months' exemption from suit are waived in an entry indorsed upon the petition and signed by one as attorney at law for such defendant as administratrix of such deceased person, such defendant as administratrix of her intestate is a party to the suit, notwithstanding that in the prayer for process her representative character is not stated.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1815; Dec. Dig. § 444.*]

3. VENUE (§ 22*)—PARTNERSHIP—ACTION AGAINST.

A suit to cancel a mortgage on realty, executed by a partnership and the members composing the partnership, may be brought in the county of the residence of the administratrix of a deceased partner.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 35; Dec. Dig. § 22.*]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Equitable petition by R. L. Dekle and others against P. H. Emmett & Co. and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

On March 31, 1902, R. L. Dekle, Lucy L. Morehead, W. J. Evans, and George P. Edenfield filed their equitable petition in the superior court of Emanuel county against P. H. Emmett & Co., the Tatnall Investment Company, Lizzie V. Emmett, administratrix of the estate of P. H. Emmett, deceased, Wade B. Shrivall, and the Ellis-Young Company, all being residents of Emanuel county, except the Tatnall Investment Company, a corporation, and the Ellis-Young Company, which were residents of Otham county. The allegations of the petition were substantially as follows:

The firm of P. H. Emmett & Co., composed of P. H. Emmett and the Tatnall Investment Company, was formed for the purpose of producing and manufacturing naval stores, having its plants and place of business in Emanuel county. John R. Young and C. S. Ellis, both of Chatham county, were respectively president and secretary and treasurer of the Tatnall Investment Company. The amounts of indebtedness of the firm of P. H. Emmett & Co. to the several plaintiffs are set forth, and it is alleged that this firm owes various other creditors several thousand dollars, all of which indebtedness was created since May 9, 1899. P. H. Emmett having died on August 28, 1901, while a resident of Emanuel county, his widow, Lizzie V., qualified as his administratrix, and waived the 12 months' exemption from suit allowed her by law. P. H. Emmett & Co., the estate of P. H. Emmett, and the Tatnall Investment Company are alleged to be insolvent. The Ellis-Young Company, of which John R. Young and C. S. Ellis are the members, hold a mortgage given by P. H. Emmett & Co. to secure an alleged indebtedness of \$11,000, and also to secure future advances, upon which it is claimed that there is due them the amount of \$25,000, and are also the transferees of a mortgage made by P. H. Emmett & Co. to the Ellis-Young Company to secure an alleged indebtedness of \$10,500 on December 15, 1897, which mortgage shows no credit, and which the transferees claim is yet due. It is alleged on information and belief that this latter mortgage was given without any consideration,

and for the purpose of defrauding and defeating certain judgments in existence against P. H. Emmett at the time of its execution. For nearly three years since the execution of the \$11,000 mortgage P. H. Emmett & Co. have shipped to the Ellis-Young Company their entire output of naval stores, worth several thousand dollars, for which no credit has been made upon either of said mortgages, and the Ellis-Young Company refuse to explain what has been done with such shipments. Since the death of P. H. Emmett, the Tatnall Investment Company, through its officers, Young and Ellis, has, as surviving partner, taken charge of the property of the firm of P. H. Emmett & Co., through Wade B. Shrivall. Young and Ellis, representing, owning, and controlling the Tatnall Investment Company, have been disposing of all the property of P. H. Emmett & Co. they possibly could, which has been acquired since the mortgage was made, and through Shrivall wasting, destroying, and removing out of Emanuel county all the property of this firm not embraced in the mortgages. The Ellis-Young Company have by virtue of a power of sale in these mortgages advertised all the property of P. H. Emmett & Co. for sale on November 22, 1901, the property being of the value of \$7,000; and the Tatnall Investment Company, in collusion with Ellis-Young Company, both of which are operated, controlled, and owned by the same parties, are by these means striving to defeat the collection of any and all just demands of all parties against P. H. Emmett & Co. It is alleged that upon a proper accounting between the firm of P. H. Emmett & Co. and the Ellis-Young Company there will be left sufficient property to pay at least 50 per cent. of the bona fide indebtedness of this firm; but, if not restrained, the Ellis-Young Company will waste, squander, and appropriate the whole amount.

The prayers of the petition are (1) for the appointment of a receiver to sell the property and dispose of all the proceeds under proper orders of the court; (2) that the mortgages of the Ellis-Young Company be brought into court and decreed to be null and void, as being without consideration, and, if there was any consideration, that it be decreed to be paid; (3) that defendants be restrained from selling, appropriating, managing, controlling, or in any manner interfering with the property of P. H. Emmett & Co., and that all the defendants be enjoined from further management or control of this property; (4) for judgment against the firm of P. H. Emmett & Co. as a partnership, and against the Tatnall Investment Company as a member of the firm, and Lizzie V. Emmett, administratrix of P. H. Emmett, deceased (de bonis testatoris), as individuals composing this firm, for the full amounts of plaintiffs' demands, and against the Ellis-Young Company, and John R. Young and C. S. Ellis, and that all

these parties be served with a copy of this petition, and with process; (5) for such other relief as they may be entitled to; and (6) "that process may issue requiring said P. H. Emmett & Co., the Tatnall Investment Company, Ellis-Young Company, Wade B. Shrivall, and Lizzie V. Emmett to be and appear at the April term of the superior court" to answer this complaint.

The process is headed: "W. J. Evans et al. v. Lizzie V. Emmett et al. Complaint"—and proceeds as follows: "The defendant, Lizzie V. Emmett et al., are hereby required," etc. The only entry of service is an acknowledgment thereof, with waiver of process, and the 12 months' exemption from suit, signed, "G. H. Williams, Atty. at Law for Lizzie V. Emmett, Adm'r of P. H. Emmett, Dec'd," dated November 19, 1901.

The defendants P. H. Emmett & Co., the Tatnall Investment Company, "the surviving copartner of the said firm of P. H. Emmett & Co.," the Ellis-Young Company, John R. Young, and C. S. Ellis, by their attorneys, on April 1, 1902, filed their demurrer to the petition, upon the grounds that it set forth no cause of action; that it showed no ground for injunction, receiver, or other equitable relief; that there is an ample remedy at law; that the petition on its face shows that the superior court of Emanuel county has no jurisdiction of the case, because no defendant against whom substantial relief, especially equitable relief, is asked, resides in that county, but all reside in Chatham county; that the date on which the alleged threatened sale, sought to be enjoined, was to take place was November 22, 1901, while the petition was not filed till April of the following year, long after it had taken place, and was, therefore, as to its main features, too late; that the allegations of the petition are too vague, there being no statement as to the property alleged to be under mortgage, and no copy of either mortgage attached to the petition, nor any reason alleged why it was not so attached; that the allegations of fraud are too vague and indefinite, and it was not alleged that plaintiffs were interested in the judgments against P. H. Emmett, mentioned in the petition; and that the petition was vague and uncertain as to parties.

After filing the petition, W. J. Evans and George P. Edenfield withdrew from the cause, leaving R. L. Dekle and Lucy L. Morehead as plaintiffs. Under an agreement between counsel the demurrer came on to be heard before Judge Rawlings on December 30, 1907, at which time two amendments to the petition were presented and allowed. The first of these amendments alleged that Mrs. Emmett, John R. Young, and C. S. Ellis collusively took possession and control of the entire estate of P. H. Emmett & Co., in Emanuel county, consisting of described lands and personality of the value of \$16,000, and, under the pretense that the mortgage referred to in

favor of the Ellis-Young Company covered this property and was a valid lien on the same, sold this property under their mortgage, bought it in themselves, and converted it to their own use, when in fact this mortgage did not cover such property; that all this property is still in the estate of P. H. Emmett & Co., but by the acts referred to has been placed out of the reach of petitioners and the other creditors of P. H. Emmett & Co.; that the administratrix is only under a small bond, not sufficient to cover this property, and the "defendants, jointly and in collusion with each other, having converted said property to their own use in manner and form aforesaid, are jointly liable to your petitioners for their respective sums against the said P. H. Emmett & Co."; that in legal contemplation the firm of P. H. Emmett & Co. consisted of C. S. Ellis, John R. Young, and P. H. Emmett, for the reason that the Tatnall Investment Company, which it was claimed was the "Company," had for several years prior to the formation of this firm been extinct, Ellis and Young being, respectively, its president and secretary and treasurer, and the business was carried on and operated by these three persons, and for this reason they had no right to dispose of the assets of the firm in the manner and form stated; and that the consideration of the notes sued on was turpentine timber sold to P. H. Emmett & Co., of which defendants got the full benefit, and in equity and good conscience they are liable to petitioners to the value of the same. The prayer of this amendment is for such judgment and decree as the pleadings, evidence, and the law of the case may authorize.

The second amendment alleges that P. H. Emmett as an individual, and the Tatnall Investment Company as a corporation, formed the partnership of P. H. Emmett & Co., and because a corporation was one of the partners the contract of partnership was contrary to public policy, null, and void, and in equity Ellis and Young (being the members of the Tatnall Investment Company) and P. H. Emmett constituted the firm of P. H. Emmett & Co., and are therefore liable individually for the amounts due thereon; that equitably all the creditors of P. H. Emmett & Co. are entitled to share in the assets of the firm ratably, regardless of liens, mortgages, and conveyances made by this firm to any creditors; and that, if Ellis and Young are not partners of that firm and individually liable as such, they can only share ratably with the other creditors as members and stockholders of the Ellis-Young Company, these mortgages being null and void in legal contemplation. The method by which the property was sold is attacked, it being alleged that the power of sale in the mortgage, signed by P. H. Emmett & Co., was revoked by the death of P. H. Emmett, and that Lizzie V. Emmett, as the administratrix of P. H. Emmett, deceased, had notice of its

illegality, and with such knowledge procured, aided, and acquiesced therein. Copies of the notes representing the petitioner's indebtedness are attached, and also of the two mortgages, and a deed made by the Ellis-Young Company to John R. Young, by virtue of the sale under the power. These mortgages and this deed are alleged to be void, and it is prayed that they be delivered up and canceled.

After the allowance of the amendment, the defendants, who originally filed their demurrer (except John R. Young, who has since died), renewed their demurrer and moved "to dismiss the case as amended, because these defendants are not served with process, or made parties, or legally brought into court, and also upon all the 10 grounds set forth in the original demurrer filed by defendants." Upon this motion to dismiss the court indorsed the following order: "The within motion not having been filed till December 30, 1907, the date when said demurrer therein referred which was filed April 21, 1902, the same is hereby overruled as coming too late; said general and special demurrer, having been filed several terms of said court previous to said motion, being equivalent to a waiver of service or any defect in the service." Defendants complain of the refusal to sustain their demurrer and the motion to dismiss.

Adams & Adams, for plaintiffs in error.
Williams & Bradley, for defendants in error.

EVANS, P. J. (after stating the facts as above). 1. At the appearance term the plaintiffs in error demurred generally and specially to the petition. To demur generally to a petition as presenting no cause of action is to plead to the merits of the case. Appearance and pleading to the merits amount to a waiver of process and service, and by demurring generally these particular defendants were properly before the court. They could not invoke the judgment of the court upon the sufficiency of the petition, unless they were to be bound by such judgment. The court very properly refused to dismiss the case because the plaintiffs in error had not been served with process. *Lyons v. Planters' Bank*, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155; *Dykes v. Jones*, 129 Ga. 99, 58 S. E. 645.

2. The two defendants residing in the county where the suit was brought were Wade B. Shrivall and Mrs. Emmett. Shrivall was only a nominal party, and was never served. The plaintiffs in error insist that Mrs. Emmett was not a party to the suit, either individually or as administratrix of the estate of P. H. Emmett. The original petition began with the allegation that petitioners complained against Lizzie V. Emmett, administratrix of P. H. Emmett, deceased, and the other defendants therein named. Her qualification as administratrix of P. H. Emmett was alleged to have occurred with-

in 12 months of the contemplated filing of the suit, and it was further alleged that she "as such administratrix has waived the exemption of 12 months from her qualification from suit in the case herein made and presented, and she is a resident of the county of Emanuel." It is alleged that the mortgage executed by her intestate is fraudulent and void for the reasons stated. The prayers of the petition include those for a judgment (de bonis testatoris) against her as administratrix of P. H. Emmett, and for a cancellation of the mortgage of P. H. Emmett & Co. to the Ellis-Young Company. Her attorney acknowledged service as follows: "Service of a copy of the within petition acknowledged, process and copy process and service thereof waived, and Lizzie V. Emmett, adm'x, hereby waives the 12 months' exemption from suit as such administratrix. Nov. 19, 1901. [Signed] G. H. Williams, Atty. at Law for Lizzie V. Emmett, Adm'x of P. H. Emmett, Deceased." The prayer for process against the several defendants included Lizzie V. Emmett, without describing her representative character; but, as no relief was prayed against her individually, her citation to court in the process would be to answer the suit served on her. At most it would be but an irregularity in the process, and one she could not take advantage of after she had specifically acknowledged service of a copy of the petition, and waived process, copy process, and service of process.

Our attention is called to the cases of *Seisel v. Wells*, 99 Ga. 159, 25 S. E. 286, and *Clayton v. Farrar Lumber Co.*, 119 Ga. 87, 45 S. E. 723, as maintaining a contrary view. In the first-cited case a petition was filed against several defendants, but process was prayed against only two. The clerk attached process against all. Those defendants against whom there was no prayer for process acknowledged service of the petition. This court held that the clerk had no authority to annex to a petition a process requiring the appearance of persons against whom there was no prayer for process, and that a mere acknowledgment of service upon a petition, and a waiver of service of the same, is not a waiver of process or prayer for process. The other cited case is to the same effect. In the instant case, not only the process prayed against Lizzie V. Emmett, but as administratrix of P. H. Emmett she specifically waived process, copy process, and service thereof. We think that Lizzie V. Emmett, as administratrix of P. H. Emmett, was a party defendant.

3. Counsel for plaintiffs in error state in their brief that their chief contention is that

the case ought to have been dismissed, because the superior court of Emanuel county was without jurisdiction. If Mrs. Lizzie V. Emmett, as administratrix of P. H. Emmett, deceased, was a necessary and proper party against whom substantial equitable relief was prayed, then Emanuel superior court had jurisdiction of the case. It was charged that the Tatnall Investment Company and the estate of P. H. Emmett were insolvent, and that the assets of P. H. Emmett & Co. were covered by apparent liens which would more than exhaust them, and it was only by invoking the aid of equity to set aside these liens and the sale thereunder which was alleged to be fraudulent, and by an accounting between the creditors, that a judgment either against the firm or its individual members could reach its assets. These mortgages were signed both by the partnership and the members of the firm as individuals, and the administratrix of the deceased partner was a necessary party to a proceeding in equity to set them aside. These mortgages were not only upon personalty, but also upon realty. The legal title to this real estate was not in the partnership, but in the partners as tenants in common (*Hartnett v. Stillwell*, 121 Ga. 386, 49 S. E. 276, 104 Am. St. Rep. 151), and the representative of the estate of a deceased partner would therefore be a necessary party to a proceeding to set aside a mortgage upon such real estate, signed not only by the partnership, but also by her decedent. Again, the contract of partnership between P. H. Emmett, an individual, and the Tatnall Investment Company, a corporation, was void, since the power to form a partnership is not one of those which is common to all corporations, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties imposed upon a corporation in the absence of such permission in the charter. *Gunn v. Central R. Co.*, 74 Ga. 509. Nor can the corporation as surviving partner here claim the legal right to administer the estate of the partnership, since it is only through the interposition of equitable principles that either its rights or obligations as a partner can be enforced. Had this suit been brought in Chatham county, the representative of the estate of P. H. Emmett, deceased, would have been a necessary party. It was therefore perfectly proper to bring this cause in Emanuel county. There was no error in refusing to sustain this ground of the demurrer.

The grounds of special demurrer were not argued in the briefs.

Judgment affirmed. All the Justices concur.

(132 Ga. 587)

GREGORY v. GEORGIA GRANITE R. CO.
(Supreme Court of Georgia. May 13, 1909.)**1. RAILROADS (§ 260*)—DUTIES—LIABILITY.**

In accepting a charter from the state containing a grant of rights and franchises, a railroad company impliedly assumes the duty of public carrier, and cannot divest itself of its public duties nor shirk its liabilities by allowing another corporation, without legislative authority, to take possession of its track and operate cars thereon.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 817-823; Dec. Dig. § 260.*]

2. RAILROADS (§ 260*)—DEFECTIVE TRACK—LIABILITY.

Where a railroad company without legislative authority permits another corporation to exercise the franchise of running cars drawn by steam over its track, the company owning the road is liable for an injury due to the defective construction of the track, as though such company itself were operating the cars.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 817-823; Dec. Dig. § 260.*]

3. CARRIERS (§ 238*)—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS.

Where a railroad company verbally consents for a quarry company to operate cars on its track, and the quarry company transports over such road its employes to and from their work, an employe of the quarry company who has no connection with the operation of the train while being so transported sustains to the railroad company the relation of passenger to the extent that the railroad company and its licensee is bound to exercise extraordinary diligence to keep from injuring him.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 238.*]

4. APPEAL AND ERROR (§ 979*)—REVIEW—DISCRETION OF TRIAL COURT—NEW TRIAL.

Where there have been two concurring verdicts for the plaintiff, and no error of law has been committed, and the verdict is amply supported by the evidence, and the trial judge states in his order granting a new trial that he does so mainly because in his opinion the evidence does not sustain an essential allegation of the plaintiff's petition, the judgment granting a new trial will be reversed where it appears that the trial court erred in deciding as to the legal effect of the evidence, which influenced him in granting a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Personal injury action by J. E. Gregory against the Georgia Granite Railroad Company. There was a verdict for plaintiff, which was set aside and a new trial granted, and plaintiff brings error. Reversed.

Hulsey & Field and J. D. Kilpatrick, for plaintiff in error. Westmoreland Bros. and Howard & Bolding, for defendant in error.

EVANS, P. J. The Georgia Granite Company, a corporation, owns and operates a quarry about three miles distant from Lithonia, a station on the Georgia Railroad. In 1904 the Georgia Granite Railroad Company, a corporation chartered under the general

railroad law by the Secretary of State, constructed a railroad from the quarry to Lithonia. For the sake of brevity hereafter we shall refer to the Georgia Granite Company as the quarry company and the Georgia Granite Railroad Company as the railroad company. The same person was the president of both corporations. The secretary and treasurer of the railroad company was the general manager of the quarry company and the vice president of the railroad company was the superintendent of the quarry company. The railroad company had no equipment, and, immediately after the completion of its track, the quarry company used it in transporting their output to Lithonia. The quarry company has an engine, but no cars, and the cars which it uses are furnished by the Louisville & Nashville Railroad Company, which operates the Georgia Railroad as lessee. The quarry company employs the engineer, the fireman, and trackmen, who operate the railroad and keep up its track. There is no formal written lease from the railroad company to the quarry company, and the latter operates the road under verbal arrangement, whereby the quarry company pays the engineer, fireman, and trackmen, and charges this expense to the railroad company. The terminus of the railroad at the quarry is called Rock Chapel, and there are two road crossings between Rock Chapel and Lithonia. In addition to transporting the product of the quarry, the quarry company also hauled fertilizers, cotton seed, and lumber for other persons, and collected freight for the same. Neither the quarry nor the railroad company maintained a ticket office or freight depot, nor was any fare ever charged or collected for carrying passengers. It was usual and customary for the quarry company to haul its employes to and from their work on the train, and to this end they left Lithonia after the arrival of the early passenger train on the Georgia Railroad for the accommodation of its employes who came daily by that train. It was also usual to stop at the road crossings between Lithonia and Rock Chapel to allow its employes to get aboard or leave the train. It was customary, not only to haul the employes of the quarry company, but also any other person in the community who wished to ride; and this custom was known to the railroad company and quarry company. In December, 1905, J. E. Gregory, an employe of the quarry company, whose work was not at all connected with the operation of the locomotive or train, while riding with numerous other employes from his work, was injured by the derailment of a car. He sued the railroad company for damages, alleging that he was riding on this car with the knowledge and sanction of the vice president and superintendent of the railroad company; that he had paid no fare as a passenger, and did not expect to be called

on to pay any fare as a passenger, but that he was able and willing and ready to pay fare had any been demanded of him; and that the derailment of the car was due to the defective construction and maintainance of the track. The defendant denied liability, and especially that it was negligent as charged. The plaintiff prevailed, and a new trial was granted. The case was again tried, and the plaintiff obtained a second verdict, which was set aside on motion for a new trial; and it is to this judgment that the plaintiff excepts. In the order granting a new trial the judge stated that it was granted mainly on the ground that the evidence failed to establish the relation between the plaintiff and the defendant of passenger and carrier, as alleged in the petition.

From the identity of the officials of the two corporations, and the cessation of active management by the railroad company after the completion of the line of railroad, and the subsequent operation of it by the quarry company, the railroad tracks seems to have been constructed mainly for the use of the quarry company. The railroad company, after having obtained from the state a charter with authority to exercise the right of eminent domain, by virtue of which it laid its track, cannot afterwards surrender the exclusive use and control of its track to a private corporation for private purposes. In accepting the grant of rights and franchises from the state a railroad corporation impliedly assumes the duty of a common carrier. The consideration of the grant is the undertaking of the corporation to impartially perform this public duty. 4 Elliott on Railroads, § 1392. A railroad company cannot divest itself of its public duties nor shirk its liabilities by simply allowing another corporation to take possession of its track and operate cars thereon. *Ga. R. Co. v. Haas*, 127 Ga. 193, 56 S. E. 313, 119 Am. St. Rep. 327; *Civ. Code 1895, § 1864*. It was held in *Macon & Augusta R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678, that, "where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has entrusted the franchise, is liable for an injury done, as though the company owning the road were itself running the cars." The theory of liability is that, where a railroad company owning the track suffers or licenses another corporation or person to discharge its public functions without legislative authority, the latter does so as the agent of the former. *Nelson v. Vermont & Canada R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Singleton v. S. W. R. Co.*, 70 Ga. 464, 48 Am. Rep. 574. The rule in the *Mayes Case*, supra, was held not to apply in case of a lessee operating the lessor's track under legislative authority, so as to make the lessor liable to the servant of the lessee for the negligence of a fellow servant

in the operation of a train. *Banks v. Ga. R. Co.*, 112 Ga. 655, 37 S. E. 992; *Killian v. A. & K. R. Co.*, 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410. In the present case there was no lease as contemplated by *Civ. Code 1895, § 2173*, and *Acts 1899 (Ga. Laws, p. 54)*, but simply a verbal consent by the railroad company for the quarry company to run its cars over its track at the expense of the quarry company. The act of 1899 provides for a record of a lease contract by a railroad company to another railroad company or a private person, and declares that a failure to record such lease shall make the lessor company liable for an injury caused by the lessee, and that a defense attempting to shift liability to the lessee shall not prevail. So that there can be no doubt that the railroad company is not absolved from liability as a common carrier for an injury caused by the derailment of the car operated by the quarry company, which was due to the defective condition and maintenance of the track simply because it had surrendered its track to the quarry company, and it did not itself otherwise engage in the business for which it was incorporated.

The plaintiff alleged that he was a passenger on the car which was derailed, and relies on the foregoing recital of facts as sufficient to show that he sustained this relation to the defendant at the time of his injury. Although in the employment of the quarry company, the duties of his employment were entirely disassociated with the operation of the train. He worked at the quarry, and, in accordance with the general custom of the quarry company, was being transported from his work on its cars when injured. Treating the quarry company as the agent of the railroad company in operating its cars over the latter's track, the servants of the quarry company operating the train relatively to the public were the servants of the railroad company. But the employees of the quarry company, whose work had no connection with the operation of the train, were not the servants of the railroad company. As was said in *Central R. Co. v. Henderson*, 69 Ga. 716: "Though one may be an employé of a railroad company, yet if his agency is disconnected from the running of trains, and while traveling he is injured, he stands in the position of a passenger." In this case the plaintiff was a depot agent of the railroad company, and was traveling on a pass. The exaction of fare by a railroad company is not essential in every case to make one riding on its cars a passenger. "One employed by a railroad company as a telegraph lineman, and who is transported to and from his work free of charge by the railroad company, and who while so traveling has nothing to do with the control or operation of the train on which he is riding, is a passenger to the extent that the company is bound to exercise extraordinary dili-

gence to keep from injuring him." *Carswell v. M. D. & S. R. Co.*, 118 Ga. 826, 45 S. E. 695. The plaintiff was not on the cars by the express permission of the quarry company, but was riding in accordance with a general custom, known to its officials, and daily practiced from the time it began to run its engine over the railroad company's track. The quarry company's permission for him to ride to and from his work will be implied from its general habit of transporting its employes to and from their work. At the time of the injury he was being transported by the agent of the railroad company, to wit, the quarry company. The conclusion we reach is that under the undisputed evidence the plaintiff sustained the relation of passenger to the defendant.

The grounds of the motion for new trial were that the verdict was contrary to law, contrary to evidence, contrary to the charge of the court, and that a certain excerpt from the charge was erroneous. There was ample evidence from which the jury could find that the derailment of the car was occasioned by the defective construction and maintenance of the railroad track, and that the plaintiff's injury was due to the defendant's negligence. The court charged the jury that the plaintiff could not recover unless it appeared from the evidence that he was a passenger, and in defining the relation of passenger and carrier used this language: "What are these elements of fact? First. There must be a carrier of passengers; that is to say, there must be a person, natural or artificial, who must do a business of carrying the public. A railroad company would be an artificial person, not a natural person. Second. There must be some person who is willing to be carried by the carrier, and carried under such terms and conditions as the carrier may lawfully prescribe. Third. The actual entry by such person into one of the vehicles furnished by the carrier for the purpose of being carried in accordance with such terms and conditions as the carrier may lawfully prescribe. When these elements of fact are all present, then the relation of carrier and passenger arises." Without stating the very elaborate criticism of this charge, it is manifest that there is nothing therein contained prejudicial to the railroad company. This is the second verdict for the plaintiff, and the court in its order granting a new trial states that he was mainly influenced to grant it because he did not think the evidence was sufficient to establish the relation of passenger. We differ with his honor as to the legal effect of the evidence on this subject. Where there have been two concurrent verdicts for the plaintiff on the same state of facts, and where no error of law has been committed, and where under all the evidence the verdict is not manifestly wrong, the trial judge could not in the exercise of his dis-

cretion grant a second new trial. *Dethrage v. Rome*, 125 Ga. 802, 54 S. E. 654.

The grant of the second new trial is reversed. All the Justices concur.

(132 Ga. 642)

BRADFORD v. BRAND.

(Supreme Court of Georgia. May 13, 1909.)

1. NEW TRIAL (§ 99*)—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

All applications for new trial upon the ground of newly discovered evidence are addressed to the sound legal discretion of the trial judge; and, even if the newly discovered evidence relied on as a ground for a new trial was not cumulative in its nature, there is nothing in the record to indicate that the judge abused the discretion vested in him in overruling the motion on this ground. *Miller v. State*, 119 Ga. 561, 46 S. E. 838.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 201, 202; Dec. Dig. § 99.*]

2. DEEDS PROPERLY ADMITTED.

The court did not err in admitting in evidence the deeds to the admission of which the plaintiff objected; nor was there any error of harmful effect to the plaintiff in the failure of the court to refer to such deeds in his charge.

3. SUFFICIENCY OF EVIDENCE.

The evidence was amply sufficient to support the verdict, and the court did not abuse its discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; J. N. Worley, Judge.

Action between M. E. Bradford and S. S. Brand. From the judgment, Bradford brings error. Affirmed.

J. A. Perry and N. L. Hutchings, for plaintiff in error. O. A. Nix and Napier & Cox, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 674)

HARRISON et al. v. BELL et al.

(Supreme Court of Georgia. May 15, 1909.)

APPEAL AND ERROR (§§ 598, 954*)—RECORD—AFFIDAVIT—REVIEW—DISCRETION OF LOWER COURT—INJUNCTION.

An application was made for a permanent and for an interlocutory injunction. On the hearing of the application for the latter, it was denied, and the plaintiffs excepted. The bill of exceptions recited that "the case went to trial upon the pleadings in the case, the petition, amendment, answer of the defendants, and the affidavit of A. J. Bell." Among other grounds urged by the defendants against the grant of the injunction prayed were laches and estoppel; and the answer did not admit all of the allegations of the petition, so as to make only issues of law. The affidavit referred to was neither incorporated in the bill of exceptions nor attached thereto as an exhibit duly identified by the judge, nor did it ever become a proper part of the record; but sent up with the record was what appeared to be a copy of an affidavit of Bell, but not otherwise identified, except that it preceded the certificate of the clerk to the record. Objection was made by counsel for defendant in error to the consideration of such

evidence, or to the reversal of the refusal of the court to grant an injunction, which in part at least rested on the exercise of his discretion.

Held:

(1) That the evidence was not properly brought before this court, and cannot be considered.

(2) In the absence of the evidence, it cannot be held that the presiding judge abused his discretion in refusing to grant an interlocutory injunction, or that the case is one so clearly controlled by a question of law as to require a reversal of such refusal, without regard to the evidence which may have been introduced.

(3) Under such circumstances, whether or not the court erred in refusing to strike certain portions of the answer, his ruling on that subject will not require a reversal of the judgment refusing to grant an interlocutory injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2644, 3818; Dec. Dig. §§ 598, 954.*]

(Syllabus by the Court.)

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by J. F. Harrison and others against H. W. Bell and others, trustees, for an injunction. From a judgment denying a temporary injunction, plaintiffs bring error. Affirmed.

W. W. Stark, for plaintiffs in error. J. S. Ayers, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 606)

MCGEE v. YOUNG.

(Supreme Court of Georgia. May 13, 1909.)

1. MUNICIPAL CORPORATIONS (§ 706*)—COLLISIONS—ACTIONS—EVIDENCE—SUFFICIENCY.

The verdict was authorized by the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. CONTENTION PROPERLY SUBMITTED.

The submission of the defendant's contention was in accordance with his plea, and adjusted to the evidence.

3. TRIAL (§ 248*)—INSTRUCTIONS—FAILURE TO CHARGE.

A charge embracing an abstractly correct and pertinent legal principal of law is not rendered erroneous by a failure to charge some other legal principle applicable to the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 582; Dec. Dig. § 248.*]

4. NEW TRIAL (§ 41*)—GROUNDS—INSTRUCTIONS.

A new trial will not be granted because of a possible slight inaccuracy in an instruction, where it is manifest that the complaining party could not have been harmed thereby.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 71; Dec. Dig. § 41.*]

5. NEW TRIAL (§ 39*)—GROUNDS—INSTRUCTIONS.

A new trial will not be granted because of the refusal by the court to give a charge containing an argumentative discussion of the various reasons underlying the rule of law that in all civil cases the jury are bound to take the law from the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 80; Dec. Dig. § 39.*]

6. TRIAL (§ 260*)—REQUESTED INSTRUCTION COVERED BY INSTRUCTION GIVEN.

In so far as the other requests presented correct and applicable principles, such were covered in the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by C. E. Young against H. H. McGee. Judgment for plaintiff, and defendant brings error. Affirmed.

Alexander & Edwards, for plaintiff in error. Wilson & Rogers, for defendant in error.

EVANS, P. J. C. E. Young, while riding a bicycle, was injured in a collision with an automobile driven by its owner, Dr. H. H. McGee. He sued Dr. McGee for damages, and obtained a verdict which the court refused to set aside, and the defendant brings error.

Judge Cann, who presided, at the trial, shortly thereafter resigned, and the motion for new trial was refused by his successor, Judge Charlton.

The scene of the collision was in Savannah, on Drayton street, at the intersection of Hall street. Drayton street extends north and south, and the roadway between the curbing is 28 feet. There is a row of large oak trees on the east side, occupying a part of the roadway near the curbing. At the time of the occurrence under investigation, a watering cart was stationed in the street just outside the trees. The plaintiff, who was riding a bicycle, was on the east side of the street, and was going northward, and the defendant was driving his automobile southward on the west side of the street. On the trial the plaintiff testified that, before he reached Hall street, he observed the defendant's automobile coming from the opposite direction. Just as he was approaching Hall street, he observed that the defendant began to turn his automobile into Hall street, and he undertook to provide against this change in direction, when the defendant suddenly changed his course, and ran into him. The defendant and his wife, who occupied the automobile, testified that the defendant never attempted to turn into Hall street, but that the plaintiff deflected his bicycle across the course of the automobile, and collided with it while the defendant was doing his best to avoid the changed course of the bicycle. It is urged that the evidence fails to show any liability, and that the court erred in refusing to grant a new trial, on the ground of insufficient evidence to support the verdict. It is argued that inasmuch as the judge who refused the motion did not try the case, and did not observe the witnesses under examination, his approval of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the verdict is not to be regarded with the same significance as if he had presided at the trial. There is a difference between the effect of an approval of a verdict on a motion for a new trial by a judge who presided at the trial, and its approval by one who only passed on the motion, but the only effect is simply to take the case out of the operation of the rule that the Supreme Court interferes reluctantly with a verdict approved by the presiding judge as contrary to law and evidence. *Cleveland v. Treadwell*, 68 Ga. 835. The variance between the plaintiff and the defendant as to the responsible and contributing cause of the collision is acute, and it was the peculiar province of the jury to settle this disputed issue of fact. By their verdict they found that the proximate cause of the collision was the defendant's negligence. In other words, they accepted the plaintiff's version of the occurrence. Their opportunity of seeing and hearing the witnesses while testifying gives them a superior advantage over us in determining the truth of the case. Unless errors of law have been committed, their verdict will be left to stand.

2, 3. It is contended that three excerpts from the charge are erroneous. The first relates to the court's summary of the defendant's contention as excluding one of his defenses. This is clearly without merit. The second exception alleges that a certain pertinent and correct charge was rendered erroneous by the failure of the court to charge in immediate connection therewith another principle of law. This exception cannot be sustained. *Cline v. Milledgeville Bkg. Co.*, 181 Ga. 611, 62 S. E. 984 (2).

4. The third exception to the charge is to this excerpt: "If a collision takes place and a party is on the wrong side of the road, the presumption is generally against the party on the wrong side of the road. This applies to whichever of the parties in this case you may find, if either, was upon the wrong side of the road." This charge is alleged to be erroneous, because it is contended that there was no evidence showing that the defendant was ever on the wrong side of the road, or was in violation of the rule of the road. The accuracy of the charge as a legal proposition is not questioned by the assignment of error. The evidence shows that the automobile just before the collision was near the middle of the road, and it is not perfectly clear that it ever crossed to the east side; but, even if it be conceded that the automobile never crossed over to the east side of the street, we do not see how the defendant was harmed by the instruction. There is no dispute that the actual collision occurred on the western side of the street, the left side relatively to the direction the plaintiff was riding his bicycle; and the force of the instruction was to the benefit of the defendant, as the jury were instructed that the presumption was against the party who was on the wrong side of the

street, and the plaintiff admitted that he had crossed the street to his left when he was stricken by the automobile.

5. Exception is taken to the refusal of the court to give in charge the following, as requested: "I further charge you that the court is responsible for the law. Your oath and your duty require you to take the law implicitly as the court delivers it. As it is sometimes unknown what reason guides juries to their conclusions, to aid your memory in this respect, the court reminds you that the charge is delivered in public in hearing of the parties and their counsel, and, if the court errs in the law, it is easy to reach such error, have a rehearing upon it, and have it corrected; but if the jury, as they privately deliberate, undertake to usurp the functions of the court, and undertakes to differ with the court as to the law of the case, it is more difficult to reach, to ascertain, or correct any such errors into which you may thereby fall. Therefore the law imposes upon the court the responsibility of determining the law of the case. The province of the jury is with the facts. You are exclusively the judges of the testimony, and it is your duty to find the facts from the testimony as delivered under oath by the witnesses, and, having found the facts, to apply the law of the case as given you by the court. I further charge you that the rule of the road, as established by the laws of Georgia, require travelers with vehicles, whether carts, wagons, automobiles, or bicycles, when meeting, to each turn to the right, and that it was the duty of the plaintiff to know and observe the rule of the road. Persons using the public streets, as conscious human agents, are bound to exercise their faculties of seeing and hearing, and are further bound to exercise ordinary care to avoid the consequences of the negligence of others who are using the public streets by either remaining away or getting out of the way of probable or known danger after they discover it if in the exercise of ordinary care and prudence they should discover it. If a person voluntarily assumes a risk or does a thing in a dangerous way which can be safely done, he assumes the risk of what he does, and, if an accident occurs and injury results to him in consequence thereof, he cannot recover; and in this connection I charge you that if you find from the evidence that the plaintiff's injuries were occasioned, wholly or in part, by his violation of the rule of the road, or in his voluntarily assuming a risk or in doing a thing in a dangerous way which he could have done in another way in safety, he cannot recover. If you find that the plaintiff's injuries were not occasioned by the negligence of the defendant, he cannot recover. The evidence must affirmatively show that the plaintiff is free from fault; otherwise he cannot recover. If you should find from the evidence that the defendant was negligent, but that the plaintiff had a clear chance to avoid the defendant's negli-

gence, but assumed the risk to himself occasioned thereby, such conduct on the part of the plaintiff is not merely contributory negligence, which will lessen the amount of his recovery, but is such a failure to avoid danger as will defeat his right to recover at all." With regard to the argumentative instruction that the jury are the judges of the facts, and must apply the facts to the law as pronounced by the court, we have only to observe that it is perfectly proper for a judge to remind the jury that in civil cases they are bound to take the law from the court, but a trial judge should not be forced by a written request in every case to enter into an argumentative statement of the reasons upon which the rule rests. We see nothing in the case which would suggest a cautionary instruction. An accurate and clear statement of a legal principle, either in the concrete or the abstract, may possibly become obscured by an extended philosophical disquisition on the rationale of the principle. In so far as the other requests were correct and applicable, they were covered by the general charge. The charge in its entirety was comprehensive, fair, and impartial, and presented the law appropriate to the case.

Judgment affirmed. All the Justices concur.

(132 Ga. 691)

CHURCHILL v. JACKSON.

(Supreme Court of Georgia. May 15, 1909.)

1. DOMICILE (§ 5*)—OPERATION OF LAW—INFANT.

It appearing that the maternal grandparents of a child of tender years had taken charge of the child and carried it from the county of its mother's domicile at the time of the latter's death, the death of the father of the child antedating that of its mother, and it further appearing that subsequently, as a result of habeas corpus proceedings instituted by the paternal grandfather of the child, custody of the child was awarded to the maternal grandfather, and that the latter, while having custody of the child, made application to the ordinary of the county of his residence for appointment as guardian of the person of the child, a finding against the ground of the caveat to such application for guardianship, on the ground that the ordinary of that county did not have jurisdiction to pass upon the application, was demanded.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 28; Dec. Dig. § 5.*]

2. GUARDIAN AND WARD (§ 13*)—PROCEEDINGS FOR APPOINTMENT—EVIDENCE—ADMISSIBILITY.

An exemplification of the record in a habeas corpus proceeding instituted to recover the custody of the child referred to above was properly admitted in evidence, to be considered solely in passing upon the question of the domicile of the child.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 45; Dec. Dig. § 13.*]

3. GUARDIAN AND WARD (§ 13*)—PROCEEDINGS FOR APPOINTMENT—EVIDENCE—ADMISSIBILITY.

The jury trying the case had upon them the duty of looking to the interest and advantages

of the child, the guardianship of whose person was involved in the case; and consequently evidence as to the financial condition of the applicant and his wife, who were the grandfather and grandmother of the child in question, was not irrelevant, and was properly admitted for the consideration of the jury.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 45; Dec. Dig. § 13.*]

4. EVIDENCE (§ 471*)—OPINION EVIDENCE—PROPER PARTIES TO RAISE CHILD.

It was error for the court to permit a witness to testify that "Mr. and Mrs. Jackson [the applicant and his wife] are proper parties to raise and bring up a female grandchild." It was competent for the witness to detail and describe the facts and circumstances which tended to show the fitness of the applicant for the guardianship of the child, but not to state his opinion. The jurors should have been left to form their conclusions from the facts stated in evidence, untrammelled by the opinion of the witness himself.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2150; Dec. Dig. § 471.*]

5. WILLS (§ 421*)—PROBATE—COLLATERAL ATTACK.

The will of the father of the child in question, which had previously been admitted to probate, having been offered in evidence, it was not competent to collaterally attack the same.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 904; Dec. Dig. § 421.*]

6. GUARDIAN AND WARD (§ 13*)—PROCEEDINGS FOR APPOINTMENT—EVIDENCE—ADMISSIBILITY.

Testimony of the wife of the applicant, to the effect that her daughter "gave her [the child] to me," was admissible for consideration by the jury in the trial of the issues in this case.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 45; Dec. Dig. § 13.*]

7. EVIDENCE (§ 107*)—FINANCIAL CONDITION—ADMISSIBILITY.

Where the financial condition of the resident of any county in this state is material to be considered, an exemplification of the tax digest, properly certified by the clerk of the court of ordinary, is admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 200; Dec. Dig. § 107.*]

8. GUARDIAN AND WARD (§ 11*)—TESTAMENTARY GUARDIAN—GUARDIAN OF PERSON.

An item of a will in the following language: "I hereby appoint my father, C. N. Churchill, guardian of my child, to hold, control, and manage the property given her during her minority; and he shall not be required to give bond or security for the performance of such trust"—was properly held by the court below to have the effect of appointing C. N. Churchill the testamentary guardian of the property only, and not the person, of the child referred to.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 38; Dec. Dig. § 11.*]

9. NO OTHER ERROR.

No other reversible errors than those which have been ruled upon above are made to appear in the record.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Application by W. A. Jackson for the guardianship of Anna Kate Churchill, a minor. C. N. Churchill filed a caveat to the application. From a judgment for applicant, the caveator brings error. Reversed.

B. F. Walker, Phillips & Phillips, and Hines & Jordan, for plaintiff in error. R. L. Gamble and Cain & Hardeman, for defendant in error.

BECK, J. This is a contest for the guardianship of the person of Anna Kate Churchill, the minor child of Stanley and Pearl Churchill. W. A. Jackson, the applicant for the guardianship, is the maternal grandfather of this child, and C. N. Churchill, who caveated this application, and who asked to be appointed her guardian, is the paternal grandfather. Upon the trial the jury returned a verdict for the applicant, and the caveator moved for a new trial. The motion having been overruled, he excepted.

1. The first ground of the caveat is that "Anna Kate Churchill is not a resident of Jefferson county, but is a resident of Warren county, this state; and therefore this court is without jurisdiction to grant such guardianship, but Warren court of ordinary is the proper and only court that can pass upon such application and appoint a guardian for said Anna Kate Churchill." The plaintiff in error insists that the verdict against him upon this ground is contrary to law and without evidence to support it. At the time of the death of the mother of the child in question, the mother, who was a widow and survived her husband only a few weeks, was a resident of Warren county, as was also the husband, Stanley Churchill, at the time of his death. Consequently there can be no question that at the time of the death of the mother the domicile of Anna Kate Churchill was in Warren county. But custody of her was taken by her maternal grandfather and grandmother, by whom she was carried from Warren county to Jefferson county, and subsequently, upon habeas corpus proceedings having been sued out by C. N. Churchill to recover possession and custody of the child, her custody was awarded to the defendant in error in this case; and we are of the opinion that thenceforward, and until lawfully changed again, the last-mentioned county was the county of the child's domicile. In the case of *Hayslip v. Gillis*, 123 Ga. 266, 51 S. E. 326, it is said: "Moreover, in that case [Darden v. Wyatt, 15 Ga. 414], the grandfather of the minors took them from the county of the domicile of their deceased father and carried them to his home in another county, there to live with him; whereas, as we have shown, the minor in the present case was carried from the county of her deceased father's domicile and cared for by persons who were not her kin. Therefore, if the court had broadly held in the Darden Case, as, perhaps, it might properly have done (see *Lamar v. Micou*, 114 U. S. 218, 55 Sup. Ct. 857, 29 L. Ed. 94) that the grandfather of an infant whose parents are both dead may change the domicile of the infant from one county to another, so as to vest in the ordinary of the latter county jurisdiction

to appoint a guardian, such a decision would not have been contrary to the case at bar, for the reason just indicated." The father and the mother of the infant of tender years both being dead, and custody of the child having been taken by the maternal grandfather, there being no nearer kin, and that custody having been solemnly adjudged to be proper and fit, and having been continued by the judgment of the court which had jurisdiction of the matter, it would seem that the place of the domicile of those to whom the custody of the child was awarded under these circumstances became the domicile of the child.

2. The exemplification of the record in the habeas corpus proceedings, which resulted in a judgment awarding the custody of the child in question to the defendant in error here, was properly admitted in evidence, in order that it might be considered by the jury in passing upon the question of the domicile of the infant, the right to whose custody was involved in the habeas corpus proceedings. But it was admissible only for the purpose indicated, and the jury should have been restricted by proper instructions from the court, directing them to give effect to this evidence only in passing upon that particular issue.

3. The applicant, as a witness for himself in this case, was permitted to testify, over the objection of caveator, that "my wife and myself are worth more than \$1,000." The objection urged was that this evidence is irrelevant. Inasmuch as the jury trying the case had upon them the duty of looking to the interest and advantages of the child, the guardianship of whose person was involved in this case, evidence as to the financial condition of the applicant and his wife, who were the grandfather and grandmother of the child in question, was not irrelevant but was pertinent to the issues involved. This evidence was pertinent and material, and the objection was properly overruled. *Walton v. Twiggs*, 91 Ga. 90, 16 S. E. 813.

4. Error is assigned upon the ruling of the court permitting C. A. Matthews, a witness for applicant, to testify, over the objection of caveator, that "Mr. and Mrs. W. A. Jackson are proper parties to raise and bring up a female grandchild." The objection urged to this evidence is based on the ground that it stated merely the conclusion and opinion of the witness. The exception was well taken, and the objection urged to the evidence just stated should have been sustained. Although the witness testified to the facts and circumstances upon which his opinion was based, when he was permitted to state his opinion and his conclusion, he was permitted to exercise and perform the function and duty of the jury. The witness should have been confined to a statement of the facts illustrating the question as to whether or not Mr. and Mrs. Jackson were "proper parties to raise and bring up a female grandchild," and the

jury should have been left free to consider those facts, unrestricted by any expressed opinion of the witness as to whether or not it followed, from the testimony of this particular witness, and others who were called to testify as to the same issue, that the applicant and his wife were suitable persons to be intrusted with the rearing of the child. "The opinion of a witness is not admissible in evidence, when all the facts and circumstances are capable of being clearly detailed and described, so the jurors may be able readily to form correct conclusions therefrom." *Mayor, etc., v. Wood*, 114 Ga. 370, 40 S. E. 239. Of course, there are exceptions recognized by law to this rule; but the issue involved here does not fall within any of the exceptions. In the case of *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110, it is said: "Evidence touching the character, conduct, and reputation for lewdness of the mother, and other evidence tending to throw light on the question at issue, was admissible; but it was not competent for witnesses to testify generally that they thought that the mother was an unfit person to rear her children." What we have said above in regard to the opinion evidence of the witness Matthews is applicable also to that of the evidence of several other witnesses, who were permitted to give in evidence their opinion touching the fitness of Mr. Jackson for taking charge of and rearing his little grandchild. Testimony of this character should have been excluded, and the court erred in overruling the objections thereto.

5. In another ground of the motion for a new trial it is complained that "the court erred in permitting counsel for the applicant, over the objection of counsel for caveator, to have C. N. Churchill, a witness for himself, to testify as follows: 'I don't know, sir, who drew this will for my son. He had it drawn. I know who drew the will. This is the original. I drew that will. There was two wills. There was a copy. That is the will that I drew from the copy. I don't know who drew the copy. I can't tell you. My son had the copy, and I drew that other one from that copy. As to whether or not this will is mine, and not his—no, sir; that is not true. I did not write this will. It was probably a week, or probably more, before my son's death, that he signed this will.' Caveator objected to this testimony, on the grounds that it was irrelevant, and because the will of Stanley Churchill, which had been probated, could not be attacked in this way." It is apparent that the ruling here complained of was error. The only effect such testimony could have had would have been to show the invalidity of the will, and this was neither the time nor place for such an attack upon the will. When the will was offered for probate, the issue of *devisavit vel non* might have been raised, and the conduct

and conscience of the witness might have been probed in an effort to ascertain before a competent tribunal whether the will which was offered for probate was actually the will of Stanley Churchill, or his father, C. N. Churchill, the witness whose testimony we now have under consideration. But the will had been probated, and the time for an attack of this character upon it had passed.

6. The court did not err in permitting Mrs. Jackson, the wife of the applicant, to testify, in answer to a question as to how she came into possession of the child, that "my daughter gave her to me." The question and answer were objected to on the ground that the testimony was irrelevant; but we are of the opinion that it was a circumstance proper to be considered by the jury in the trial of the issues in this case. *Watson v. Warnock*, 31 Ga. 715.

7. Where the financial condition of the resident of any county in this state is material to be considered, an exemplification of the tax digest, properly certified by the clerk of the court of ordinary, is admissible in evidence. See, in this connection, the case of *Clark v. Empire Lumber Co.*, 87 Ga. 744, 13 S. E. 826, and cases there cited.

8. The ninth item of the will of Stanley Churchill is as follows: "I hereby appoint my father, C. N. Churchill, guardian of my child, to hold, control, and manage the property given her during her minority; and he shall not be required to give bond or security for the performance of such trust." This item of the will was properly held by the court below to have the effect of appointing C. N. Churchill the testamentary guardian of the property only, and not of the person, of the child referred to. The contrary instruction, which was requested in writing by counsel for plaintiff in error, was properly refused.

9. No other reversible errors than those which we have indicated are made to appear in this record. The evidence was conflicting; and, as the case is remanded for another trial, we, of course, refrain from any expression as to the weight of the evidence as shown in this record.

Judgment reversed. All the Justices concur.

(5 Ga. App. 193)

NORTH AMERICAN ACCIDENT INS. CO.
v. WATSON. (No. 1,609.)

(Court of Appeals of Georgia. May 18, 1909.)

1. INSURANCE (§ 539*)—SICK BENEFIT—NOTICE OF SICKNESS—CONDITION SUBSEQUENT.

A condition in a policy of insurance for sick benefits, requiring that written notice of the sickness for which the benefit is claimed shall be given to the company within 10 days from the commencement of the sickness under penalty of forfeiture, unless expressly stipulated to be a condition precedent, will be treated as a condition subsequent, and given a liberal con-

struction in favor of the beneficiary of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

2. INSURANCE (§ 539*)—SICK BENEFIT—NOTICE OF SICKNESS—FAILURE TO GIVE—EXCUSE.

Where the insured was suddenly stricken with some disease of the brain, which rendered him unconscious, and made it impossible for him to give to the company written notice of his sickness within the time stipulated, this fact was legally sufficient to excuse him from a compliance with this condition of the policy during the existence of such disability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1334; Dec. Dig. § 539.*]

3. INSURANCE (§ 539*)—SICK BENEFIT—NOTICE OF SICKNESS—FAILURE TO GIVE—EXCUSE.

Although the time in which the insured shall give to the company notice of his sickness is fixed by the contract, if his sickness makes a literal compliance impossible, he will be excused for the failure, if he complies with his contract in this respect within a reasonable time after it becomes possible for him to do so, or within the time stipulated after the cause preventing compliance ceases to exist.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1334; Dec. Dig. § 539.*]

4. INSURANCE (§ 646*)—SICK BENEFIT—ACTIONS—BURDEN OF PROOF.

The burden is on the insured to excuse his failure to comply with the plain, unambiguous terms of his contract. In this case the insured did not successfully carry this burden, and the evidence affirmatively shows that he failed to exercise reasonable diligence in complying with the terms of the contract requiring him to give written notice to the insurance company of the commencement of the sickness for which he claimed a benefit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1666; Dec. Dig. § 646.*]

(Syllabus by the Court.)

QUESTIONS FOR JURY.

In construing contracts of insurance, the substance should be preserved and the intention of the parties effected regardless of immaterial stipulations. If it is the purpose of the contract to furnish indemnity against loss, it is to be presumed that conditions subsequent in a contract of insurance will be limited to those objects which were in the contemplation of the parties when making the contract. Insurance is designed to afford proper protection, and not to provide for profitable speculation. In my opinion, it is for the jury to say from the facts and circumstances adduced in evidence whether the conditions subsequent in a policy of insurance are immaterial or material, and, if material, whether they were reasonably complied with; and therefore, it was for the jury to say whether the notice of the insured's sickness was given the company within a reasonable time. The evidence was sufficient, in my judgment, to support the verdict of the jury and to authorize their finding that the insured complied with his contract within a reasonable time after it became possible for him to do so.

(Per Russell, J., dissenting.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by O. H. Watson against the North American Accident Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Tye, Peeples, Bryan & Jordan, for plaintiff in error. Smith, Hammond & Smith and F. L. Neufville, for defendant in error.

HILL, C. J. Watson sued the North American Insurance Company in a justice's court for \$100, claimed as a sick benefit under a policy issued to him by the company. He obtained a judgment for the full amount, and on appeal to the superior court the jury found a verdict in his favor for this amount. The company filed a motion for a new trial, which was overruled. The insurance company defended on the sole ground that the plaintiff had forfeited his right to the sick benefit claimed by him under the policy because of his failure to comply with the following express condition thereof: "Written notice of any injury, fatal or nonfatal, or of any sickness for which claim can be made, shall be given to the company at its home office at Chicago, within ten days of the occurrence of the accident or commencement of the sickness, and failure to give such written notice within ten days from the date when it becomes possible to give such notice of injury, or, in case of sickness, within ten days from date of commencement of sickness, shall invalidate any and all claims under this policy." The company admitted that it had received written notice from the plaintiff of his sickness, but claimed that this notice had not been received by it either at its home office in Chicago or elsewhere within 10 days from the commencement of the plaintiff's sickness as required by this stipulation of the policy. The plaintiff replied to this defense by the allegation that he had been providentially prevented from giving the written notice within the 10 days because of mental and physical incapacity caused by his sickness, and that, after he had recovered sufficiently to give the notice required by this condition of his policy, he did so with all reasonable and proper diligence. By an amendment to his petition he alleged that the company had waived his failure to give the notice within the time stipulated, by sending to him, through its agent, a blank form for the purpose of having him prepare and send the notice to it, which he did as soon as he received the blank. The question for decision arises on the construction of this condition of the contract.

Some authorities hold that, where the language is plain and unambiguous and mandatory in its character, its terms cannot be enlarged by judicial construction, but demand strict compliance with the letter of the contract, and that liability cannot in any event survive a failure to comply literally with its requirements in this respect. Gamble v. Accident Assurance Company, 4 Ir. R. O. L. 204; Patton v. Employers' Liability Assur-

ance Corporation, 20 Law Rep. (Ir.) 93. Other authorities take a more liberal view, and hold that stipulations as to time in which notice of injury, loss, or sickness for which indemnity is claimed is required to be given are not necessarily and in every instance to be literally complied with in order to prevent a forfeiture of the policy. Unless these provisions are expressly stipulated to be conditions precedent, they should be treated as conditions subsequent and given a liberal construction in favor of the beneficiary of the policy to prevent a forfeiture. The condition that notice shall be given operates upon the contract of insurance only subsequent to the fact of loss, injury, or sickness, and it should therefore receive a liberal and reasonable construction in favor of the beneficiary under the contract. Niblack on Accident Insurance and Benefit Societies, § 417; Woodmen Accident Association v. Pratt, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777. It is settled by an overwhelming weight of authority that where the failure to give prompt notice is not due to the negligence of the insured or beneficiary, but such compliance has been prevented and rendered impossible by an act of God, this would furnish a sufficient legal excuse for the delay in giving the stipulated notice, and this doctrine has been applied in cases in which a specified time for the giving of the notice has been fixed by the contract. The theory of these cases, as stated by Cooley (4 Briefs on the Law of Insurance, 3482), is that "it could not have been in the contemplation of the parties that if the insured, who was required to give the notice, was unable to do so by reason of the very accident against which indemnity was given, he should therefore lose such indemnity through no fault of his own." Reed v. Loyal Protective Association (Mich.) 117 N. W. 600; 37 Insurance Law Journal, 1024; Brown v. Fraternal Accident Association, 18 Utah, 265, 55 Pac. 63; Comstock v. Fraternal Accident Association, 116 Wis. 382, 93 N. W. 22; Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135; Insurance Company v. Boykin, 12 Wall. 433, 20 L. Ed. 442; Woodmen Accident Association v. Pratt, 62 Neb. 674, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777. The Supreme Court of Georgia in the case of United Benefit Society v. Freeman, 111 Ga. 355, 36 S. E. 764, in a policy where the condition as to notice to be given was expressly stipulated to be a condition precedent, clearly recognizes that impossibility of performance by the insured would be a sufficient legal excuse for a failure to give the notice within the time required by the terms of the policy. In that case the court holds, however, that the evidence was not sufficient to support the finding that it was impossible for the plaintiff to give the notice to the society within ten days from the date of his injury. We deduce the proposi-

tion from the authorities cited that where the insured is suddenly stricken with some disease of the brain which renders him unconscious, and makes it impossible for him to give to the company within the time stipulated written notice of his sickness, this fact is legally sufficient to excuse him from a compliance with this condition of the policy during the existence of such disability. We are also of the opinion that, although the time in which the insured should give to the company written notice of his sickness is fixed, if the sickness itself makes a literal compliance impossible, giving the notice required within a reasonable time after it becomes possible to do so, or within the time stipulated after the cause preventing prior compliance has ceased to exist, would be sufficient to prevent a forfeiture. McFarland v. U. S. Mutual Accident Association, 124 Mo. 204, 27 S. W. 436; Woodmen Accident Association v. Pratt, supra. The questions of the sufficiency of the excuse offered, and the diligence of the beneficiary in giving the notice after the removal of the disability, are generally questions of fact, to be determined by the jury, according to the nature and circumstances of each individual case.

The material facts in the case now under consideration are not controverted. On July 20, 1907, the insured, while walking on the streets in Macon, was suddenly stricken with some disease of the brain which rendered him unconscious. He was taken to a hospital, where he remained under constant treatment for 16 days. During the first five days he was totally unconscious, the remainder of the time he had lucid intervals, but, according to the testimony of his physician, during the entire 16 days he was incapable of transacting any business. On August 5th he was sufficiently restored to be removed to his home, some 10 miles in the country. According to his own testimony, as soon as he arrived at his home, he sent for his family physician, and on the next day after his arrival he secured his policy, with a blank copy of the notice required to be given of his sickness, and asked the physician to aid him in making it out by filling in the statement to be made as to his condition by his attending physician. The doctor suggested that the physician who had attended him while he was in the hospital in Macon was the proper one to make this statement, and, acting on this suggestion, the blank was inclosed and sent through the mail to this physician at Macon, with the request that he complete it and return it to the insured. The insured further testified that he did not hear from the physician in Macon for some time, and he thereupon wrote him a letter asking the cause of the delay, and received a reply stating that the blank notice had been misplaced. It does not appear definitely in the testimony how long the insured waited before writing this second letter to the physician in Macon,

but it is fairly deducible from the testimony that he did wait for several weeks, for he testified that immediately on hearing from the physician he wrote to the agent of the company at Atlanta on the 29th of August, requesting him to send him another blank notice, which notice he received on the 30th of August, and that he thereupon filled out the notice and mailed it to the company at Chicago, and it was received by the company on the 9th of September. It therefore appears that the company did not receive the stipulated notice for a period of 50 days from the time the insured was first stricken with the sickness for which he claimed the benefit. It is clearly established by the evidence that he was mentally and physically incapable of transacting any business or complying with the condition of the policy as to the notice during the first 16 days after his sickness and while he was in the hospital in Macon, but it does not appear that this disability continued to exist after his arrival at his home on August 5th. It does appear from his own evidence that, immediately on his arrival at home, he realized the importance of sending the notice to the company, and undertook to do so. It is reasonable, therefore, to infer that he was mentally and physically capable of complying with this stipulation of his contract from the time of his arrival at home on August 5th to the time when he did actually comply with it by sending the notice which was received by the company on September 9th. Whether he exercised all reasonable diligence during this time in complying with the requirements of his policy would be a question for determination by the jury, if, under his own testimony, there was any doubt on the question. It is true he states generally that for the entire 10 weeks of his sickness he was unable to attend to business, and was really not able to attend to business when he did return to his work on September 28th; but this general conclusion of his cannot overcome the specific facts stated by him showing that he was mentally and physically able to attend to the giving of the notice to the company under his contract; for, as a matter of fact, he did send the notice to his physician at Macon on August 6th. No reason appears why he could not have sent this notice directly to the company. It does not appear that any special form of notice was necessary. The condition of the policy simply required that written notice of his sickness should be given to the company at Chicago. It seems, too, that he was guilty of laches in waiting for at least three weeks to hear from the physician in Macon before writing to him to know the cause of the delay. He does not give any reason why it was necessary for him to wait so long a time. The law imposed upon him the burden of showing, by a preponderance of the evidence, that he was incapable, mentally or physically, of complying with this requirement of his policy from the time that he was taken sick

to the time when he did actually comply with it by sending the notice. It was his duty to show, to the satisfaction of the jury, that he was incapable, on account of his physical or mental condition, of giving this notice, either within 10 days after his disability to do so had been removed, which was the measure of diligence agreed on by the parties to the contract, or, at least, that in the exercise of all reasonable diligence, he could not have done so sooner than when he did actually give the notice as required by his contract. The defense set up in this case cannot be regarded as purely technical. There are substantial reasons why notice of the commencement of the sickness within the time stipulated, or, at least, within a reasonable time thereafter, would be important to the company for the purpose of determining its liability for the benefit claimed. While this court is reluctant to adopt any construction of an insurance contract which would deprive the insured of the benefits of his policy, and will not do so unless convinced that such construction is demanded by the law and the evidence, under the facts of this case, we are clearly of the opinion that the plaintiff not only failed to carry the burden which the law imposed upon him, but did, by his own testimony, affirmatively show that he failed to comply with the plain, unambiguous terms of his contract without a sufficient legal excuse.

There is no evidence whatever that the company waived a performance by the plaintiff of this condition of the contract. The only evidence relied upon by the plaintiff as showing a waiver is the fact that the company's agent at Atlanta sent him a blank for the purpose of giving the notice; but it is undisputed that the agent did not know that the plaintiff had been sick, or that he had not given the notice as required when he sent the blank in compliance with his request. In his letter to the agent asking for a blank, the plaintiff did not inform him even that he had been sick, and in the letter there was no intimation given to the agent that the plaintiff had forfeited the benefits of his policy by a failure to comply with any of its conditions.

Judgment reversed.

POWELL, J. (specially concurring). I agree that the condition as to notice is *prima facie* reasonable. I agree that the time during which the insured by reason of his mental incapacity was prevented from sending the notice is not to be counted as a part of the 10 days. I think, however, that when he had had 10 days after excluding from the calculation the period of his mental or physical incapacity to send the notice, and had not sent it, his right to sue on the policy ended.

RUSSELL, J. (dissenting). I concur in the propositions stated in the first three head

notes, but I cannot agree to set aside the finding of the jury in this case upon a question which it was their sole province to determine. It is conceded in the opinion of the majority that the stipulation of the contract which affords the insurance company its sole excuse for claiming a forfeiture of the sick benefits which the jury found that the defendant in error was entitled to recover (to wit, the condition that "written notice of any injury, fatal or nonfatal, or of any sickness for which claim can be made, shall be given to the company at its home office at Chicago within ten days of the occurrence of the accident or commencement of the sickness, and failure to give such written notice * * * in case of sickness, within ten days from the date of commencement of sickness, shall invalidate any and all claims under this policy") must be treated as a condition subsequent, and not as a condition precedent, nor as an essential warranty on the part of the insured. In *Southern Life Insurance Company v. Wilkinson*, 53 Ga. 536, the Supreme Court held that, if there was any variation in the conditions of the policy which changed the nature or extent or character of the risk, failure to fulfill the conditions would avoid the policy, but held, further, in the sixth division of the opinion that "the question as to giving notice of the death of the person whose life was insured to the company within a reasonable time was one for the jury, under proper instructions, to be given in the charge, and was not to be absolutely passed upon by the court." And the court ruled that it was not error to refuse to charge the jury as requested by the insurance company that a delay for several months to give notice of the death of the party whose life was insured would be failure to give notice in a reasonable time. I conceive the proper rule as to conditions subsequent in a policy of insurance, such as to give notice similar to that embodied in the contract now under consideration, to be that the stipulation will be held to be complied with if there is compliance within a reasonable time, and that the jury are the sole judges as to whether such conditions subsequent have been reasonably complied with. Unlike conditions precedent, conditions subsequent, embodied in a contract of insurance, do not affect the nature, extent, or character of the risk; and, if the conditions precedent or warranties on the part of the insured are shown to have been fulfilled, and the insured has paid all the premiums which by his contract he has been required to pay, no construction should be indulged which would enable the insurer, by the use of an unsubstantial technicality, to defeat an honest claim of the insured to the indemnity promised him by the contract. The great learning of Judge Bleckley was never more pithily expressed than in the

statement: "Insurance is business, and not elaborate and expensive trifling." *Mobile Fire Department Insurance Co. v. Coleman*, 58 Ga. 257.

In this case my Brethren, conceding that the evidence shows that the insured could not give the stipulated notice within the 10 days required by the contract, and admitting that within a certain period thereafter a notice would have been efficacious, nevertheless hold that the notice given by the insured at a later period by a few days comes too late, and the insured's benefits must be lost to him because notice was not given 3 weeks sooner. Of what materiality is this stipulation? If it be reasonable at all, especially as to the requirement which requires notice of a fatal accident to be given within 10 days or else the benefits will be lost (although no one but the deceased may know that he has a policy, and it may not be discovered for more than ten days after his death by accident), and if it be conceded that there may be instances of reasonable cause for delay, and that notice may be given after the 10 days which can properly be held to have been given within a reasonable time, then it seems to me clear that it is for the jury, and for the jury alone, judging the question by the peculiar facts of the special case before them, to determine whether the condition has been so substantially complied with as to render the fact that it was not sooner complied with immaterial. In my opinion (based upon that of Chief Justice Bleckley), when one pays his money for insurance, whether it be life, fire, or accident insurance, and the bona fides of his claim for indemnity under the contract of insurance cannot be questioned, no stipulation of the contract which is immaterial in the ascertainment of the honesty and justness of the claim should be permitted to defeat his just demand. If it be said that the purpose of the notice is to give the insurer an opportunity of ascertaining whether the insured was really sick, and the notice confessedly was not given until after the insured was well, how can it be said that the rights of the insurance company were materially affected by the notice having been given three weeks and four days after the insured recovered from his sickness, rather than two days after he had actually recovered? As said by Judge Bleckley in the *Coleman Case*, *supra*: "The Code governs the contract, and the construction of the Code is settled, to the effect that what is wholly immaterial to the risk is so utterly immaterial that the yea or nay of it will not render the policy void. If this be the true meaning of the Code, even an express stipulation by the parties that the validity of the policy shall depend upon immaterial as well as material matters is, at bottom, an attempt to repeal the law. Such a stipulation is itself immaterial in the sense of being idle and nugatory. The Code, instead of rele-

gating to the parties the subject of materiality, holds possession of it for rational and honest adjudication by the tribunals of the country. Whoever makes a contract of insurance in this state must submit to have its force and effect governed by the statutory provisions applicable to that class of contracts. There is a public policy involved in standing by substance. Insurance is business, and not elaborate and expensive trifling. Of course, what is in any degree material should be allowed its due effect; but the absolutely immaterial should count for nothing." This was the criterion established by the Supreme Court for determining as to the binding force even of representations of the assured warranted to be true. And much less then should a condition subsequent, which, in my view, is utterly immaterial to the validity of the contract, and which does not touch its substance, be permitted to defeat a claim whose honesty is unchallenged, and whose merit has been asserted by the solemn verdict of a jury. If Watson had never given any notice, and the circumstances had been such as to authorize the jury to find that he was not excused therefrom, the circumstance that he had failed to give the notice might tend to discredit the bona fides of his claim, but mere failure to give notice could not defeat it if a jury was authorized to find, and did find, that the circumstances were such as that he was excused from giving notice. I think that the jury were as much authorized to find that Watson (whom the evidence does not show to have been well, although convalescent) was as much to be relieved from literal compliance with the stipulation in regard to the 10-days notice at the time when the notice was finally sent as he could properly have been excused (according to the opinion of my Brethren) at the time that he first sent the notice to the physician. As to whether the notice, if ever given, was given in a reasonable time, was a question purely for the jury, and their finding, approved by the learned trial judge, meets my hearty concurrence. If it is the purpose of a contract of insurance to honestly furnish indemnity against loss, the substance of the contract should be preserved, regardless of immaterial technical stipulations. It is not to be supposed that it was within the contemplation of the parties to this contract of insurance that an honest claim for indemnity, purchased by the insured's payment of the required premiums for that sole purpose, should be defeated because of noncompliance with stipulations designed solely for the protection of the insurer against fraud, and where it could not be contended that compliance would either increase or diminish the true amount to which the beneficiary would be entitled in return for the pre-

miums. Insurance premiums are not designed wholly for the profit of the insurer, but also partly for the protection of the insured. The presumption may be indulged that the insurer caused conditions subsequent to be ingrafted for his proper protection against fraud, but if provisions are inserted which apparently can serve no purpose other than to afford an excuse to defeat a liability which, according to the substance of the contract, is just, such stipulation should be disregarded as immoral, illegal, and void. In construing the condition subsequent in a contract of insurance, it can properly be assumed that proper protection, and not profitable speculation, was what was within the contemplation of the parties at the time of the contract.

(6 Ga. App. 189)

GARBUTT LUMBER CO. v. WALKER et al.
(No. 1,590.)

(Court of Appeals of Georgia. May 18, 1909.)

1. FRAUD (§§ 20, 46*)—RELIANCE ON FALSE REPRESENTATION—ACTIONS—DECLARATION—SUFFICIENCY.

There was no error in sustaining the demurrer and dismissing the plaintiff's petition. To recover in an action for deceit, it must appear, not only that the representation made was false, to the knowledge of the party making it, but that the plaintiff parted with his money on the faith of the false representation. A declaration which fails to allege that the plaintiff parted with his money on the faith of the false representation is totally defective.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 17, 41; Dec. Dig. §§ 20, 46.*]

2. LIMITATION OF ACTIONS (§ 100*)—FRAUD—DISCOVERY—REASONABLE DILIGENCE.

Under the allegations of the petition, the suit was barred by the statute of limitations. The rule laid down in section 3785 of the Civil Code of 1895, to the effect that in cases of fraud the period of limitation shall run only from the time of its discovery, does not operate in favor of a plaintiff who might, by the exercise of ordinary diligence, have made such discovery. The petition now under review makes a case where the exercise of such diligence would have resulted in discovering the defendant's alleged fraud, if any there was, and states no sufficient or satisfactory reason or excuse for the plaintiff's failure to use such diligence. Consequently there was no error in dismissing the action. *Little v. Reynolds*, 101 Ga. 594, 28 S. E. 919 (1) (2).

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 490; Dec. Dig. § 100.*]

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Action by the Garbutt Lumber Company against Nancy Walker and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hal Lawson, for plaintiff in error. M. E. Land, Eason & Bull, and Haygood & Cutts, for defendants in error.

RUSSELL, J. Judgment affirmed.

(6 Ga. App. 251)

MOSES v. STATE. (No. 1,842.)

(Court of Appeals of Georgia. May 18, 1909.)

1. ARREST (§ 70*)—DUTY TO BRING BEFORE JUDICIAL OFFICER.

An officer, arresting under a warrant, should exercise reasonable diligence in bringing the person arrested before a judicial officer authorized to examine, commit, or receive bail. While the officer has authority to imprison the person arrested before commitment trial, he should not do so arbitrarily and without reasonable cause.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. § 172; Dec. Dig. § 70.*]

2. OBSTRUCTING JUSTICE (§ 3*) — RESISTING EXECUTION OF WARRANT OF ARREST—FORCE —“OBSTRUCT, RESIST, OR OPPOSE.”

The words “obstruct, resist, or oppose,” as used in the statute making it an offense to obstruct the execution of legal process (Pen. Code 1895, § 306), imply forcible resistance.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 4; Dec. Dig. § 3.*]

3. OBSTRUCTING JUSTICE (§ 3*) — RESISTING EXECUTION OF WARRANT OF ARREST.

The verdict is without any evidence to support it.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 4; Dec. Dig. § 3.*]

(Syllabus by the Court.)

Error from City Court of Blakely; W. A. Jordan, Judge.

Whit Moses was convicted of resisting an officer, in violation of Pen. Code 1895, § 306, and he brings error. Reversed.

Moses was convicted of a violation of section 306 of the Penal Code of 1895 which is in the following language: “If any person shall knowingly and willfully obstruct, resist, or oppose any officer of this state, or other person duly authorized, in serving, or attempting to serve or execute, any lawful process, or order, * * * he shall be guilty of a misdemeanor.” The evidence, briefly stated, is as follows: The deputy sheriff of the county of Early arrested Moses under a warrant, duly issued by a justice of the peace, charging him with the offense of wife-beating. Moses made no resistance, but took the arresting officer in his buggy and drove with him to the jail. When Moses was arrested, a white citizen in the store where he was arrested offered to the deputy sheriff to then and there go upon his bond. The officer refused to take bond. This same citizen thereupon went to the courthouse, saw the sheriff of the county, and told him that he wanted to go on the defendant's bond. The sheriff made no objection to the bondsman offered, but refused to take bond at all. When the defendant and the deputy sheriff reached the jail, the officer ordered him to get out of the buggy and go into the jail, whereupon the defendant began cursing and said that he would not go to jail. The officer took hold of him, and he tried to jerk loose from the officer, and said he was not

going to jail; that he had done nothing for which to go to jail. He tried to jerk loose from the officer two or three times, and the officer called upon a negro bystander to assist him in putting the defendant in jail. The defendant made no threat of violence, and did not attempt in any way to assault the officer. When the officer first commanded him to go into the jail, and he refused, the officer left him and went into the jail, got his pistol, and returned with it; the defendant remaining quietly outside until the officer returned. The evidence further showed that the city court of Blakely was then in session at the courthouse near the jail, and several justices of the peace, including the one who issued the warrant, were easily accessible to the arresting officer. The arrest was in the daytime, and no reason whatever was shown why the defendant should have been imprisoned before a commitment trial, nor why he was not taken before some judicial officer of the state for this purpose, by the arresting officer. The record shows the exceptional and remarkable fact—in a criminal case—that the plaintiff in error paid the cost of his appeal and did not resort to a pauper's affidavit.

Pottle & Glessner, for plaintiff in error.
Walter Park, Sol., for the State.

HILL, C. J. (after stating the facts as above). We do not think that the plaintiff in error, under the facts, was guilty of a violation of the Code section above quoted. The words of the statute, “obstruct, resist, or oppose,” imply force as a necessary element of the resistance. It will be noted that the defendant, when he was arrested, made no resistance at all, but got into his own buggy and carried the officer with him to the jail. This pacific conduct of the defendant was probably induced by the impression that his white friend would go on his bond, if it became necessary, and that he would have a preliminary investigation. It was quite reasonable that he should have had such an impression. The law made it the duty of the officer arresting to take the defendant with reasonable diligence before the judicial officer who issued the warrant, or some other judicial officer authorized to examine, commit, or receive bail, for the purpose of a preliminary investigation. Of course, an arresting officer would have the right, in a proper case, to imprison a defendant before a preliminary investigation, if it was necessary to do so for his safe-keeping before or pending such investigation. But in the present case no reason is assigned for the exercise of this right by the officer. Not only was the city court in session, but there were other judicial officers, easily accessible, all of whom were fully authorized to examine, commit, or receive bail in the case. The imprisonment of the defendant, therefore, by the officer,

seems to have been without warrant and arbitrary.

The defendant did not resist his arrest. Neither did he forcibly resist the attempt to imprison him without reasonable cause. He simply protested against his unreasonable imprisonment, and emphasized his natural objection to being incarcerated under the circumstances, by refusing to voluntarily go into the jail. Under all the circumstances, we think the defendant's conduct was neither unwarranted nor unlawful, and that his conviction was unauthorized. He seems to be a negro of some property and character. He owned his horse and buggy, paid the costs of his appeal to this court, and has white friends anxious to go on his bond. These things, added to his natural repugnance to be put in jail without a preliminary investigation, furnished, in connection with the apparently arbitrary act of the officer, reasonable grounds for his vehement protest.

Judgment reversed.

(6 Ga. App. 185)

BENNETT v. CENTRAL OF GEORGIA RY. CO. (No. 1,540.)

(Court of Appeals of Georgia. May 18, 1909.)

1. CARRIERS (§ 295*)—CARRIAGE OF PASSENGERS—INJURIES—NEGLIGENCE.

In a suit to recover damages for personal injuries received by a passenger from the sudden slamming of a car door by a servant of a railway company, in order to show a cause of action, it is not necessary to allege that the servant had actual knowledge of the dangerous position of the passenger at the time that the injuries were received, or that the act of the servant was intentional. Negligent ignorance on the part of the servant in connection with the act which caused the passenger's injury may be sufficient to warrant a recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1191; Dec. Dig. § 295.*]

2. NEGLIGENCE (§ 108*)—ACTIONS—PETITION—SUFFICIENCY.

The allegations of the petition make the question of the defendant's negligence an issuable fact, and therefore the court erred in dismissing the petition on demurrer.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 174; Dec. Dig. § 108.*]

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Edgar Bennett, by next friend, against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Oliver & Oliver, for plaintiff in error. H. W. Johnson, for defendant in error.

HILL, C. J. Bennett sued the Central of Georgia Railway Company to recover damages for personal injuries. A demurrer, general and special, was sustained, and the petition dismissed. This judgment is the error assigned. The allegations of the petition

to which the demurrer was directed, omitting mere formal parts, charges that on the afternoon of Saturday, June 6, 1908, petitioner was a passenger on a train of the Central of Georgia Railway Company, and was returning from Tybee to the city of Savannah. It became necessary for him to pass from the smoking car into the passenger car, and, in so doing, he approached the doorway of the passenger car. Just as he reached the door a flagman of the Central of Georgia Railway Company approached the door from the other side, opened it, and passed out. Petitioner stood aside for the purpose of permitting the flagman to pass. On account of the rapid motion of the train, and for the purpose of steadying himself and preventing himself from falling, or from being thrown from the platform, he placed his hand upon the facing of the doorway of the car, not knowing that his fingers extended to that portion of the door facing upon which the door shut. He could not see that his hand was in a dangerous position on account of the manner in which he was standing, and it was the only available place at that particular time which he could seize and hold for the purpose of steadying and holding himself on the platform. While he was so standing and holding the door facing with the end of his finger so extended in the door facing where the door slams, the flagman, seeing him so standing upon the platform, and seeing him holding to the side of the door, and knowing that petitioner's hand was in a dangerous position, or when in the exercise of ordinary care he could have known that petitioner's hand was in a dangerous position, forcibly and violently seized the knob of the door and shut it upon the end of petitioner's finger on the right hand, etc. Negligence is specifically charged in the following respects: (1) The flagman saw petitioner standing by the side of the door and holding it. He knew that petitioner's hand was in a dangerous position, and that, when he slammed the door, it would be caught and his finger mashed, or, if the flagman did not know these facts, by the exercise of ordinary and reasonable care he could have known them. (2) In willfully slamming the door on petitioner's finger. (3) The flagman permitted the door to slam on petitioner's finger, when, by the exercise of ordinary care, he could have prevented it. The special demurrer attacks the allegations on the subject of negligence contained in the second and third subparagraphs of the petition on the ground that they are mere conclusions of the pleader, without any facts stated upon which to base the conclusion that the flagman willfully slammed the door on petitioner's finger, or that the flagman could by the exercise of ordinary care have prevented the injury. The court required the plaintiff to amend so as to show actual

knowledge by the flagman of the dangerous position of plaintiff's hand at the time he shut the door upon it. This amendment was not made.

Evidently the trial judge based his judgment upon the theory that no recovery could be had in the case, unless the evidence proved actual knowledge by the flagman when he slammed the door of the dangerous position of the plaintiff's hand on the door facing; in other words, that the act of the flagman in slamming the door on the plaintiff's hand must have been intentional or willful. We do not know upon what theory of the law this opinion is based. The Code of this state, embodying elementary principles of law, declares that "every person shall be liable for torts committed by his servant * * * within the scope of his business, whether the same be by negligence or voluntary." Civ. Code 1895, § 3817. And, where the master is a railway company and the party injured is a passenger, it imposes upon the former the duty of exercising, through its servants, agents, or employes, extraordinary care and diligence to prevent any injury to the latter. Civ. Code 1895, § 2266. This degree of care is imposed upon the servants of the railway company to prevent and protect passengers from all injuries, and makes the railway company responsible for any injury that the servant could have avoided by the exercise of such diligence. For a flagman or other servant of the company to negligently slam a car door on the hand of a passenger would make the company liable in damages, just as for any other negligent act by the servant within the scope of his employment.

The learned counsel for defendant in error insists that "the natural result of opening and closing a car door, which was made to open and close, and is constantly used for that purpose, would not be to cause injury to any one"; and hence he concludes: "Unless the employé of the company, when using the door in this natural manner, knew that the passenger's finger was placed in the opening so that the door would shut on it, negligence in the opening and closing of it could not be charged." We think his conclusion is a palpable legal non sequitur; for the employé, in closing the car door, is charged by law with the duty of exercising extraordinary care and diligence in opening and closing it so as to prevent any injury to a passenger; and negligent ignorance in connection with this act, from which a passenger receives an injury, is no exception to the general rule of liability on the part of the master. With reference to the special demurrer, the petition alleges specific facts upon which to base the conclusion that the flagman, by the exercise of that degree of care which the law imposed upon him, could have known of the perilous position of the plaintiff's hand at the time he opened and shut the door. In a suit to re-

cover damages for injuries received as a result of the negligence of a servant of a railway company, the right to recover does not depend upon actual knowledge or willful or intentional conduct on the part of the servant. It may be based on actual knowledge or willful conduct, but negligent ignorance on the part of the servant of that which the law makes it his duty to know is all that is required. In safeguarding a passenger the law makes it the duty of the servant of the railway company to know every fact which by the exercise of extreme diligence he could discover.

To conclude, we think that the allegations of the petition are entirely sufficient to make the question of negligence by the flagman of the railway company an issuable fact, and that the court erred in sustaining the demurrer both on the general and special grounds. The questions in this case are fully covered by the decision of this court in *Pacetti v. Central of Ga. Ry. Co.* (No. 1660, recently decided) 64 S. E. 302.

Judgment reversed.

(8 Ga. App. 205)

LEWIS v. STATE. (No. 1,746.)

(Court of Appeals of Georgia. May 18, 1909.)

1. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a criminal case, where the guilt of the defendant is dependent wholly upon circumstantial evidence, the jury should be instructed that, if the proved facts are consistent with innocence, the defendant is entitled to an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1887; Dec. Dig. § 784.*]

2. INTOXICATING LIQUORS (§ 233*)—KEEPING AT PLACE OF BUSINESS—EVIDENCE.

Where one is charged with the offense of keeping on hand at his place of business alcoholic, spirituous, malt, or intoxicating liquors prohibited by law, and intoxicating liquors are shown to have been found at his place of business, such evidence is sufficient to support the inference that the forbidden liquors were kept by the owner of the place of business, but such inference is not conclusive, for it may be shown, among other things, that the forbidden liquors were not the property of the accused, that they had been temporarily deposited in his place of business by some other person, and that the owner of the place of business had no knowledge of their presence or existence.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293, 295; Dec. Dig. § 233.*]

(Syllabus by the Court.)

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Noah Lewis was convicted of keeping intoxicating liquors at his place of business, and brings error. Reversed.

Hixon & Greer and L. J. Blalock, for plaintiff in error. Jule Felton, for the State.

RUSSELL, J. Lewis was tried and convicted of the offense of keeping on hand at his place of business, to wit, his barber shop, "certain alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks, which, if drunk to excess, will produce intoxication." He excepts to the judgment overruling his motion for new trial.

The evidence for the state showed that at about 10 o'clock in the morning a policeman entered the defendant's barber shop, and found in a room formerly used as a bathroom four quart bottles of whisky. The defendant had charge of this former bathroom, and a door led from it into his barber shop proper. The evidence in behalf of the defendant disclosed that the bathroom had a window shutter on the outside, but no door except the one opening into the barber shop; and this door was open at the time the whisky was found. The shop is a public shop, in which people are coming in and going out all of the time, getting hair cut and being shaved. The defendant contended that some one else put the whisky into his shop the night before, and stated that the panes of glass had fallen out of the window, and that for anybody to get in there was nothing to do but raise the window, which was not locked or fastened. The evidence shows that the shop had been searched before for whisky, but none had ever been found there, and that the four bottles of whisky found on this occasion were all full.

We think the evidence was sufficient to raise the inference that the defendant was keeping the whisky in question on hand at his place of business, and, for that reason, was sufficient to support conviction. Express exception is taken, however, to the fact that the court failed to charge the jury the law upon the subject of circumstantial evidence, inasmuch as the evidence in the case at bar was entirely circumstantial, and not wholly inconsistent with the hypothesis that the liquor found in the defendant's possession might have been put in his place of business by another without his knowledge or consent. As ruled by this court in *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031, and *Glaze v. State*, 2 Ga. App. 709, 58 S. E. 1126, and by the Supreme Court in *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528, and *Toler v. State*, 107 Ga. 682, 33 S. E. 629, where the guilt of the defendant depends entirely upon circumstantial evidence, the attention of the jury should be called to the rule of law embodied in section 984 of the Penal Code of 1895, and the jury should be told in appropriate language that to warrant a conviction on circumstantial evidence the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis but that of the guilt of the defendant. In the present case, from the fact that four quart bottles of whisky were found in the defendant's closet, the inference might arise that it was his whisky, and was

being kept on hand there by him. On the other hand, under the evidence in the case, the inference is also suggested that the whisky might have been that of some patron of the barber shop, who had temporarily deposited it in the closet or bathroom without the knowledge of the defendant. Furthermore, the case is not like that of *Jenks v. State*, 4 Ga. App. 859, 62 S. E. 574, in which the facts that the mouth of the jug was still wet and smelled of corn whisky which had just passed through it, and that the whisky remained in the bottom of one of the glasses, pointed to the fact that whisky was being kept on hand; and, furthermore, the defendant in the *Jenks Case* admitted that the whisky which was found was his property, and that he was keeping it for his wife. In the *Jenks Case* some of the whisky was found under lock and key, and the defendant had the key in his possession. The facts made a case of direct proof. In the present case, to settle the ownership (which was admitted in the *Jenks Case*), the jury were compelled to rely upon the mere circumstance that the whisky was in the place of business of the defendant, in so public a place as a barber shop, and the evidence shows that the barber shop was in continuous use as such by the public. The mere fact that any article of personal property such as a walking cane or a book or even a bundle containing a bottle of whisky was there might raise the inference that the article in question was the property of the proprietor of the barber shop, but the presumption would not be so conclusive as to raise the evidence of location into the class of direct proof; and for this reason we think that the court erred in failing to charge the jury the principle of law enunciated in section 984 of the Penal Code of 1895. The error was particularly harmful because it ignored and obliterated the sole defense of the defendant. While the finding of the whisky in a defendant's constructive possession at his place of business, might raise such a presumption that he was keeping it on hand in violation of the statute as would authorize a conviction, still it was not direct proof of the fact of its being kept on hand by the defendant, or that the defendant knew it had been deposited in his place of business. For instance, if the door had been closed in the present instance, instead of being open, and glasses were there for the purpose of drinking whisky, or if some of the bottles were empty, these circumstances would lend additional force to the conclusion that the whisky had not been temporarily deposited by some patron of the barber shop, or some passerby, but that it was the property of the defendant. There being no direct proof that the defendant was the owner of the whisky in question, nor that he brought it to the place of business (even though the fact of keeping whisky might be shown by

circumstantial evidence), the guilt of the defendant depended at last entirely upon circumstantial evidence, and on account of the failure of the judge to properly instruct the jury upon this point, so as not to exclude an inference which the jury might have preferred, a new trial must be granted.

Judgment reversed.

(6 Ga. App. 172)

SOUTHERN RY. CO. v. WRIGHT.

(No. 1,531.)

(Court of Appeals of Georgia. May 18, 1909.)

1. CARRIERS (§ 318*)—NEW TRIAL (§ 76*)—CARRIAGE OF PASSENGERS—ACTIONS—EVIDENCE—SUFFICIENCY—GROUNDS—EXCESSIVE DAMAGES.

The verdict was authorized by the evidence, and the recovery cannot be set aside upon the ground that it was excessive, inasmuch as no showing is made that the finding was induced by prejudice or bias or by corrupt means.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318; * New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

2. APPEAL AND ERROR (§ 207*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO IMPROPER ARGUMENT.

It is the duty of the trial judge, even without request, to check improper remarks to the jury or improper conduct on the part of any person or persons in the presence of the jury, and to seek, by proper instruction to the jury, to remove any prejudicial effect that improper remarks or improper conduct may have been calculated to have against the opposite party; but a verdict will not be set aside because of such remarks or because of any omission of the judge to perform his duty in the matter, unless timely objection be made at the trial. In such case silence will be construed as a waiver of the right to object, or as an admission that the apparently prejudicial circumstance was in fact harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.*]

3. APPEAL AND ERROR (§ 205*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—OFFER OF EVIDENCE—NECESSITY.

An assignment of error based upon the refusal of the trial judge to permit a question to be answered presents no ground for review, unless the answer sought to be elicited is stated to him at the time of the ruling complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1282; Dec. Dig. § 205.*]

4. APPEAL AND ERROR (§ 302*)—PRESENTATION OF QUESTIONS—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.

A ground of a motion for new trial, complaining of admission or rejection of evidence, should be complete in itself or in connection with the exhibits attached to the motion, and should not require reference to be made to other parts of the record to render it intelligible. "A mere statement in a brief of evidence that the plaintiff 'introduced in evidence the mortality and annuity tables in the seventieth Georgia Report' does not authorize this court to take judicial cognizance of the contents of the tables published by the official reporter as an appendix to that volume." *W. & A. R. R. Co. v. Hyer*, 113 Ga. 776, 39 S. E. 447.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747; Dec. Dig. § 302.*]

5. TRIAL (§ 203*)—APPEAL AND ERROR (§ 1046*).

It is the duty of the court to inform the jury as to the issues submitted by the pleadings, and this may be done by stating the contentions of both parties as they appear in the pleadings, which the jury will have with them in the jury room. And, if any issue has by any means been eliminated, it is the duty of the judge to so inform the jury. The attention of the jury may be called to the abandonment of an issue stated in the pleadings by first stating the original contentions, and then informing the jury as to what has been abandoned. And where counsel in open court calls the attention of the court to the fact that his client has abandoned one of the contentions raised by the pleadings, and the court acquiesces, the fact that the court may previously have stated that the abandoned contention appears in the original pleadings, does not prejudice the cause of the defendant, but rather tends to accentuate the plaintiff's abandonment of his position.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 478; Dec. Dig. § 203; * Appeal and Error, Cent. Dig. § 4134; Dec. Dig. § 1046.*]

6. CARRIERS (§§ 247, 303*)—CARRIAGE OF PASSENGERS—INJURIES—TERMINATION OF RELATION.

The duty of extraordinary diligence for the safety of passengers, devolving upon a carrier, continues until the passenger has safely alighted from the train, and it is not error to so instruct the jury. Whether extraordinary diligence requires that a passenger be assisted in alighting is dependent upon the circumstances and conditions surrounding the passenger, and the facts of the particular case. If, in the exercise of extraordinary care, it should become necessary for the safety of a particular passenger in an emergency that the passenger be assisted to alight, it would then become the duty of the carrier to assist the passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 992, 1232; Dec. Dig. §§ 247, 303.*]

7. TRIAL (§ 255*)—APPEAL AND ERROR (§ 1032*)—REQUESTS FOR INSTRUCTIONS—BURDEN OF SHOWING PREJUDICE.

In the absence of a timely request, it is not necessarily reversible error for the trial court to omit to charge upon the burden of proof. In a case where complaint is made that no instructions are given as to the burden of proof, the general rule that he who assigns error must show not only error, but that the error was hurtful to him, should be applied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255; * Appeal and Error, Cent. Dig. § 4050; Dec. Dig. § 1032.*]

8. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTIONS—FUTURE PAIN.

In determining whether a plaintiff is entitled to recover for future pain and suffering and the amount of such recovery, it is proper for the jury to ascertain from the evidence whether the injury which occasioned the suffering is permanent or merely temporary.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 552; Dec. Dig. § 216.*]

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by Dora Wright against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Trawick & Ault, J. L. Tison, and Maddox, McCamy & Shumate, for plaintiff in error.

J. M. McBride, U. G. Brock, and G. R. Hutchens, for defendant in error.

RUSSELL, J. Mrs. Dora Wright brought suit against the Southern Railway Company for \$10,000 damages on account of injuries alleged to have been occasioned by the act of an agent or employé of the defendant company in jerking her from one of its passenger trains. The original petition contained also an allegation that the plaintiff's fall (which was the cause of her injury) was caused by the fact that the stool which was placed at the foot of the car steps to aid passengers in alighting was placed upon rough and uneven ground, but this allegation of negligence was abandoned upon the trial. The jury rendered a verdict for the plaintiff for \$3,500; and the defendant excepts to the judgment overruling its motion for new trial.

1. But little need be said as to the usual general grounds, that the verdict is contrary to the evidence, etc. The evidence in behalf of the plaintiff authorized the jury to find that an employé of the company in charge of the train and wearing its uniform (perhaps thinking that Mrs. Wright was not leaving the train as expeditiously as was necessary) seized her by the arm and jerked her from the second step of the passenger coach, whence she fell at full length upon the ground, and that after her fall he made no effort whatever to assist her to arise; that she was seriously hurt, and, as a result of her injuries, has suffered and will permanently suffer great physical pain from retroversion of the womb and serious internal complaints consequent thereupon. The plaintiff's evidence as to the cause of the injury was disputed; and evidence was also introduced to show that her present condition was perhaps due to other causes than the fall which she received. The issue of fact thus raised, however, was for the determination of the jury. It is insisted in the first ground of the amendment to the motion for new trial that the verdict is excessive. As we have already decided in *Murphey v. Meacham*, 1 Ga. App. 155, 57 S. E. 1046, and in *Merchants' & Miners' Trans. Co. v. Corcoran*, 4 Ga. App. 654, 62 S. E. 130 (7), the verdict of a jury cannot be held to be excessive unless it be manifestly the result of prejudice or bias, or corrupt motive.

2. In the fourth ground of the motion for new trial it is insisted that a new trial should be granted because of the misconduct of the plaintiff's attorney while addressing the jury in saying: "There is Dr. McCurdy. He has the appearance of a dope fiend." It is insisted that this language was not authorized by anything in the testimony, that it was a gross violation of the rules of practice, and tended to prejudice the jury against the witness McCurdy and his testimony. Section 4419 of the Civil Code of 1895 declares: "Where counsel in the hearing of the jury make statements of prejudicial matters which

are not in evidence, it is the duty of the court to interpose and prevent the same; and, on objection made, he shall also rebuke the same, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if plaintiff's attorney is the offender." This court, while standing for the allowance of the utmost latitude to counsel in proper argument, stands also for the strict enforcement of the above-quoted section of the Code. But it must be borne in mind that, while the duty of the judge is prescribed in the first portion of this Code section, affirmative action on his part is invoked only "on objection made." If improper argument is being indulged, and no objection is made by the opposing party, it may be presumed that such argument is at least not considered hurtful. Indeed, we have seen many instances in which severe and unwarranted criticism of a party or a witness has reacted against the critic. In our view of the case, as no objection was made in the lower court, the exception to the alleged improper remark of counsel cannot be considered. *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49. In that case (page 505 of 90 Ga., page 51 of 16 S. E.) it was ruled that "although it is the duty of the trial judge, whether so requested or not, to check improper remarks to the jury, and to seek, by proper instructions to the jury, to remove any prejudicial effect they may have as to the opposite party, a verdict will not be set aside because of such remarks or because of any omission of the judge to perform his duty in the matter, unless objection be made at the trial." Indeed, in the earlier case of *Young v. State*, 65 Ga. 525, it was held that, when counsel in argument travel outside of the case, the attention of the court should be called to it, and a ruling invoked to restrain him or the attention of the court directed thereto by way of request to charge, but it is too late to raise the point on motion for new trial. See, also, *Metropolitan Street R. Co. v. Powell*, 89 Ga. 601, 16 S. E. 118; *Edwards v. State*, 90 Ga. 143, 15 S. E. 744; *Gress Lumber Co. v. Coody*, 99 Ga. 778, 27 S. E. 169; *Bowens v. State*, 106 Ga. 760, 32 S. E. 666; *Smith v. State*, 119 Ga. 113, 46 S. E. 79 (5); *Odell v. State*, 120 Ga. 152, 47 S. E. 577. We will remark in passing, however, that, as the jury have the right to consider the appearance of the witnesses and their manner of testifying, it cannot well be said that counsel in argument, if he desires, might not as a matter of right have commented upon the appearance of the witness, though, as a matter of judgment, it may sometimes be very inexpedient to do so. It is the right of counsel to discuss and criticize before the jury the manner of witnesses on the stand, and in most cases this would involve the appearance of the witness.

3. The fifth, sixth, eighth, and ninth

grounds of the motion for new trial, which object to the exclusion of testimony, in that the court refused to permit certain questions to be asked, present nothing for our consideration. In each case objection is made to questions asked and not to evidence elicited by those questions; and the court was not informed what answer was expected so as to be able to pass upon its relevancy. In the fifth ground it appears that the defendant objected to a question asked of the plaintiff, but, inasmuch as it appears that the question was not answered, we are unable to say that an error was committed, or, if there was an error, that it was harmful to the defendant. In the sixth ground error is assigned because the court refused to allow the witness to answer a question propounded by the defendant's counsel, but the court was not informed what answer was anticipated, and consequently could not determine whether the question would elicit matter relevant to the issues. See *Clay v. State*, 4 Ga. App. 142, 60 S. E. 1028; *Anderson v. Savannah Press Publishing Co.*, 100 Ga. 455, 28 S. E. 216. The same rule requiring the court to be informed of the probable answer of the witness, where a question is objected to, is applicable to the assignments of error in the eighth and ninth grounds of the motion. The eighth ground is as follows: "Because the court erred in the following ruling: While the witness McCurdy was on the stand, he testified as follows: 'The womb is not a delicate organization, and not easily injured as a rule.' The following question was then asked him, and the ruling of the court made as follows: 'Q. Isn't there, Doctor, a pretty considerable and respectable portion of your profession that believe the womb is just a bundle of muscles? Mr. McBride: I object to that. In the first place, it is a leading question; and, in the next place, what his profession think generally is not admissible. They can bring the profession in here and use them as witnesses, but what other people think cannot be given by this witness. The Court: Now, if you have any medical authority, you might prove it. I think you will have to bring in the proof. McCamy: I think the rule to be just the other way. The doctor can testify as to the opinion of physicians generally. I submit I have the right to ask this witness what a considerable portion of his profession believe about the womb. The Court: I think if there is medical authority, those medical works might be introduced. I rule the question out. You cannot go into that.' Movant insists that the testimony was relevant, and should have been admitted." As to the complaint made in the ninth ground, that the court would not allow the conductor to give his opinion as to the cause of the plaintiff's fall, we cannot determine whether the matter upon which the opinion of the conductor was sought (after having detailed the facts upon which he based that opinion) was ad-

missible, or was inadmissible (as it would have been if the opinion was such a conclusion upon the facts as it was the sole province of the jury to make), for the same reason that prevented the lower court, either at the trial or upon the motion for new trial, from considering the insistence of plaintiff in error. It does not appear that at the time of the trial the court was informed as to the answer sought or expected from the witness; and for the reasons so clearly stated by Judge Atkinson in *Anderson v. Savannah Press Pub. Co.*, 100 Ga. 455, 28 S. E. 216, we are not able to say whether the ruling complained of was or was not error. While a witness, after stating the facts, may give his opinion in some instances as to some facts which might induce a conclusion which the jury is impeded to reach, he cannot supply even a proper conclusion for the jury by the statement of a conclusion of his own. *Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239 (2); *Thomas v. State*, 122 Ga. 151, 50 S. E. 64 (1); *O'Neill Mfg. Co. v. Harris*, 127 Ga. 643, 56 S. E. 739 (5); *Robinson v. State*, 128 Ga. 254, 57 S. E. 315 (4).

4. Complaint is made in the seventh ground that the court erred in admitting, over the defendant's objection, the mortality tables in the appendix of the seventieth volume of Georgia Reports. The plaintiff in error insists that the effect of this error was to exaggerate the jurors' idea of the plaintiff's damages, and that the error assisted the plaintiff in convincing the jury that she was worse hurt than she actually was. The error assigned upon the admission of the mortality tables is that they were immaterial and irrelevant, and illustrated no issue in the case. If we were deciding the point as one of first impression, and could consider the assignment of error as sufficient, we would not hold it to be well taken. If one is entitled to recover for pain and suffering at all, and it is demonstrated by the evidence that the pain and suffering will continue as long as life lasts, it would seem that evidence as to probable duration of life would be admissible to enable the jury to measure, or at least approximate, the total pain and suffering. It is true that this is to be measured only by the enlightened conscience of an impartial jury, but even a jury left for their admeasurements to no other tribunal than their own enlightened conscience, having arrived at a valuation of the pain endured for a year, if satisfied that the pain would continue through life, might desire to know the probable duration of that life. And, if this measure of computation addressed itself to their consciences, it would be nothing more than equitable to the defendant, either by the use of the annuity table or some similar means, to reduce the tentative finding to its present cash value. We are aware that the Supreme Court has decided in *Macon, Dublin & Savannah R. Co. v. Moore*, 99 Ga. 229, 25 S. E. 460, and in *Atlanta, Knoxville R. Co. v. Gard-*

ner, 122 Ga. 83, 49 S. E. 818, that the mortality and annuity tables are not proper evidence, and that a charge thereon was inappropriate where there was no proof of value of services or earning capacity. But we are not called upon to decide whether or not the trial judge erred in the admission of the tables in the present case; for the reason that the ground of the motion fails to show the contents of the tables. *W. & A. R. Co. v. Hyer*, 113 Ga. 776, 39 S. E. 447. It has frequently been decided that the ground of a motion for new trial, complaining of the admission or rejection of evidence, should be complete in itself or in connection with exhibits attached to the motion, so as not to require reference to other portions of the record to render it intelligible; and, though the dissenting opinion of the minority of the court in the *Hyer* Case, *supra*, accords with our individual judgments, and it would seem that reference to tables contained in the volumes of our own reports might be the subject-matter of our judicial knowledge, still the exact point was presented in *W. & A. R. Co. v. Hyer*, *supra*, and decided to the contrary of our individual views. In that case it was held that "a mere statement in a brief of evidence that the plaintiff 'introduced in evidence the mortality and annuity tables in the seventieth Georgia Report' does not authorize this court to take judicial cognizance of the contents of the tables published by the official reporter as an appendix of that volume." This being true, the seventh ground is insufficient to present to our consideration the complaint that the court erred in the admission of tables which are not set out in the motion. As remarked above, however, if we were not bound by the ruling in the *Hyer* Case, the effect of our ruling upon the plaintiff in error would be the same, for we would hold that there was no error in admitting the tables upon the authority of the decision in *Powell v. Augusta & Summerville R. Co.*, 77 Ga. 192, 3 S. E. 757 (10), in which it was held that, "where there is evidence tending to show that the state of impaired health and diminished ability to labor, attributable to the injury, may endure through life, the mortality tables are admissible in evidence to aid the jury in dealing with the element of time involved in their computation of the damages." An inspection of the original petition as contained in the record in the Supreme Court in that case shows that the damages were sought, just as in the present case, as compensation for pain and suffering alone. The same objection to the mortality tables was urged as is now before us. In passing upon this phase of the case, Chief Justice Bleckley said: "There was such evidence in this case, and the tables were, therefore, relevant. One who is to live long in pain is more damaged than one who has to endure suffering but for a brief time. Test this by applying it to two cases and contrasting them, the first in

which pain is to last only for a day, and the second for 20 years. It may be thought that the loss of ability to labor is not pain, but this is a mistake. There is no greater blessing of life than ability to labor, even though the proceeds may belong to another. It is better for happiness, as well as for virtue, to work for nothing than to be idle. A physical injury that destroys the power of a human being to labor is one of the most serious injuries which it is possible to inflict. True, it is not to be measured by pecuniary earnings where the suit is by a married woman, for such earnings as a general rule belong to the husband, and the right of action for their loss is in him, but the wife herself has such an interest in her working capacity as that she can recover something for its destruction, and what she is to be allowed ought to be more or less according to the length of time during which her privation is likely to continue. Such privation may well be classed with pain and suffering, especially where it involves the breaking up of established habits. To man or woman accustomed to work enforced idleness is torture." Under the well-recognized rule that the older of two decisions must control, it would seem to us that if there be conflict between what is ruled in the *Powell* Case, *supra*, and the *Moore* Case and the *Gardner* Case, *supra*, cited by counsel for the plaintiff in error, the latter decisions must yield to the prior adjudication.

5. In the tenth ground of the motion for new trial complaint is made that the court erred in submitting to the jury an allegation of negligence contained in the petition, to wit, that the stool was improperly placed at the steps of the coach, when there was no evidence authorizing the submission of this issue. We do not think that the court was guilty of any error in this respect. The tenth ground is as follows: "Because the court erred in the following charge to the jury: 'Plaintiff alleges that, when the train reached Anniston and stopped at the depot, the agent of the company placed the stool under the steps of the train for her to alight, or for the passengers to alight, and that, in placing it, they placed it on unlevel ground, and that, when she stepped upon the stool, it turned and threw her to the ground violently, and injured her. (Interposed by plaintiff's counsel: "I was intending to state to the court that we did not rely upon that ground.") The Court: I was stating the pleadings. The other ground of negligence, gentlemen, is: She alleges further that when she was attempting to alight, and was on the second step from the ground, the agent or employe of the company took her by the arm and pushed or pulled her off the steps and violently onto the ground, and that her knee, hip, face, and head were injured, and that her womb was injured or displaced, disarranged. Now, that briefly states the issues, gentlemen. I do not undertake to give all

the words of the petition or plea, but to briefly state the contention of the parties.' Movant says that this charge was error, because it submitted to the jury an issue which was not supported by the evidence, to wit, plaintiff's contention that the stool upon which she alighted was negligently and improperly placed upon the ground, and that this fact assisted in bringing about her injury." It is apparent that the court did nothing more in the excerpt complained of than to state the contents of the pleadings. It is always proper for the trial judge to summarize the contentions of the parties as made by the pleadings, and not less important that he should do this if there has been an abandonment of any of the contentions of either party, or a failure to establish a contention on the part of either. This for the reason that if he first calls the attention of the jury to the original contentions between the parties, and then states that any special position or contention has been abandoned or withdrawn, and therefore should be disregarded, the jury are assisted by having their attention more especially directed to the remaining issues by the process of subtraction, and their vision of the contested issues is clarified by this elimination of issues which have been abandoned or which there has been a failure to prove. In this case the court was proceeding to summarize the allegations of the petition, and the interruption by the plaintiff's counsel, and his statement that the plaintiff abandoned the allegation that she was injured by the improper placing of the stool was an incident which withdrew from the consideration of the jury that allegation of negligence even more forcibly than perhaps the judge could, as he doubtless would, have done later in his charge. That the statement of the abandoned ground of recovery was intended merely as a rehearsal of the pleadings which the jury would have with them in the jury room, and that it was no doubt the intention of the judge later in the charge to narrow the issue to the allegation which was supported by testimony, is evidenced by the judge's language in proceeding after the interruption, when he said, "I was stating the pleadings." The entire charge of the court was not sent up, but it is evident, from the excerpt quoted above, that the jury could not have been misled or the plaintiff in error prejudiced by the circumstance of which complaint is made.

6. Complaint is made in the eleventh ground that the court charged the jury that, "under the law, the railroad company is held to exercise extraordinary diligence in receiving and transporting passengers and in seeing that they are safely alighted from the train. That degree of diligence is upon them until the passenger has safely alighted from the train—extraordinary diligence." And, further, that the court erred in charging upon the same subject: "Now, the question is: Did the railroad company exercise

this degree of care and diligence in seeing that this passenger was properly and safely deposited upon the ground at her destination?" It is insisted that by this charge the court held the defendant to the duty of actually assisting the plaintiff to alight from the train, and that, under the circumstances of the case, the defendant did not owe the plaintiff that duty. It is urged that the court's expression that the defendant was required to use extraordinary care in seeing that passengers "are safely alighted from the train" and "safely deposited upon the ground" necessarily includes the idea of actual assistance, and stated too strongly the duty of the defendant carrier to the passenger. In support of this contention, the plaintiff in error's counsel relied upon the decisions in *Daniels v. W. & A. R. Co.*, 96 Ga. 786, 22 S. E. 956, and *Western & Atlantic R. Co. v. Earwood*, 104 Ga. 127, 29 S. E. 918. We do not think that the ruling in either of these cases is in conflict with the charge of the trial judge in this case. It is not decided in the *Daniels Case* that there are not occasions when it might be the duty of a railroad company to render passengers physical personal assistance in alighting from trains. It was merely held that the circumstances in that case were not such as to call for personal assistance in the exercise of extraordinary diligence. In the *Earwood Case* it was held that if a railroad company has provided suitable and safe means for entering and alighting from its trains, and has stopped its train in proper position to enable passengers to avail themselves of this means, it is not bound to render them personal assistance. It was further held that "the contract of the carrier is that he will carry the passenger safely and in a proper carriage, and afford him convenient and safe means for entering and alighting from the vehicle in which he carries him, but he does not contract to render him personal attention beyond that." In the *Earwood Case* the damages were attributable to a breach of an alleged contract of the defendant's to assist an aged and infirm passenger to alight from the train; and the court very properly held under the facts of that case that neither was the defendant informed of the passenger's condition nor was the contract alleged the contract made, even if the promise as made by the conductor was binding upon the company; and the judgment was reversed for the error of the court in charging, in effect, that the promise of the conductor was binding on the company.

As to the charge in the present case, we think in the first place that the instruction is not subject to the criticism urged against it, to wit, that he instructed the jury that the defendant was under the duty of assisting this plaintiff to alight from the train. Whether it is the duty of a carrier to assist a passenger from the train in the exercise of that extraordinary diligence which it is

its duty to exercise towards every passenger must depend upon the particular facts of the special case under investigation. A railroad company is ever bound to use extraordinary care and diligence for the safety and comfort of its passengers. In most instances this would not include assistance in entering or alighting from a train. But the duty of exercising extraordinary care does not terminate until the relation of carrier and passenger ceases; and the relation does not cease until the passenger has at least been discharged. A passenger in alighting from a train, if his destination has been reached and the proper time for leaving the train has arrived, is still as much a passenger as when seated in the coach. Whatever is necessary to be done for the safety of the passenger in the exercise of extraordinary care for his safety must be done as much while the passenger is alighting as while he is pursuing his journey. If a helpless passenger or an intoxicated passenger is attempting to alight, and, by reason of his helplessness or his intoxication, his safety is endangered, it might be the duty of the company, in the exercise of extraordinary diligence toward its passenger, to assist such passenger to alight. Whether such a duty would arise would depend upon whether the circumstances were such as that extraordinary diligence would require that the passenger be assisted. It may be stated as a rule that, while it is not necessarily the duty of a carrier to assist its passengers to alight from a train, circumstances might arise within the knowledge of the carrier which would require assistance in alighting to be extended in the exercise of extraordinary care. And whether such circumstances exist as require active assistance is a question to be determined by the jury in determining whether extraordinary diligence was used. If the charge of the court in this case could be construed as announcing that the carrier was under a fixed duty to assist its passengers to alight in all cases, it would undoubtedly be erroneous under the principles announced in the Earwood Case, *supra*, but plainly the language actually employed could not have conveyed any meaning to the jury other than that the duty of extraordinary diligence for the safety of a passenger continues until the passenger has safely alighted upon the ground. And this is sound law. No harm could have resulted from the instruction; because the plaintiff's recovery, if she is entitled to recover at all, depends upon the fact that she alleges, not that the defendant company failed to assist her to alight, but on the contrary, that the employé of the defendant actually jerked her violently down off the steps when she was attempting to alight. Under her testimony, if the jury believed it, she would have been entitled to a recovery against the defendant whether it was the duty of the defendant's agents to assist her to alight or not. When the charge criticised

is analyzed, it simply amounts to a statement that the defendant was bound to use extraordinary, and not ordinary, diligence; and, for this reason, the second criticism, in which it is insisted that the duty of the carrier to passengers in alighting is only ordinary diligence, is without merit. See *W. & A. R. Co. v. Voils*, 98 Ga. 453, 26 S. E. 483, 35 L. R. A. 655, and *Macon, Dublin & Savannah R. Co. v. Moore*, 108 Ga. 84, 33 S. E. 889 (1).

7. In the absence of a timely request, it is not necessarily reversible error for the trial court to omit to charge upon the burden of proof. In a case where complaint is made that no instructions are given as to the burden of proof, the general rule that he who assigns error must show not only error, but that the error was hurtful to him, should be applied. In the present instance, under the evidence adduced, and in the absence of a request, and bearing in mind that when the plaintiff showed her injury the presumption of negligence on the part of the railroad company was raised, the plaintiff in error should have shown, by the assignment of error, in what respect it was injured by the omission. See *Augusta Southern R. R. Co. v. McDade*, 105 Ga. 137, 31 S. E. 420.

8. Complaint is made that the judge erred in charging the jury as follows: "You will determine from the evidence whether or not the injuries are permanent, or whether they are temporary injuries. That you will arrive at from the proof in the case. If you find the issue for the plaintiff, and you find the injuries are permanent, there is no rule of law given by which you would estimate damages in a case of this kind. The damages sought to be recovered are for pain and suffering. She alleges that she suffered great pain from the injuries received, and that she will continue to suffer great pain, and that is what she seeks to recover damages for; and, under the law, there is no rule laid down save the enlightened conscience of impartial jurors seeking for the truth. Under all the evidence in the case, you consider what ought to be paid. Now, after you go that far with the case, you determine whether the injuries are permanent, or whether they are temporary injuries." The instruction complained of in this ground of the motion evidently referred only to the character of plaintiff's injuries as to their permanence, or their temporary character, and falls within the rule stated by Chief Justice Bleckley in the *Powell Case*, *supra*. If the plaintiff's injuries were permanent, she was, of course, entitled to recover more than if her suffering was temporary and ephemeral. If, after determining that the plaintiff had been injured by the fault of the defendant, the jury were satisfied that she was entitled to a recovery of some amount, the next question which would naturally arise would be: What was a proper amount? This would bring

up the question as to whether the injuries were permanent or temporary, and evidently there can be no recovery for permanent pain and suffering growing out of physical injury unless the evidence shows that the injury itself is permanent. For this reason we are of the opinion that the instruction complained of was not confusing. It would perhaps have been well to instruct the jury that the question of permanent injury in the case at bar was introduced solely for the purpose of illustrating whether the pain and suffering was likely to continue permanently. As the entire charge was not sent up in the record, we, of course, do not know what language anteceded or followed the instruction of which complaint is made; but there is nothing in this instruction, when it is boiled down, except that it is the duty of the jury to determine whether the injuries are permanent or temporary, and this inquiry is pertinent where the contention is made that the suffering will be permanent. In other words, the instruction of the judge amounted to the statement: "No injury, no suffering; temporary injuries, temporary suffering; permanent injuries, permanent suffering." The instruction of the learned trial judge that, if the injuries are permanent, there is no rule of law given by which you may estimate the damages in a case of this kind, save the enlightened conscience of impartial jurors, etc., evidences that the idea of diminished capacity to earn money was intended to be excluded from the consideration of the jury, and must have been so understood by it.

We conclude that the verdict was authorized both by the law and the evidence, and there was no error in refusing a new trial.

Judgment affirmed.

(6 Ga. App. 208)

VEASEY v. STATE. (No. 1,757.)

(Court of Appeals of Georgia. May 18, 1909.)

1. CRIMINAL LAW (§ 919*)—NEW TRIAL—REMARKS OF COUNSEL.

The remarks of the solicitor were entirely legitimate under the evidence, and, even if objectionable, would not be a ground for a new trial, unless they were objected to at the time and some appropriate action of the court then invoked. Civ. Code 1895, § 4419; Odell v. State, 120 Ga. 152, 47 S. E. 577; Southern Ry. Co. v. Wright (this day decided) 64 S. E. 703.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2199, 2200; Dec. Dig. § 919.*]

2. REVIEW ON APPEAL.

No error of law appears, and there is some evidence, although weak and unsatisfactory, to support the verdict, which was approved by the trial judge.

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Fletcher Veasey was convicted of crime, and brings error. Affirmed.

J. C. Newman, for plaintiff in error. W. L. Stallings, Sol., and W. C. Wright, for the State.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 208)

LIVINGSTON v. STATE. (No. 1,803.)

(Court of Appeals of Georgia. May 18, 1909.)

INDICTMENT AND INFORMATION (§§ 111, 191, 202*)—OFFENSE INCLUDED IN CHARGE.

The statutory offense of pointing a weapon at another may be included within the offense of assault with intent to murder, where the assault is charged to have been committed by pointing and aiming a gun or pistol at another. It is not necessary to negative explicitly the exceptions provided in a penal statute, by the operation of which a defendant may be justified or excused in the commission of an act otherwise unlawful, when the existence of the statutory exceptions is necessarily impliedly negated by the language employed in making the charge. Judgment may be pronounced upon a verdict finding one guilty of pointing a weapon at another, although the pointing is not expressly charged to have been intentional, if the language used in the accusation is such as to raise no other implication than that the pointing and aiming was intentional.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298, 604-621, 645; Dec. Dig. §§ 111, 191, 202.*]

(Syllabus by the Court.)

Error from Superior Court, Appling County; T. A. Parker, Judge.

G. W. Livingston was convicted of unlawfully pointing a pistol at another, and brings error. Affirmed.

W. W. Bennett, for plaintiff in error. J. H. Thomas, Sol. Gen., for the State.

RUSSELL, J. The plaintiff in error was indicted for assault with intent to murder, and was convicted of unlawfully pointing and aiming a pistol at another. He moved in arrest of the judgment, upon the ground that the indictment does not contain sufficient allegations, not sufficiently specific allegations, to be the basis of the verdict of the jury, and especially that the indictment did not contain an allegation that the pistol was "intentionally" pointed at another, not in any sham battle by the military, and not in self-defense, nor in defense of habitation, property, or person. The motion in arrest of judgment was overruled. The indictment charges Livingston with the offense of assault with intent to murder, "for that the said * * * Livingston * * * unlawfully, feloniously, with malice aforethought, and with a certain pistol, * * * did make an assault, with the intent the said A. S. Cody to kill and murder, and the said * * * Livingston, with said weapon, which he then and there held, did then and there unlawfully, felo-

niously, and with malice aforethought, point, aim at, and attempt to shoot and kill him, the said A. S. Cody, with the intent aforesaid, contrary to the laws of said state, the good order, peace, and dignity thereof." The verdict was: "We, the jury, find the defendant guilty of a misdemeanor, pointing a pistol at another, not in his own defense."

That the offense of pointing a pistol at another may be so included within the offense of assault with intent to murder that one who is indicted for assault with intent to murder may be convicted of the lesser offense of pointing a pistol at another has been decided by the Supreme Court in *Jenkins v. State*, 92 Ga. 470, 17 S. E. 693 (1), upon the authority of the prior rulings in *Arnold v. State*, 51 Ga. 144, and *Isom v. State*, 83 Ga. 378, 9 S. E. 1051. It is true that in the *Isom Case*, supra, as pointed out in *Lanier v. State*, 5 Ga. App. —, 63 S. E. 536, the verdict was for stabbing, upon an indictment charging assault with intent to murder, and to that extent the nature of the case differs from the one now before us. The principle, however, is the same. It is not necessary to negative explicitly the exceptions provided in a penal statute, by the operation of which a defendant may be justified or excused in the commission of an act otherwise unlawful, when the existence of the statutory exceptions is necessarily impliedly negated by the language employed in making the charge. In the *Lanier Case* we held that if it was admitted that the stabbing was done unlawfully and "contrary to the laws of said state, the good order, peace, and dignity thereof," these statements alone (if the explicit negating of the exceptions was not insisted upon by demurrer) were sufficient to show that the cutting was not done in self-defense, nor under any circumstances of justification provided by the Code. In *Jenkins v. State*, supra, where the indictment was for assault with intent to murder by pointing, aiming, directing, shooting off, and discharging a loaded pistol at another, it was held that a verdict of guilty of shooting at another would be sufficient, even without superadding the words "not in his own defense."

The learned counsel for the plaintiff in error insists, however, that the verdict is insufficient to authorize a judgment thereon, for the reason that the indictment does not charge that the pistol was "intentionally" pointed. We agree with the counsel that the fact that the pointing is intentional constitutes the gravamen of the offense of pointing a pistol or gun at another, and that it is essential that it should be charged and proved that the pointing alleged was intentional. Section 343 of the Penal Code of 1895 declares that "any person who shall intentionally point or aim a gun or pistol, whether loaded or unloaded, at another, not in a sham

battle by the military, and not in self-defense, or in defense of habitation, property or person, or other instances standing upon like footing of reason and justice, shall be guilty of a misdemeanor." The ruling in the *Jenkins Case*, supra, rules as to the exceptions provided in the statute; and the rulings in *Isom v. State*, supra, and *Lanier v. State*, supra, control as far as the point made upon the omission from the indictment of the word "intentionally" is concerned. It being alleged in the indictment that the pistol was unlawfully, feloniously, and with malice aforethought pointed at Cody, in an attempt to kill him, the only necessary implication which can be raised is that the pointing was intentional. The pointing could not have been an unintentional pointing, if it were either unlawful or felonious; and if done with malice aforethought, as the indictment charges, the pointing was obliged to have been found by the jury to have been done, not only intentionally, but perhaps with deliberate intention.

Judgment affirmed.

(6 Ga. App. 189)

PATE-SMITH CO. v. H. B. CLAFLIN CO. JOHNSON v. SAME. (Nos. 1,584, 1,585.)

(Court of Appeals of Georgia. May 18, 1909.)

COSTS (§ 260*)—PROSECUTION FOR DELAY—DAMAGES.

It is apparent from an inspection of the records and the questions made that the writs of error in these cases have been prosecuted for delay only, and for the purpose of preventing the prompt collection of a just debt. The points made are wholly without merit, and the judgments are affirmed, with damages for bringing the cases to this court for delay.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 983; Dec. Dig. § 260.*]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by the H. B. Clafin Company against the Pate-Smith Company, and by the same plaintiff against W. A. Johnson. Judgments for plaintiff, and defendants bring error. Affirmed.

Claude Payton and C. E. Hay, for plaintiffs in error. Polhill & Foy, for defendant in error.

HILL, C. J. Judgments affirmed, with damages.

(6 Ga. App. 240)

MANNING v. STATE. (No. 1,817.)

(Court of Appeals of Georgia. May 18, 1909.)

SUNDAY (§§ 3, 29*)—SHOOTING ON SUNDAY—"WILLFUL AND WANTON FIRING OF WEAPON."

A mad dog is a public enemy; and to shoot at a mad dog is not the "willful and wanton firing of a weapon," within the terms of the

act of 1898 (Acts 1898, p. 107), which forbids the shooting of firearms on Sunday. It is the duty of the court, upon the trial of one charged with a violation of this statute, to instruct the jury as to the meaning of the words "willful and wanton," as used in the statute; and it is error to restrict the defense of the accused to cases of actual self-defense or defense of property. It is for the jury to determine whether shooting at a mad dog on Sunday is a willful and wanton shooting, within the meaning of the statute, although they might believe that the dog was fleeing at the time he was shot at, and that neither the defendant's person nor his property was in danger.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 3; Dec. Dig. §§ 3, 29.*]

(Syllabus by the Court.)

Error from City Court of Monticello; A. S. Thurman, Judge.

Clarence Manning was convicted of willfully firing a weapon on Sunday, and brings error. Reversed.

Greene F. Johnson, for plaintiff in error. Doyle Campbell, Sol., for the State.

RUSSELL, J. Judgment reversed.

(6 Ga. App. 244)

ATHENS v. CITY OF ATLANTA. (No. 1,841.)

(Court of Appeals of Georgia. May 18, 1909.)

INTOXICATING LIQUORS (§§ 10, 112*)—ILLEGAL SALE—CITY ORDINANCES.

A municipality may under its ordinances punish the offense of keeping intoxicating liquors on hand for the purpose of illegal sale, and it makes no difference in a particular case that the keeping of the liquor for this purpose was at a place of business or other public place. The municipal offense is distinct and separate from the state crimes which may have been incidentally committed in connection with it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12, 122; Dec. Dig. §§ 10, 112.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Speros Athens was convicted of an illegal sale of intoxicating liquor, and brings error. Affirmed.

Rosser & Brandon and Moore & Branch, for plaintiff in error. W. P. Hill and J. L. Mayson, for defendant in error.

POWELL, J. The plaintiff in error, Athens, was convicted in the police court of Atlanta for the violation of section 1537 of the City Code, which is as follows: "Any person, firm or corporation, who shall keep for unlawful sale in any store, house, room, office, cellar, stand, booth, stall, or other place, or shall have contained for unlawful sale in any barrel, keg, can, demijohn or other package, any spirituous, fermented, or malt liquors for such sale, shall, on conviction, be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding thirty

days, either or both, in the discretion of the court." The proof showed that the defendant had some whisky at his restaurant in Atlanta and sold some of it. He applied for the writ of certiorari, the judge of the superior court refused it, and he excepts.

Counsel for the plaintiff in error, in their argument seem to concede that the ordinance is, so to speak, abstractly valid, under the authority of *Callaway v. Mims*, 5 Ga. App. 9, 62 S. E. 654, and the cases there cited; but they contend that it is unenforceable as applied to the facts of the present case. They insist that, since the state law makes it a misdemeanor for any person to have intoxicating liquor on hand at his place of business or at other public places, the ordinance cannot be applied to a case where the defendant's act of keeping the liquor for unlawful sale was at his place of business or other public place, because this would allow the city to punish for the identical transaction cognizable by the state courts under the law just mentioned. They analogize the case to that of *Kassell v. Mayor of Savannah*, 109 Ga. 491, 35 S. E. 147, and to that of *Pennington v. City of Newman*, 117 Ga. 701, 45 S. E. 65.

In the *Kassell Case* the court said: "We do not mean to say that the second section of the city ordinance in question should be treated as absolutely a void enactment. That portion of the ordinance simply provided generally against the sale of any spirituous or intoxicating liquors of any character on Sunday. If a person who committed such an act was not one whose business or ordinary calling involved the work of retailing spirituous or intoxicating liquors, the principle herein decided would not apply to his case. In the present case, however, it appears from the record that, if the accused was guilty of any offense at all, it consisted in pursuing her business, or the work of her ordinary calling, on the Lord's Day, within the meaning of the penal law of the state on that subject." In the *Pennington Case* the ordinance prohibited the carrying on of trade or traffic on the Sabbath. The Supreme Court held that the ordinance could not be applied to one whose only offense against it was the carrying on of his ordinary trade, as that was an offense against the criminal laws of the state.

We fully recognize the soundness of the principle of these and similar cases; and, if the ordinance now before us prohibited merely the keeping on hand of intoxicating liquor generally, these cases would be clearly in point, and we would have no hesitancy in holding that such an ordinance would have no validity, as applied to a case where the defendant kept the liquors on hand only at a place of business or other public place. The fact that the defendant kept the liquors at his place of business created no offense under the ordinance. The fact that the place where the liquors were kept was a place of business

was in no wise essential to the investigation under the ordinance. Only the fact that they were kept, and that the intent or purpose of the keeping was an unlawful sale of them, entered into the gist of the transaction cognizable in the police court.

The purpose of the keeping is without importance as applied to the state offense, and is altogether important as applied to the city offense. To have kept the liquors at the restaurant to drink himself, or give way, or to induce trade, or to manufacture into other beverages, would have been a violation of the state law, but not of the municipal law. The city offense never came into existence until the defendant formed the intent and purpose of making an unlawful sale. The fact that he had already violated the state law by bringing the liquors to his place of business, and that he was continuing to violate it by keeping them there, did not put him in a position where he could not aggravate the transaction by adding to it an additional element, not included in the state offense, thereby converting it into a municipal offense.

This brings us to the contention of the plaintiff in error that, if the intention or purpose of the actor in the transaction is to be considered as such an element of the municipal offense as to distinguish it from the crime under the state law, then to allow the municipality to hold jurisdiction to punish because of this distinction alone would be to permit punishment for a mere state of mind. The argument is not valid. Intention, state of mind alone, is oftentimes the essential element in distinguishing the lawful from the unlawful, and in differing one offense from another. To take property from the lands of another without an animus furandi is trespass; with the intent to steal, it is larceny. The specific intent to kill differentiates assault and battery from an assault with intent to murder. An intention to defraud distinguishes the criminal sale of mortgaged property from the innocent. A reasonable fear of an apparent, though not actual, danger to one's life, a mere state of the slayer's mind, converts the killing from murder to justifiable homicide. To have intoxicating liquors at one's place of business to drink or to give away is unlawful, but it lacks that aggravation which characterizes the keeping of it for the purpose of unlawful sale, just as to commit assault and battery in a private place is unlawful, but lacks the element of aggravation which converts it into a municipal offense if it be committed in a public street.

Suppose the city ordinance were a state law; would a conviction of the offense created therein bar a prosecution under the statute upon territory of which the ordinance is said to trespass, or vice versa? Or, to state it more concretely, suppose that prior to the adoption of the general prohibition law there had been enacted a special law for Fulton

county, making it criminal for any person to have on hand intoxicating liquor for the purpose of unlawful sale, and the defendant had been indicted and had been convicted in the state court for that offense upon proof that since the date of the enactment of the general prohibition law he had kept the liquor on hand at his restaurant for the purpose of unlawful sale; would this conviction bar another prosecution under the prohibition law for keeping it on hand at his place of business? We think it would not. The two transactions would be legally distinct. *Veasy v. State*, 4 Ga. App. 845, 62 S. E. 561, and cases cited.

The municipal offense in this case is sandwiched (if I may use this word to express the idea) between two state offenses, the essential elements of one of which (the keeping of the liquor and the fact that the place where it was kept was a place of business) furnish one of the elements of the city offense and an incidental detail connected with the transaction physically considered; and the commission of the other, the actual sale, supplies the proof as to the other essential element, namely, that the keeping was for the purpose of unlawful sale. But does this extinguish the independence and separate identity of the municipal offense, or merge the transaction wholly into the state crimes?

Let us see if we cannot suppose a transaction in which the separate state offenses may be similarly involved without any one of them being merged into one or both of the others. A person at a church, having a pistol concealed in his pocket, shoots at another from the pocket through the lining, and without revealing the existence of the pistol otherwise. He may on this state of facts be separately tried and convicted for the three offenses, carrying a pistol to a church, carrying a pistol concealed, and shooting at another. See *Veasy v. State*, supra. To this transaction the crime of carrying the pistol concealed stands almost identically in the same relation as does the municipal offense of having had the liquor on hand for the purpose of unlawful sale stand to the two state crimes involved in the facts of the case now before us. In the supposed case the elements of the crime of carrying the pistol to the church (the carrying and the fact that the place was a church) furnished one of the elements of the concealed weapon case (the carrying) and an incidental detail connected with that transaction physically considered; and the commission of the other offense, the fact of the shooting, supplies the only proof of the fact that the defendant had a pistol concealed, for it was stated in the supposed facts that the existence of the pistol in the defendant's pocket was not otherwise revealed.

We went into all this question fully in the case of *Callaway v. Mims*, supra. In that case we discussed the whole question at length, and indulged in an extensive citation

of authorities. That case, at least to the extent of the line of reasoning there presented, controls this one. We see no reason to change the views we there expressed. We would not again have dealt so lengthily with the question, if it were not for the ability and strenuousness with which we are urged by counsel to limit that case, and to distinguish the present transaction upon its particular facts.

We have had several of these cases involving the right of municipalities to punish under ordinances like the one before us; and in almost every case it is argued that it is a dangerous policy to permit police courts, in which no jury trial is obtainable, to impose such severe penalties as most of the city charters allow for the violation of these ordinances on a subject as to which the municipalities hold jurisdiction by so small a margin and by so slight a shade of distinction. There may be force in this argument. Personally, some of the judges of this court think so. If so, it addresses itself to the General Assembly, and not to the court. However, there is one obvious way by which these complaining offenders may escape all this hardship—by respecting and obeying the law.

Judgment affirmed.

(6 Ga. App. 245)

LYONS v. CITY OF ATLANTA. (No. 1,835.)
(Court of Appeals of Georgia. May 18, 1909.)
INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTION—ILLEGAL SALE.

The defendant was properly and legally convicted of a violation of the municipal ordinance of the city of Atlanta against keeping liquor on hand for the purpose of illegal sale, and the judge of the superior court did not err in overruling the certiorari.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Mike Lyons was convicted of keeping liquor on hand with intent to sell unlawfully, and brings error. Affirmed.

Lamar Hill and Burton Cloud, for plaintiff in error. W. P. Hill and J. L. Mayson, for defendant in error.

POWELL, J. Mike Lyons had an upstairs bedroom on Broad street, in the city of Atlanta; and he was accused and convicted in the recorder's court of the city of Atlanta for keeping intoxicating liquor on hand in that room for the purpose of unlawful sale. A witness swore that he met Lyons in a poolroom, and, hearing some one else ask him what sort of whisky he had, he also asked him if he could get some whisky from him. Lyons took him to this room, and sold him rye whisky. The witness lay

down on a bed in the room, and while he was there several other persons came in and bought liquor from Lyons. The police raided the place, and found a large quantity of whisky under the bed, in a trunk, in bureau drawers, etc. After having been convicted in the recorder's court, Lyons took the case by certiorari to the superior court. Upon the hearing there, the judge overruled the certiorari, and he excepts.

The plaintiff in error presents the point that by converting his bedroom into a blind tiger, and by allowing a large number of persons to come there indiscriminately and get liquor, he made it a place of business and a public place, and that the only offenses committed by him were violations of the state law. The facts in the record present no such point. It is true that in the case of *Bashinski v. State*, 5 Ga. App. 3. 62 S. E. 577, this court held: "If a person should make a common practice of selling liquor illegally at a fixed place, that place would thereby become his place of business; but a single sale of liquor, or even sporadic sales, will not ipso facto convert the place where the sale occurs into the seller's 'place of business,' in accordance with the meaning of that phrase as found in the prohibition act of 1907." We also held, in *Tooke v. State*, 4 Ga. App. 497, 61 S. E. 917 (4c), that a person might convert even his private residence into a public place, by allowing the public to come there indiscriminately to buy or drink liquor. Therefore it may be true by these tests, that Lyons had succeeded in converting his bedroom into either a public place or a place of business.

But if we concede all this, and should further concede that the municipal offense of keeping liquor on hand for illegal sale cannot be committed in a place of business or a public place (and we in no wise concede this; see *Callaway v. Mims*, 5 Ga. App. —, 62 S. E. 654; *Athens v. Atlanta*, 64 S. E. 711, this day decided) yet the concession would not help the defendant's case, even though he converted the private place into a public place or place of business, by bringing liquor there to sell and thereby attracting a crowd to whom he sold it; for his crime was complete when he brought the liquor into the private place for unlawful sale, and his subsequent continuation and augmentation of the nuisance, and his consequent conversion of the private place into a public place, so that he also violated the state law, did not wipe out his already complete guilt under the municipal law. "An offense committed against one jurisdiction cannot be wiped out by committing another against another jurisdiction." Per *Bleckley, C. J.*, in *Menken v. Atlanta*, 78 Ga. 672, 2 S. E. 561.

Judgment affirmed.

(6 Ga. App. 241)

JORDAN v. STATE. (No. 1,821.)

(Court of Appeals of Georgia. May 18, 1909.)

REVIEW ON APPEAL.

No error of law is complained of, and the evidence fully supports the verdict.

(Syllabus by the Court.)

Error from City Court of Monticello; A. S. Thurman, Judge.

Lum Jordan was convicted of crime, and brings error. Affirmed.

Greene F. Johnson, for plaintiff in error.
Doyle Campbell, Sol., for the State.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 167)

ELDERS v. BANCROFT-WHITNEY CO.
(No. 1,473.)

(Court of Appeals of Georgia. May 18, 1909.)

APPEAL AND ERROR (§ 613*)—BILL OF EXCEPTIONS—CERTIFICATION—NECESSITY.

The bill of exceptions, not being certified by the presiding judge to be true, presents nothing for the adjudication of this court, and must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2703; Dec. Dig. § 613.*]

(Syllabus by the Court.)

Error from City Court of Reidsville; C. L. Morgan, Judge.

Action between W. H. Elders and the Bancroft-Whitney Company. From the judgment, Elders brings error. Writ dismissed.

H. H. Elders, in pro. per. H. C. Beasley, for defendant in error.

RUSSELL, J. Writ of error dismissed.

(6 Ga. App. 167)

GASKINS v. GRAY LUMBER CO.
GRAY LUMBER CO. v. GASKINS.
(Nos. 1,494, 1,495.)

(Court of Appeals of Georgia. May 18, 1909.)

TRESPASS (§§ 19, 20*)—TITLE WITHOUT ACTUAL POSSESSION—COMMON GRANTOR.

Where, in an action of trespass, it appears that a named grantor had conveyed a portion of the standing timber to the defendants, and had subsequently conveyed the land and the remainder of the timber to the plaintiff and that the defendants had cut some of the trees not included in their timber conveyance, and it further appears that there had been no actual possession of the land, the plaintiff, in order to recover for the cutting of the timber not deeded to the defendant, must, under section 3877 of the Civil Code of 1895, show legal title to the land or to the timber involved in the suit. While the plaintiff in trespass may generally make a prima facie case against the defendant by showing that he and the defendant claim under a common grantor, yet this principle is not applicable to the state of facts set out above. The grant of a portion of the timber conveys a distinct estate, separate and apart from the estate conveyed by the grant of the land and the re-

mainder of the timber; and the doctrine of estoppel by reason of claiming under a common grantor applies only when both parties to the action claim title to the same property.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 19, 34; Dec. Dig. §§ 19, 20.*]

(Syllabus by the Court.)

Error from City Court of Douglas; C. T. Roan, Judge.

Action by J. A. Gaskins against the Gray Lumber Company. Judgment for defendant, and plaintiff brings error. Defendant assigns cross-error. Affirmed on the main bill, and cross-bill dismissed without prejudice.

J. A. Gaskins brought suit against the Gray Lumber Company for trespass, and the trial resulted in the court's awarding the nonsuit, to which exception is taken. The substance of the plaintiff's claim was that Fisher H. Gaskins had conveyed to Timmons, McWhite & Co. all of the timber suitable for turpentine and sawmill purposes growing on certain lots of land in Berrien county, that Timmons, McWhite & Co. had in turn conveyed this same timber to the Gray Lumber Company, and that subsequently to making the timber deed just mentioned Fisher H. Gaskins had conveyed to the plaintiff the land upon which the timber stood, thereby conveying to him such timber as was not included in the other conveyance; but, as we gather from the record, the plaintiff does not contend that this conveyance transferred to him any rights in such of the timber as was included in the defendant's timber deed. The plaintiff's contention is that the defendant cut from the lands, after they were deeded to him, certain timber standing thereon not included within the terms of its deed, because it was not suitable for sawmill and turpentine purposes. One branch of this controversy went to the Supreme Court, and in that case the deed under which the defendants claimed the timber was construed. See *Gray Lumber Co. v. Gaskins*, 122 Ga. 342, 50 S. E. 164. In the present action the plaintiff notified the defendant to produce all the deeds, leases, and other muniments of title by which it claimed the right to cut any of the timber mentioned in the petition, and the defendant produced only the timber deed mentioned above; and this was introduced in evidence by the plaintiff. The plaintiff also introduced warranty deeds from Fisher H. Gaskins to the plaintiff, dated subsequently to the timber deed and conveying the lands upon which the timber was located. It is unnecessary to recite the other evidence in the case, as the foregoing is all of it that relates to the plaintiff's right to recover, so far as his title is concerned. There was no possession of the land, and the plaintiff was required to prove title, in order to recover.

Hendricks & Christian and W. H. Griffin, for plaintiff in error. Lankford & Dickerson, for defendant in error.

POWELL, J. (after stating the facts as above). By reason of section 3877 of the Civil Code of 1895, the common-law rule that, if the owner of land was out of possession, he could not recover in trespass, has been changed to the extent that the true owner (that is, the person holding the legal title) may maintain an action of trespass, though he was not in possession at the time the wrong was committed; but, to bring himself within the statute, the burden is upon him to show that he is the true owner, and this he can do only by showing title. *Yahoola Mining Co. v. Irby*, 40 Ga. 482; *Whiddon v. Williams Lumber Co.*, 98 Ga. 701, 25 S. E. 770; *Moore v. Vickers*, 126 Ga. 42, 54 S. E. 814. In the opinion in the case of *Moore v. Vickers*, supra, there is the hint as to a lurking doubt as to whether the plaintiff could show such a title as would support an action of trespass by proving that he and the defendant claimed under a common grantor. However, in the case of *Garbutt Lumber Co. v. Wall*, 126 Ga. 172, 54 S. E. 944, decided at the same term of the court, the proposition was definitely stated and announced that, if it be shown that the defendant in the trespass action claims title from the same common grantor as the plaintiff and from no other source, *prima facie* the plaintiff may recover if his title as derived from the common propositus is the superior; in other words, the admission implied against the defendant by reason of his having taken a conveyance of the property from the plaintiff's grantor is sufficient to cast on the defendant the burden of showing that the title was not in the common grantor at the time he took his conveyance. The estoppel does not seem to be so complete in the case of trespass as in the action of ejectment, where the application of the general doctrine is more familiar.

The question that confronts us, then, is whether, under the facts of the present case, the plaintiff and the defendant so hold under a common grantor as to make a *prima facie* case in behalf of the plaintiff. It will be remembered, from the statement of facts given above, that the defendant claims no title to the land and holds no conveyance to the land itself, but claims and shows a conveyance only to the timber, which, however, is realty, and is a thing that may be conveyed and dealt with as realty separate and apart from the land itself. *Balkcom v. Empire Lumber Co.*, 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58; *Moore v. Vickers*, supra; *Red Cypress Lumber Co. v. Beall*, 5 Ga. App. 202, 62 S. E. 1056; *Atlantic Coast Line R. Co. v. Davis*, 5 Ga. App. 214, 62 S. E. 1023. The plaintiff, on the other hand, claims no interest in so much of the timber as is included in the conveyance under which the defendant

holds. As to the timber which the plaintiff says the defendant cut and damaged, the latter either has no title at all or else its title is derived from some source independently of the plaintiff's grantor; and since it produced at the trial no conveyance covering the timber in dispute it will be presumed that it had none. Under these circumstances we do not think the rule as to estoppel by reason of claiming under a common grantor is applicable. There is no contest whatever between this timber deed and the plaintiff's land deed. Neither claims superiority over the other as a conveyance of title from Fisher H. Gaskins, the alleged common grantor. The plaintiff admits the validity of the timber deed and the defendant admits the validity of the plaintiff's land deed, so far as the regularity of the conveyance is concerned. If the plaintiff claimed any of the timber included within the defendant's conveyance, then the rule would be applicable; but he makes no such claim. The defendant would, if the question arose, be estopped primarily from denying that Fisher H. Gaskins owned the timber which he conveyed it; but Fisher H. Gaskins might have owned the timber which he conveyed the defendant, and not have owned the land on which the timber stood. Since the land and the timber or the land and certain portions of the timber, may be separately owned, it is a non sequitur to say that, because the defendant is required in law to admit that an alleged common propositus owned a portion of the timber, the admission must extend to the fact that he also owned the land and the remaining timber.

Almost this same question was involved in the case of *Moore v. Vickers*, supra. There the plaintiff himself had conveyed the land to a person named McMillan, and had reserved the timber to himself. McMillan sold the land to the defendant, and the defendant cut the timber which had been reserved. The Supreme Court, speaking of the attempt to apply the doctrine of common grantor, said: "Even if it be conceded that this rule is applicable to cases of trespass, it does not follow that the plaintiff has shown himself by virtue thereof to have been the true owner of the standing timber at the time of the alleged trespass. The rule as to common source of title only applies where each of the contesting titles emanates from the same grantor. It does not apply where the contest is between a grantor, who reserves an interest in the land, and his grantee, in a case where the burden is on the grantor to show title to the excepted interest." *Moore v. Vickers*, 126 Ga. 44, 54 S. E. 815. It was held, therefore, that the plaintiff did not make out a *prima facie* case by showing the facts just recited. In the case of *Campau v. Campau*, 87 Mich. 245, it is said: "The doctrine that adverse claimants under a common grantor are estopped from denying their grantor's title does not hold where the grantor's deed does not purport to convey the entire title." The facts of

that case make it analagous in principle to the case at bar.

Suppose, in the case before us, that the alleged common grantor, instead of conveying to the grantees in the timber deed the timber on five lots of land, had conveyed to them two lots of land, and then had conveyed to the plaintiff the three lots of land remaining in the tract, and the defendant had, under the deed to the two lots, attempted to cut, also, the timber on the other three lots. Would it for a moment be contended that the plaintiff could recover by showing the two sets of deeds emanating from the same source to these parts of the same tract, and by showing, either inferentially or directly, that the defendant claimed the right to cut the timber on the plaintiff's three lots by no other right than the deed to the two lots? To allow such a recovery would be to overthrow a proposition well established in the law, that where the land is in the actual possession of no one the trespasser is amenable for the damages only to him who can show the title. The timber and the right to cut it are as distinct entities, in the sense in which we are now talking about these things, as would be the two separate parts of a tract of land. We have made a somewhat exhaustive search for authorities upon this question, and we have found no case which militates against the proposition here asserted, while the case of *Moore v. Vickers*, supra, from our own state, and the *Michigan* case, cited above, both seem to support the principle fully. We are led to the conclusion, therefore, that the court did not err in granting a nonsuit on account of the failure of the plaintiff to show such a title to the property sued for as would support the action.

We have discussed the question as if the plaintiff's action sounded in trespass, because both parties have ably argued the case as if it were such an action. It may be, however, that, properly construed, the suit is one in trover for timber cut and carried away. Such a cause of action we construed the petition as asserting in the case of *Milltown Lumber Co. v. Carter*, 5 Ga. App. 344, 63 S. E. 270. It will be readily seen, however, that the doctrine we have announced above is clearly applicable, whether the suit is in trover or in trespass; for the plaintiff's title to the timber he is suing for depends upon his title to the land in either event.

Judgment on main bill of exceptions affirmed. Cross-bill dismissed without prejudice.

(6 Ga. App. 164)

FREEMAN v. MATTHEWS. (No. 1,338.)
(Court of Appeals of Georgia. May 18, 1909.)

1. **FRAUDS, STATUTE OF (§ 150*)—ALLEGATION OF CONTRACT IN WRITING—NECESSITY.**

"Where proceedings are brought to enforce rights arising under a contract required to be

in writing, failure to allege in the pleadings that such contract was in writing cannot be taken advantage of by demurrer. The silence raises no presumption that the contract exists only in parol." *Anderson v. Hilton & Dodge Lumber Co.*, 121 Ga. 688, 49 S. E. 725 (1); *Taliaferro v. Smiley*, 112 Ga. 66, 37 S. E. 106; *Draper v. Macon Dry Goods Co.*, 103 Ga. 661, 30 S. E. 566, 68 Am. St. Rep. 136.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 361; Dec. Dig. § 150.*]

2. **APPEAL AND ERROR (§§ 206, 1033*)—HARMLESS ERROR—INSTRUCTIONS—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—ADMISSION OF EVIDENCE.**

The charge of the court is free from any material error, and the exception to the ruling of the trial judge, in permitting the question which was objected to, cannot be considered, because only the question was objected to, and no statement is made as to the answer anticipated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4056; Dec. Dig. §§ 206, 1033.*]

3. **SUFFICIENCY OF EVIDENCE.**

A verdict in favor of the plaintiff was authorized by the evidence; but as the verdict rendered in his favor includes two items amounting to \$100, which were not proved it is directed that the judgment be reduced by that amount.

(Syllabus by the Court.)

Error from City Court of Blakely; *W. A. Jordan*, Judge.

Action by *Mike Matthews* against *J. T. Freeman*. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

Pottle & Glessner, for plaintiff in error.
Park & Collins, for defendant in error.

RUSSELL, J. 1. The defendant in the court below excepted *pendente lite*, and in the bill of exceptions assigns error on the judgment overruling certain special demurrers to the plaintiff's petition. The demurrers raise the point that the petition does not show that the contracts of sale complied with the statute of frauds. The petition alleged that the petitioner and the administrator's deceased intestate each owned a one-third interest in a certain sawmill outfit, steers, and a lumber dray, and that the petitioner sold his third interest in this property to the deceased for \$300. Another item of indebtedness alleged in the petition arises from the sale by the petitioner to the deceased of a watch for the sum of \$50. The plaintiff did not amend his petition in response to the special demurrers, and the contention of the plaintiff in error is that, under the provisions of Civ. Code 1895, § 5048, and the decision of the Supreme Court in *Western Union Telegraph Company v. Griffith*, 111 Ga. 564, 38 S. E. 859, the trial judge should have dismissed the petition.

There can be no doubt that, as a general proposition, the principle relied upon by counsel for the plaintiff in error is sound; but under the rulings of the Supreme Court in *Draper v. Macon Dry Goods Company*, 103 Ga. 661, 30 S. E. 566, 68 Am. St. Rep. 136,

Taliaferro v. Smiley, 112 Ga. 62, 37 S. E. 106 (3), and Anderson v. Hilton & Dodge Lumber Company, 121 Ga. 688, 49 S. E. 725, the failure to allege that a contract is in writing does not raise the inference that it is necessarily in parol. The plea of the statute of frauds is a personal plea, and the failure to allege that the contract was in writing cannot be taken advantage of by demurrer. In other words, it is presumed, unless the contrary appears from the petition itself, that those contracts which by law are required to be in writing have been put in writing—that the parties have obeyed the law, rather than disobeyed it. So, when a contract is alleged, it is presumed that the contract was in writing. As in this case the plaintiff alleged a contract of sale which by terms of the statute of frauds should have been in writing, and therefore presumably was reduced to writing, and as, for that reason, the defendant should have pleaded as an affirmative defense, that the contract rested only in parol, and was therefore violative of section 2693 of the Civil Code of 1895, the trial judge did not err in overruling the special demurrers.

2. It is unnecessary to discuss in detail the several exceptions taken to the charge of the court. It is sufficient to say that, while the language employed in one instance is somewhat involved, we do not think that the jury was misled thereby, and the subject presented, as well as the language used, was more favorable to the defendant than to the plaintiff. The former, therefore, can have no cause of complaint. The exception to the question which the court permitted to be asked over the objection of the defendant's counsel presents nothing for our consideration, as the answer was not objected to, and no statement as to the answer anticipated was made to the trial court in advance of his ruling.

3. The evidence was sufficient to authorize the finding in favor of the plaintiff as to the sawmill outfit and the item of \$15 for which suit was brought. A verdict for the plaintiff, in the absence of any evidence in behalf of the defendant, was therefore demanded. There is, however, no evidence to support a finding for the purchase price of the watch, for the value of which plaintiff sued; nor did the sole witness, Mr. Howell, state that he had any knowledge that Matthews advanced any of the \$50 claimed to have been loaned by him to the deceased during his sickness. The proof as to both of these items rests purely upon supposition. We therefore direct that, if the defendant in error will write off \$100 from the verdict and judgment in his favor, the judgment refusing a new trial be affirmed; otherwise, that the judgment be reversed.

Judgment affirmed, on condition.

(6 Ga. App. 208)

ROBINSON v. McWILLIAMS-RANKIN CO.
McWILLIAMS-RANKIN CO. v. ROBINSON.
(Nos. 1,619, 1,698.)

(Court of Appeals of Georgia. May 18, 1909.)

EXEMPTIONS (§ 48*)—WAGES—"LABORER."

A conductor of a freight train may be required to exercise both mental skill and manual labor in the performance of his duties; but where the printed rules of the railway company, regulating his employment and prescribing the character of his work, clearly show that his services consist mainly of work involving the exercise of his intellectual faculties and business capacity, he is not a "laborer," within the meaning of Civ. Code 1895, § 4732, and his wages are subject to garnishment.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3952-3968; vol. 8, p. 7700.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between T. E. Robinson and the McWilliams-Rankin Company. From the judgment, Robinson brings error, and the McWilliams-Rankin Company assigns cross-error. Affirmed on the main bill, and cross-bill dismissed.

R. D. Feagin, for plaintiff in error. R. S. Wimberly and Napier & Maynard, for defendant in error.

HILL, C. J. The only question presented in this case for the decision of the court is whether or not the wages of a conductor of a freight train are exempt from the process of garnishment, on the ground that he is a laborer, within the meaning of Civ. Code 1895, § 4732. There is no controversy as to the facts. The oral evidence shows that some of the duties of a freight conductor are mental, and some are manual, in character. As was said by this court in *Howell v. Atkinson*, 3 Ga. App. 58, 59 S. E. 816: "The nature of the labor to be performed, and whether the mental element preponderates or not, is to be determined by the contract of employment." The written rules regulating the employment of the conductor and prescribing his duties in the present case clearly show that he was to have general control and superintendence of the train and of the employes on the train, its running and management, procuring waybills, making reports, attending to the delivery of freight according to waybills, and generally performing work requiring the exercise of intellectual faculties and business capacity. We see no difference in the facts of this case from those of *Miller and Bussey v. Dugas*, 77 Ga. 386, 4 Am. St. Rep. 90, where it was decided that the wages of a conductor of a passenger or freight train were subject to garnishment under the Code.

Who falls within the category of a journey-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

man mechanic or day laborer, within the meaning of the statute, must depend upon the facts of the particular case. The Supreme Court, in *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300, has laid down the test by which the question should be determined. This test is whether the contract of employment requires mainly mental skill, or mainly manual labor. If the former, the wages are subject to garnishment; if the latter, they are not subject. See, also, *Howell v. Atkinson*, supra, and *Cohen v. Aldrich*, 5 Ga. App. 256, 62 S. E. 1015. Applying the test given by the Supreme Court in the *Oliver Case*, supra, to the duties of this conductor, as prescribed by the rules of the railway company regulating his employment, we conclude that his wages were subject to the process of garnishment, and that the judgment of the superior court, in dismissing the certiorari and affirming the judgment of the justice in so holding, should be affirmed.

Judgment affirmed on main bill of exceptions. Cross-bill of exceptions dismissed.

(6 Ga. App. 166)

SPARKS MERCANTILE CO. et al. v. R. T. STONE TOBACCO CO. (No. 1,435.)

(Court of Appeals of Georgia. May 18, 1909.)

1. PORTION OF PLEA PROPERLY STRICKEN.

The exception to the striking of a portion of the defendant's plea is not well taken.

2. APPEAL AND ERROR (§ 615*)—BRIEF OF EVIDENCE—APPROVAL OF JUDGE.

What purports to be a brief of the evidence does not bear the approval of the trial judge. Therefore this court is not in position to consider errors assigned upon the overruling of the motion for a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2712; Dec. Dig. § 615.*]

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by the R. T. Stone Tobacco Company against the Sparks Mercantile Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Hendricks & Christian, for plaintiffs in error. Bule & Knight, for defendant in error.

RUSSELL, J. Judgment affirmed.

(65 W. Va. 506)

THOMPSON et al. v. ROBINSON et al.
(Supreme Court of Appeals of West Virginia.
April 20, 1909.)

1. FRAUDS, STATUTE OF (§ 131*)—OPERATION—MODIFICATION OF CONTRACT.

A contract for sale of coal provides that part of the purchase money shall be paid by a given day, when the vendor is to make a deed, and that, if not so paid, the contract shall be void, and declares this provision for payment of the essence, and there is default in such

payment. No oral extension of time made after that day will bind the vendor.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.*]

2. FRAUDS, STATUTE OF (§ 131*)—SALE OF REALTY—MODIFICATION OF CONTRACT.

A defunct contract for the sale of realty cannot be revived by an oral contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.*]

3. SPECIFIC PERFORMANCE (§ 97*)—PAYMENT OF CONSIDERATION OR TENDER THEREOF.

A contract for sale of land demands payment of purchase money by a given day, and declares this provision of the essence, and if not complied with the contract to be void, deed to be made on such payment. The vendee must pay or tender the money on the day, and thus put the vendor in default, else the vendee cannot have specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

4. VENDOR AND PURCHASER (§ 140*)—ABSTRACT OF TITLE—DUTY TO FURNISH.

Unless the contract so provide, a vendor of land is not required to furnish abstract of title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 262; Dec. Dig. § 140.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Marshall County.

Bill by Josiah V. Thompson and others against James M. Robinson and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Wm. H. Conaway, for appellants. McCamie & Clarke and A. C. Chapman, for appellees.

BRANNON, J. James M. Robinson made two written agreements with M. Low Parriott selling to Parriott the coal in two tracts of land. Each agreement contains the following clause: "But it is further agreed by and between the parties hereto that the payment of the first installment of one-fourth of the purchase money on or before the 8th day of August, 1905, is the essence of this agreement, and in the failure to pay the same in the time specified is to render this contract null and void, and the parties of the first part and second parts are to stand relieved from all damages and responsibility for the nonexecution and nonfulfillment of this contract, but a compliance in making said payment is to render this contract unconditional, absolute, and binding to all intents and purposes on the parties hereto of the first and second parts." Parriott assigned the contracts to Josiah V. Thompson. Robinson refusing to convey, Thompson filed a bill in Marshall county circuit court to enforce a conveyance, which the court dismissed without relief.

The contract plainly makes payment of three-fourths of the money the soul and es-

sence of the contract. It is not pretended that the money was paid or tendered by the day named, but it is claimed that Robinson waived it by allowing further time to Parriott to have a survey made and an abstract of title. This contention of waiver on pay day must be closed against the plaintiff by saying that only two witnesses speak on this point, Parriott and Robinson, and they flatly contradict each other. This feature of the case having been decided by the circuit court on conflicting evidence, and we not being convinced that the decision is wrong, it must stand, as to the alleged waiver before the contract by its terms ceased to exist. I speak of waiver before the death of the contract. I am here conceding, for argument, that such prompt payment might be waived before the contract expired by its terms; but there are authorities of high character saying that when the statute of frauds demands a writing, as terms of payment are a substantial element, the contract cannot be varied as to those terms except in writing. "Time of performance of a contract to convey land cannot be extended by parol." *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121. In *Emerson v. Slater*, 22 How. 42, 16 L. Ed. 860, it is said that "a written contract not required to be written may be varied by oral agreement; but the better opinion is, according to the weight of authority, that a written contract within the statute of frauds cannot be varied by any subsequent agreement, unless such agreement is in writing"—citing a large number of English and American authorities. Again asserted as law in *Swain v. Seamans*, 9 Wall. p. 272, 19 L. Ed. 554. Likewise *Abel v. Munson*, 18 Mich. 306, 100 Am. Dec. 165; *Brown v. Sanborn*, 21 Minn. 402; *Ladd v. King*, 1 R. L. 224, 51 Am. Dec. 624. The plaintiff bearing the burden to prove clearly the waiver before the death of the contract (*Lumber Co. v. Friedman*, 64 W. Va. —, 61 S. E. 815), it is not necessary to decide whether there can be such oral waiver. Perhaps under our state decisions there may be. If an original question, I would say that such oral agreement, changing a material provision of the contract, cannot be allowed. The statute was made to avoid fraud and perjury. What more striking instance of its wisdom than this: Two contracting parties swearing squarely contrary on a vital point, one or the other false, the court cannot say which, and must decide against the assertor of this waiver. It is not plausible to say that Robinson was to furnish abstract. The contract does not put the duty upon him; the law, in America does not. "In the United States an abstract is not an implied feature of every sale of land. Since every title is of record, the doctrine of caveat emptor, in the absence of special agreement, requires the purchaser to satisfy himself as to title, and for that purpose to make the necessary investigation and abstracts." 1 Am. & Eng. Ency. L. 213. It would be well

to shut out oral evidence in this state where promoters, adventurers, and speculators take these contracts, fail to answer their conditions, hold them indefinitely, thus tying up the owners of land, and at last defeat the conditions by trumped-up oral evidence.

I say that the plaintiff has not proven any waiver of this vital condition before the expiration of the contract. 20 Cyc. 233, tells, what in reason ought to be and is law: "Where a written contract for the sale of land has ceased to be operative in accordance with its terms, either by lapse of time or occurrence of specified conditions, an oral agreement reviving the contract is within the statute." The text of 29 Am. & Eng. Ency. L. 1101, is: "A new agreement altering the terms of a written contract which was within the statute of frauds, or required by any law to be in writing, or discharging or waiving such contract in part only, must also be in writing, in order to be binding or admissible in evidence, inasmuch as a verbal waiver would be to substitute a verbal contract for one required to be in writing. This is true even though the agreement of waiver may be in such terms that, taken alone, it would not require to be in writing. The only ground upon which a party will be bound by such waiver is that the other party has so governed his conduct, relying upon the attempted waiver or alteration, that it would be aiding a fraud to permit him to deny its validity." On page 897 is the text: "Where a written contract for the sale of land has ceased and terminated by its own terms upon the happening of a contingency, or by the action of the parties under it, it cannot be revived by parol and have its original force and effect." In *McConathy v. Lanham*, 116 Ky. 735, 76 S. W. 535, was a written sale of minerals, with clause that, if consideration should not be paid by a date, agreement to be void. Failure to pay. Parol contract to extend time. Held that, as contract was terminated by failure to pay, parol extension was void under the statute. *Brown on Stat. Frauds*, § 267, says: "It would seem to be very clear that a defunct mortgage cannot be revived by a parol agreement, and it has been decided that a defunct written agreement for the sale of land could not." *Wood on Stat. Frauds*, § 238, so states. In *Heth v. Woolridge*, 6 Rand. 605, 18 Am. Dec. 751, there was a sale of land and a time given for searching for coal. It was claimed that an oral subsequent agreement extended this time, but the court held that the statute denied any force to such agreement. The able Judge Carr said: "Many cases may be cited to show that a written agreement cannot be varied by parol." In *Williamson v. Paxton*, 18 Grat. 475, we find that "a parol agreement on the part of the vendor, however explicit, to waive the forfeiture of the contract which the purchaser had incurred, would be of no effect at law, and could be enforced in equity only where there has been part per-

formance." There is no question of part performance in this case. In *Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491, the court said: "It is not pretended that the plaintiff paid or tendered the consideration within the time given by the written option. It is contended that the defendant, the owner, made certain oral extensions and agreements, which may be enforced. * * * Assuming that the evidence establishes that the defendant * * * verbally gave an extension of time in which he would sell and convey, such oral agreement must be held void under the statute of frauds." In *Teal v. Bilby*, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263, it is held that, where there is nothing in a contract requiring a writing, it may be varied by an oral contract; but the court said that rule did not apply "where there is something in the nature of the contract requiring it to be in writing, and the conclusion necessarily follows that where, as in this case, there is something in the nature of the contract requiring it to be in writing, it may not be waived by a consequent oral agreement." *Emerson v. Slater*, 22 How. 42, 16 L. Ed. 360, says that there may be oral modification where the contract is not one requiring a writing, but that "a written contract within the statute of frauds cannot be varied by any subsequent agreement, unless such new agreement is also in writing." So in *Swain v. Seamans*, 9 Wall. 272, 19 L. Ed. 554.

Of course, the cases given in beginning of this opinion denying force of oral contracts to vary writings even before their end would, for stronger reason, apply after extinction of the contract. The English case, *Marshall v. Lynn*, 6 Mees. & W. 109, holds that such oral extension "is a new contract, incorporating new terms, and I think cannot be enforced by action unless in writing." Now, in fact, in our case there is no agreement after the death of the contract to extend time for payment. Nothing further is shown than that Robinson employed a surveyor to survey the land, and stated to strangers that the land had been sold to Parriott, and that he was still tied up by his sale; that he had an abstract made and took it to Parriott. It is said he thus recognized the sale. What if he did? He might have made the most explicit admission as to that sale. He might have made a distinct resale. It would not avail. It would not prevent from change of mind. The case of *Gas Co. v. Elder*, 54 W. Va. 335, 46 S. E. 357, may seem to conflict with this decision; but the terms of that contract were different, as it required a clear title when money should be paid, and put the duty of abstracting and showing good title on the vendor, and it provided, not that there should be unqualifiedly forfeiture for nonpayment on a day, as it said "on 30th day of November, 1890, or as soon thereafter as title shall be examined and accepted by the

vendee," and the vendor could not then make good title. The contract itself allowed the vendee time beyond the day. No bad title is proven in this case. There is no pretense of any tender of purchase money on pay day. Say that the covenant by Parriott and that by Robinson were mutual and dependent. Ought not Parriott have tendered the money, and thus put Robinson in default? Could he ask deed before offer of the money? *Irvin v. Bleakley*, 67 Pa. 24, puts it in such case very strongly: "Whichever party first desired to enforce performance was bound to regard his part of his contract as a condition precedent and perform or tender it." That was where payment and conveyance were dependent covenants. *Pomeroy's Eq. vol. 6, § 809*, says: "Where the stipulations are mutual and dependent—that is, where the deed is to be delivered on payment of the price—an actual tender and demand by one party is necessary to put the other in default and cut off his right to treat the contract as still subsisting. Time essential. Where time of payment by the vendee is made essential, and a fortiori where, if his payments are not made on the exact day named, the vendor may treat the contract as at an end, the vendee must make an actual tender of the price and a demand of a deed at a specified time." "Where certain conditions remain unperformed by the plaintiff which it would be his duty to perform contemporaneously with the defendant's compliance with the contract, there must be a tender or offer of performance by the plaintiff, or specific performance will not be decreed." 26 Am. & Eng. Ency. L. 42. In fact the contract in the present case makes the duty of payment prior to the duty of conveyance, since it says, after requiring payment by a date, "that upon the cash payment of three-fourths of the purchase money on or before the 8th day of August, 1905, that the party of the first part is to convey."

Decree affirmed.

(65 W. Va. 602)

SHEPHERD v. ADAMS EXPRESS CO.

(Supreme Court of Appeals of West Virginia.
April 27, 1909.)

EXCEPTIONS, BILL OF (§ 57*) — EXECUTION — CERTIFICATE—RECORD.

When a judge executes a bill of exceptions within 30 days after term, he must send it to the clerk accompanied by his certificate to the clerk certifying it as executed by him, and the clerk must record the certificate in the law order book under the caption of the case, to make the bill a part of the record.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 97; Dec. Dig. § 57.*]

(Syllabus by the Court.)

Error to Circuit Court, Cabell County.

Action by W. R. Shepherd against the Adams Express Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Simms, Enslow, Fitzpatrick & Baker, for plaintiff in error. Geo. S. Wallace, for defendant in error.

Adams & Cooper and J. Newman, for plaintiff in error. Robinson & Prunty, for defendant in error.

BRANNON, J. We cannot consider evidence or instructions, since the bills of exceptions presenting them cannot be considered. There is no certificate of the judge to the clerk certifying them to him to be filed as made within 30 days of the term. This certificate is the final act of the judge—his final act of authentication. If exceptions are made in term, though ever so formally executed by the judge, no one would say they were part of the record without a court order. If in vacation, this certificate and order of the judge take the place of the court order. It is the final act. The order must be recorded in the order book, and a copy appear in the transcript. There is nothing to show filing, except the clerk puts the bill in the transcript. No such certificate. We must so hold, unless we ignore former cases. Section 9, c. 131, Code 1906, in words requires these things. *State v. Blair*, 63 W. Va. 635, 60 S. E. 795; *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 260; *Ketterman v. Railroad*, 48 W. Va. 606, 37 S. E. 683.

No error appearing, we must affirm the judgment.

(55 W. Va. 562)

MOORE v. WEST VIRGINIA HEAT & LIGHT CO.

(Supreme Court of Appeals of West Virginia. April 27, 1909.)

1. TORTS (§ 27*) — ACTIONS — EVIDENCE — WEIGHT AND SUFFICIENCY.

In an action for tort, the plaintiff bearing the burden of proof, a verdict for him cannot be found on evidence which affords mere conjecture that the liability exists, and leaves the minds of jurors in equipoise and reasonable doubt. The evidence must generate an actual rational belief in the existence of the disputed fact.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 34; Dec. Dig. § 27.*]

2. GAS (§ 20*)—INJURIES—ACTIONS—EVIDENCE —BURDEN OF PROOF.

Where a liability is asserted on the ground of tort, the plaintiff bears the burden of proof of the fact on which the liability rests, and the burden to disprove such fact does not shift to the shoulders of the defendant until plaintiff's evidence shows a state of facts sufficient to establish a rational belief of the existence of such fact.

[Ed. Note.—For other cases, see *Gas*, Cent. Dig. § 17; Dec. Dig. § 20.*]

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.

Action by T. E. Moore against the West Virginia Heat & Light Company. Judgment for plaintiff, and defendant brings error. Reversed.

BRANNON, J. T. E. Moore's house was destroyed by fire, and he sued the West Virginia Heat & Light Company to recover damages for its loss. That company owned a natural gas well 5,580 feet from Moore's house, and a pipe conveying its gas ran within 150 yards of Moore's house, and from that pipe a smaller one conveyed gas to Moore's house for his use in it. He used gas in two stoves. The company shut off the gas to connect with a pipe to convey the gas to Cairo, and then without notice turned on the gas again, and, as Moore claims, this caused the fire. Upon the trial the defendant company demurred to the evidence, and upon the demurrer the circuit court of Ritchie county gave judgment for Moore for \$950, and the company sued out this writ of error.

The question ruling the case is: Does the evidence sustain the plaintiff's action? The case does not so much involve negligence. The question is whether the fire originated from the returning gas. Assuming that turning off and turning on again the gas without notice is negligence, the problem is: Did the fire come from this cause? It is needless to say that the burden of proof to establish this fact rests on the plaintiff. "A verdict based alone on mere conjecture, without evidence to support it, where the rule as to burden of proof requires some reliable affirmative evidence, should not be permitted to stand." *Robinson v. W. Va. & P. R. Co.*, 40 W. Va. 583, 21 S. E. 727. "A mere equipoise of evidence is insufficient to satisfy the burden of proof, nor is conjecture or theory or bare possibility of the existence of the ultimate fact to be proved sufficient." 8 Ency. of Ev. 866. "When, under the evidence, the injuries complained of may have resulted either from defendant's negligence or from some other cause for which he is not responsible, the plaintiff cannot recover, as he has not discharged the burden of proof." 21 Am. & Eng. Ency. L. 516.

The house was a board house of one story and a half. One stove was in the kitchen, another in the sitting room. The upstairs including part of the house was not used as a room, but as a place to stow away things. It was over the sitting room. The gas was turned off from the well and the fire went out in the stoves. Then Mrs. Moore left the house and went to a neighbor's to get him to put up a stove for coal, as she had been told some time before by an agent of the company that, owing to a sale of the well, the gas would be cut off from the house at some future time, and, when cut off, it would not be restored to the house. Shortly after she left the house was discovered to be on fire. There was then no one in the house, and no one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
64 S.E.—46

saw the commencement of the fire, or could give any account of its commencement or how it started. It was first observed at a schoolhouse in the vicinity by fire issuing from the roof, and, when the teacher and another or others went to the house, he opened the sitting room door, and saw that the fire was in the garret and was consuming the ceiling over the sitting room. It is clear that the fire started in the garret; but how no one knows. Mrs. Moore had been ironing, and had the stoves quite hot. From the stove in the sitting room ran a pipe to the ceiling, and there connected with a flue of iron running from the ceiling up through the tin roof; the flue being an iron casing used in oil wells. When the teacher and another with him looked in the sitting room, they saw no fire in the stove. This, so far, goes to show that the gas had not yet come back. The plaintiff's theory is that the gas passed into the burner in that stove and went up pipe and flue. How did it ignite, if so? His counsel would say that there was a latent spark in burner or pipe or flue, and when the gas went into them, one or another, ignition occurred. The teacher and the witness with him did not observe it there. If it went into the stove pipe or flue and there ignited, the flame would have followed the current back down into the stove, so they could have seen it in the stove, unless the stream was so strong as to drive it on up, which is a far-fetched idea; there being no evidence of such a strong volume of gas. And how can we say that the volume was any greater than it had been all day before the gas was cut off? The regulator was the same, the stopcocks the same. If the gas filled the room and exploded, we could see how the fire occurred, but there was no explosion. And whence the fire to cause explosion? And the fire started above the room and burned downward. There is nothing to show any stronger current; but what we do know goes against it. Another circumstance proven by the teacher, a witness for the plaintiff, is that there was a gas jet or flambeau in the yard, and the teacher did not see it burning when on the ground, and thinks it was not. These things go to show that the gas had not yet come back when the fire started. The teacher noticed no gas escaping. The evidence for plaintiff of experienced gas men is that, if the regulators worked well, no greater quantity of gas would be admitted when the gas came back than before. We could ourselves assume this, even if not proven. When there is no evidence of greater flow of gas, when the regulators and stopcock were the same as before, how can we say that the trouble came from a larger flow? And why, if no larger, would it set the house on fire when it had not for nine months before? There was no change in fixtures. Evidence of plaintiff clearly proves that, if the regulators worked, there would be no greater flow of gas than before. Why, if the gas

came back and ignited, would it not go up the pipe and flue and out? Why prove so disastrous at this particular time? Why would it not go up the flue? I ask again. If the gas came on before the fire, it would either go up the flue, or into the room; but those on the ground scented no gas, and no explosion occurred. The chief reliance of plaintiff to prove that this gas started the fire when it came back is that a latent spark might have been in the burner in the stove, stovepipe, or flue in soot, and, when the gas came, it was fanned into a flame, and thus the gas ignited. Unless we adopt this theory (only theory), there is absolutely no ground for the claim that the fire came from returning gas. Such a thing is barely possible, not probable even. The gas was cut off at least a quarter of an hour. A plaintiff's witness residing close to Moore, and getting gas from the same pipe line, timed it, and says the gas was off one hour. Now would it be likely that latent sparks would lie latent so long? Evidence for plaintiff, giving different opinions as to how long sparks would last, goes to show this not likely. There is not a particle of evidence to prove that sparks or soot were there. It is all surmise. We are asked to build up this theory for charge on mere surmise, mere possibility; but the party alleging negligence must "establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. The facts from which the jury can determine whether or not there was negligence must be shown by competent evidence, and the jury should not be left to mere conjecture or random judgment." *N. & W. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521. So, on the same principle, possibility that this spark theory may be true will not do; even mere probability will not. No man can say with any confidence that it is true.

It is important in this connection to add that the chief witness offered as an expert to support this theory, Huldeman, says that such might have been the origin of the fire, yet distinctly says that this is a mere conjecture; that the origin of the fire is conjecture. He says he had known several fires to occur by leaking gas and igniting of gas, "or something of the kind they did not discover," and further said he had heard of several fires similar to Moore's "the cause for which could not be explained." He was asked if he knew of a house burned in that way, and answered: "Not just exactly that way. I don't know exactly that it was soot forming that caused it, but I have known houses to burn by leaking valves, or the igniting of gas that accumulated, and that no one knewed anything of in the building." Then came the question: "I mean to ignite from latent flames? Answer: I don't know as to that. Question. You don't know that Mr. Moore's house caught from a latent flame? Answer. I don't know. Question.

You don't know how it caught, do you? Answer. I don't know how it burned. I know that the house was burned. That is all I know about it." I have detailed this much of this witness' evidence so much relied on to show how frail the foundation. Such the case of the evidence. I am, have been above, speaking of the evidence for the plaintiff. This witness says there would have to be a blaze for ignition. Not likely there was any lingering blaze in a light burner and pipe so long after gas was off. Not likely a spark would become a blaze. If there was a blaze, it could not have been in the burner in the stove. How could it be away up in the pipe or flue? An experienced witness for plaintiff stated that he would think that metal of the thickness of such a gas burner as Moore's would not get hot enough to ignite "to turn off and right on again"; that the burner would not usually get hot unless soot filled it up. There was no evidence of this. Surely the burner would cool in 15 minutes or more, taking the shortest time the gas was off under the varying evidence. It is suggested, but not much pressed, that the returning gas may have ignited from a red hot burner or stove. But Mrs. Moore, the only person in the house, and she using the stove, says the burner in the sitting room, which was under the garret where the fire started, was not red hot. She did not notice that the one in the kitchen was. The fire did not start over the kitchen.

Plaintiff, seeing how frail this foundation, appeals to the evidence of a witness who saw gas burning in the pipes, seeking to show the actual presence of gas. But that was 8 o'clock, long after the fire began, after the house had been consumed. Of course, if the gas came during or before the total extinction of the fire, it would ignite from the burning house. Just here I remark there is another feature casting obscurity. It is not certain that the gas had come back to the house when the fire started. There is variance among witnesses as to the length of time the gas was off. The evidence of those at the well is that the gas was turned off at half past 12 o'clock. A witness of plaintiff, Cokely, living near Moore, and getting gas for his home from same pipe line, the most accurate witness because he carefully noted the time by the clock and examined his regulator, and seems to be careful in observation, says the gas went off at 1 o'clock and came back at 2, by the clock. If this be correct, it is quite probable that the fire started before the gas came on; for Mrs. Moore says it started a little after 1 o'clock, and the teacher says he first noticed fire about 2, but it then had a good start, was coming out the roof, and destroying the ceiling. It was then large enough to be observed at the school several hundred yards off. It was burning downward, and would thus take longer time

to gather volume. And the roof was tin, not shingles. The fire probably started a good while before discovered. And it goes to show that the gas came on after the fire began, that the teacher and those with him did not see or hear the jet or flambeau of gas in the yard. If flaming and roaring, it is likely they would have seen and heard it.

Counsel say that the evidence establishes a prima facie case, and the burden falls on the defendant to prove that the fire did not come from the cause alleged by the plaintiff. But a case to call for judgment has not been proven. The evidence does not do so. Where a railroad company was sued for causing a fire, in order to raise the presumption of negligence, so as to cast on defendant the burden that its locomotive had suitable fixtures to arrest sparks, the jury must be reasonably satisfied that sparks emitted in dangerous quantity caused the fire, "and evidence merely 'tending' to prove it is not as a matter of law sufficient." *L. & N. R. Co. v. Malone*, 109 Ala. 509, 20 South. 33. Mere tendency to prove will not shift the burden. If the evidence "in reference to a fact is equally balanced, or it does not generate a rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, the party affirming its existence must fail for want of proof." 2 Ency. of Ev. 785. "Where the testimony upon the issue leaves it doubtful whether the affirmative of that issue is sustained, it is a safe and proper course for the jury to find against the party holding the affirmative." *Lexington Co. v. Paver*, 16 Ohio, 324. The court said in *Sim v. Bank*, 8 W. Va. 274, that evidence to establish a debt should do more than produce a suspicion—"it should be sufficiently clear and definite in its character to satisfy the mind of the court of the fact to a reasonable certainty." The evidence should generate a rational belief of the fact creating liability in cases of tort.

We reverse the judgment, set aside the verdict, and render judgment for the defendant upon the demurrer to evidence.

(85 W. Va. 567)

STAFFORD v. JONES et al.

(Supreme Court of Appeals of West Virginia.
April 27, 1909.)

1. MORTGAGES (§ 337*)—FORECLOSURE—SALE UNDER TRUST DEED.

After the institution of a judgment creditors' suit to enforce liens under section 4147, Code 1906, a trust deed creditor who has been made a party to the suit cannot have sale under his trust deed out of court, but must abide the action of the court.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1025; Dec. Dig. § 337.*]

2. MORTGAGES (§ 338*)—FORECLOSURE—INJUNCTION—GROUNDS.

Such trust deed creditor and his trustee may be enjoined from making sale under the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

deed of trust, notwithstanding his lien may be prior to all others; and it is not error to refuse to dissolve the injunction and decree a sale of the trust property until it is judicially determined that such trust creditor's lien has priority.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 1026-1035; Dec. Dig. § 338.*]

3. APPEAL AND ERROR (§ 101*)—APPEALABLE ORDER.

A decree refusing to appoint a special receiver is not appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 683; Dec. Dig. § 101.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County.

Bill by Minnie B. Stafford against H. C. Jones and others. Decree for plaintiff, and defendant W. P. Hawley appeals. Affirmed.

Harold A. Ritz, for appellant. Sanders & Crockett, Cook & Howard, and John L. Stafford, for appellee.

WILLIAMS, J. D. M. Easley, substituted trustee in a trust deed executed by H. C. Jones conveying certain real estate in Bluefield, Mercer county, W. Va., to secure a note owned by W. P. Hawley, advertised to sell on the 8th day of February, 1908. Pending the publishing of this notice of sale, Minnie B. Stafford, a subsequent judgment creditor of H. C. Jones, brought a lien creditors' suit in the circuit court of Mingo county against said Jones, making other lienors, including said Hawley and the trustee, parties to the suit for the purpose of enforcing the liens against Jones' land, and enjoining the sale by the trustee until the amounts and priorities of the liens could be ascertained. The injunction was granted, and on the day before the trustee's sale was to have been made, it was served upon the trustee and said Hawley. Original process issued on the 5th of February, 1908, returnable to "March Rules," and was served on H. C. Jones, the judgment debtor, on the day of its date, and on W. P. Hawley and D. M. Easley, trustee, on the 8th of February, 1908. There are other lien creditors, parties to the bill, upon whom no service appears to have been made. Plaintiff alleges that Jones is the owner of real estate in Mingo and in Mercer counties; that Hawley's trust deed lien is upon land in Mercer county, alleging the date thereof and the date of her judgment, thereby showing that the trust deed is prior to her judgment. But it does not allege the dates and amounts due of all the liens; nor that Hawley's lien is prior to all others. The bill is filed on behalf of plaintiff and all other lien creditors, and further alleges that the sale by the trustee, if permitted to be made for cash, as it was advertised to be sold, and in the condition of the title on account of the unsettled liens, would result in a great sacrifice of the lands. The bill was sworn to, and was filed at March rules, 1908. Hawley filed his sworn

answer in term on the 4th of March, and moved for a dissolution of the injunction, and for the appointment of a receiver to take charge of Jones' land and collect the rents and profits, and hold the same subject to the future order of court. Notice of motion for a receiver had been served upon Jones; and both he and the plaintiff appeared to the motion to dissolve the injunction. The court denied both motions, and from that order Hawley appealed.

Two questions are presented: (1) Was it error to refuse to dissolve the injunction? (2) Was it error to refuse to appoint a receiver.

Hawley's answer denies none of plaintiff's allegations; but some of them, for want of information, he refuses to admit. In support of his motions, he alleges that since the making of the trust deed securing his debt Jones had sold and conveyed some of the land covered by it; that the property embraced in his trust deed consists of houses and lots in the town of Bluefield; that the houses are badly in need of repair; that taxes are unpaid; that there remains not more than a sufficient amount of land embraced in his trust deed to satisfy his debt, which he alleges to be \$6,221.75, with interest from the 4th of January, 1908; that his is the first lien on said real estate; that considerable sums of money are derived by Jones as rents from said houses; but it is not alleged that Jones is insolvent. He prays for a dissolution of the injunction, and for the appointment of a receiver. To his answer Jones at the same time filed his sworn replication; but he did not answer the bill. In his replication he admits the amount of Hawley's lien and its priority, and specifically sets out the value of each parcel of land covered by the trust deed, and advertised to be sold by the trustee, which, according to his estimate, amounts to very much more than the trust debt. He also admits having sold certain lots after the trust deed was given. He denies that the taxes had not been paid, and specifically sets forth certain improvements which he had made on his houses. He further avers that the buildings thereon are insured against loss by fire for the benefit of said trust creditor for an amount ample to pay said debt in case of loss by fire. He avers his solvency, and that he owns considerable other property than that covered by the trust deed, and that he is able to respond to any judgment that might be returned against him for any deficiency that might result from a sale of the property covered by the deed of trust. No proof was taken.

The question presented is whether or not, upon this showing, and at this stage of the case, the court should have dissolved the injunction and directed the trustee as commissioner to execute the trust and bring the fund into court. It clearly appears from the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state of the pleadings that the cause was not matured for final hearing; nor does it seem that an order of reference could have been made, as it does not appear that any notice had been given of a motion for such reference at that term. A number of the defendants had not answered, and the cause was not matured as to them. This is a lien creditors' suit, brought on behalf of Hawley and all other lien creditors, under the provision of section 4147, Code 1906, the concluding clause of which section reads: "If after the commencement of such suit, any lien holder commence any other suit or proceeding in or out of court to enforce a lien claimed by him on the real estate, or any part thereof, of the judgment debtor, upon which a lien is sought to be enforced by such suit, the court, or the judge thereof in vacation, may enjoin him from so doing, and require him to come in and assert his lien in such suit, or make such order or decree in relation thereto as to such court or judge may seem right and proper to protect the interest of all parties having such liens." This statute unquestionably denies the right to the trust creditor to enforce his lien out of court. In construing the above statute in the case of *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285, this court held that, where a trust creditor and his trustee had been made formal parties to such creditors' suit, they could not thereafter make sale under the deed of trust. Point 5 of the syllabus in that case further holds that such trust creditor cannot defeat the action of the court by such independent proceeding outside of the suit, but that he must await the court's action. This case, however, does not go so far as to decide that such trust creditor, if he be the prior lienor, may not have a sale of the trust subject under an order of the court, and before a final decree adjudicating the rights and priorities of all the parties. Hawley's answer and Jones' replication thereto show the exact amount of Hawley's lien, and that it is the first lien on the land covered by the deed of trust. This fact is therefore conclusively established as between Hawley and Jones; and by the law as laid down by this court in *Bensimer v. Fell*, 35 W. Va. 16, 12 S. E. 1078, 29 Am. St. Rep. 774, and *Bank v. Distilling Co.*, 41 W. Va. 580, 23 S. E. 792, 56 Am. St. Rep. 878, it is also conclusive on other lienors unless fraud or collusion be shown. These cases decide that one judgment creditor cannot in such judgment creditors' suit collaterally attack the judgment of another creditor except for fraud. This rule we understand to apply also to a lien of a trust deed. But may not the other lienors dispute the priority of the lien? One of the chief purposes of such a suit is to determine priorities of liens; and any lienor has the undoubted right to dispute the priority of any other creditor's lien. Consequently Jones' admission of the priority of Hawley's trust lien is not conclu-

sive on the other lienors; and, until this asserted priority is determined either by their answer admitting it, or by the finding of a commissioner, it could not be certainly said that Hawley's trust lien is prior to the liens of some other creditors. The dates of some of the judgments do not appear from the pleadings. It might bring about great confusion if the court should direct a sale of the land before the priorities of the liens are determined in a manner binding on all the parties. The creditors who might want to bid for the land at a sale would be uncertain as to their rights, and would not know how to bid on the property. Such a condition would tend to becloud the title, and to materially depreciate the value of the property.

The fact that the trustee advertised to sell for cash is not a matter of which Jones can complain, and is certainly not a matter of which any creditor of his could complain. Jones himself is responsible for this, having stipulated in the deed of trust the manner of sale. It is a part of his solemn agreement. The court itself in decreeing sale could not change the contract of the parties, if the trust deed is the first lien, and direct a sale on any different terms. So that, if a cash sale should work a hardship on Jones, he is the author of it. *Watterson v. Miller*, 42 W. Va. 108, 24 S. E. 578; *Wood v. Krebs*, 33 Grat. (Va.) 685. Section 4147, Code 1906, does not deny a prior trust deed creditor the right to have a sale by order of court of trust property according to the terms of his trust, after the bringing of a lien creditor's suit to which he is made a party, before an ascertainment of the rights of all subsequent lienors, and before final decree. It simply prohibits him, after such suit, from proceeding out of court or from instituting any other proceedings in court. His rights must be administered in the judgment creditor's suit. There would seem to be no good reason for requiring a prior trust creditor to stand by and wait the determination of the rights of all subsequent lienors after his lien has been conclusively determined. The determination of their rights could in no wise affect his. Neither could any pending questions among subsequent lienors in any wise affect the title of the trustee. In such a case the court might with perfect propriety, and without danger of violating the rights of subsequent lienors, direct a sale of the trust property, and require the fund to be brought into court for distribution. In view of the fact that it is not conclusively shown that Hawley's trust debt is the first lien, and in view of the fact that its alleged priority is liable to be controverted by other parties to the suit, we do not think the court erred in refusing to dissolve the injunction.

It is insisted that it was error to refuse to appoint a receiver to take charge of Jones' real estate, collect rents and profits, and preserve the same for the future order of the

court. The refusal to appoint a receiver is not an appealable order. But an order appointing a receiver has been held to be appealable on the ground that it falls under the seventh clause of section 4038, Code 1906, allowing an appeal from an order requiring the possession or title of property to be changed. *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5. There are a number of cases decided by this court where the action of the circuit court in the appointment of receivers has been reviewed; but none reviewing such action in case of a refusal to appoint a receiver. And it has been at least once before expressly decided by this court that an order refusing to appoint a receiver is not appealable. *Robrecht v. Robrecht*, 46 W. Va. 738, 34 S. E. 801. We therefore hold that we have no jurisdiction to entertain an appeal from the order refusing to appoint a receiver.

For the reasons herein expressed, we will affirm the decree.

(65 W. Va. 471)

HARTIGAN et al. v. HARTIGAN.

(Supreme Court of Appeals of West Virginia.
April 20, 1909.)

1. CURTESY (§ 11*)—BAR—DIVORCE FROM BED AND BOARD.

A decree of divorce from bed and board, with perpetual separation, in the terms provided by section 12, c. 64, Code (Code 1906, § 2923), does not bar the curtesy of the husband against whom such decree is pronounced in lands belonging to the wife at the time of the decree; but upon lands thereafter acquired by her it operates like an absolute divorce, thus, as to such property, barring claim to curtesy.

[Ed. Note.—For other cases, see *Curtsey*, Cent. Dig. § 37; Dec. Dig. § 11.*]

2. BARRING RIGHT OF CURTESY.

Quere: May not the court by virtue of section 11, c. 64, Code (Code 1906, § 2927), in granting such divorce, bar, by a special order in the decree, the right of curtesy or dower in the existing real estate of the parties, or either of them?

3. DIVORCE (§ 169*)—DECREE—"INTEREST" OF PARTIES.

Within the meaning of the word "interest," there is usually embraced a mere contingent or inchoate interest.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 551; Dec. Dig. § 169.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3697; vol. 8, p. 7691.]

(Syllabus by the Court.)

Error to Circuit Court, Monongalia County.

Action by Elizabeth W. Hartigan and others against James W. Hartigan. Judgment for defendant, and plaintiffs bring error. Affirmed.

See, also, 58 W. Va. 610, 52 S. E. 720.

Lazzelle & Stewart, for plaintiffs in error.
Goodwin & Reay, for defendant in error.

ROBINSON, J. In a suit for divorce pending in the circuit court of Monongalia coun-

ty it was decreed "that the plaintiff, Mary V. Hartigan, be divorced from bed and board from her husband, the said defendant, James W. Hartigan; that the said plaintiff and defendant be perpetually separated; that said plaintiff be hereafter perpetually and fully protected in her person from said defendant and in all her property and estate now owned by her except as hereinafter provided, and in all her property and estate hereafter acquired by her against any claim, demand, or estate of said defendant and free from any marital right or claim of said defendant; that the said defendant be hereafter perpetually and fully protected in all his property and estate now owned by him except as hereinafter provided, and in all property and estate hereafter acquired by him against any claim, demand, or estate of said plaintiff." That this decree was founded upon the ground of cruelty, and not desertion, is made clear by the opinion upon the affirmance of the decree by this court. 58 W. Va. 616, 52 S. E. 720. Mary V. Hartigan died seized and constructively possessed of real estate. James W. Hartigan was in actual possession of the same as her tenant under provisions of the divorce decree. He refused to surrender possession to the heirs of Mary V. Hartigan, claiming the right thereto as tenant by the curtesy. The heirs sought to oust him by an action of unlawful detainer, claiming that his curtesy right was terminated by the clause of the divorce decree recited above. The case was heard upon an agreed statement of the facts. The court found in favor of the defendant, and rendered judgment for him. The effect of that judgment is that James W. Hartigan's right of curtesy in the real estate was not cut off by the divorce decree. Does the decree sever that right? This is the principal question for our consideration upon the writ of error to the judgment.

At the common law a divorce a mensa et thoro had no effect whatever upon curtesy or dower, nor, indeed, upon any of the marital rights of either party touching property. 2 Minor's Inst. (4th Ed.) 121. And in Virginia such divorce has no more effect than at the common law, in the absence of any order of court, in the sentence of divorce, to the contrary. 2 Minor's Inst. 122. The same is true in this state. Our statutes on the subject are the same as those of Virginia. The jurisprudence of the two states in this behalf is the same. And in the Virginias a divorce a mensa et thoro, with a decree of perpetual separation added, such as is now in question before us, provided for by statutes precisely the same in the two states, is plainly defined as to its effect on curtesy or dower by Mr. Minor. "Such a decree of perpetual separation," says he, "has no effect upon the marital rights of the parties (nor

consequently upon curtesy and dower) as to existing property; but upon property thereafter acquired it operates like a divorce a vinculo matrimonii, thus, as to such property, barring the claim to curtesy or to dower." 2 Inst. 122. Is not this text a construction of our statute law by eminent Virginia authority? He is speaking of the identical section of the law upon which this decree is based. And in the decree the court has followed this statute, doing only that which is provided by the statute, using the same language employed in it. May we not say, then, that Mr. Minor, in fact, construes this decree by the text we have quoted? That construction says that this decree does not bar the curtesy which James W. Hartigan claims. The real estate in which he claims such right was owned by Mary V. Hartigan at the time of the divorce decree. It is not property acquired by her thereafter.

It is true that Mr. Minor indicates throughout his dissertations on the subject that, in granting a divorce, it is competent for the court to make an order barring or affecting curtesy or dower where without such order the decree would not have that effect. 1 Inst. 303; 2 Inst. 118, 119, 138. It would seem that this view is based on that which is section 11 of chapter 64 of our Code (Code 1906, § 2927). In granting any kind of divorce the court is by that section given power to make any order it may deem expedient concerning the estate and maintenance of the parties or either of them. It is insisted that this relates only to alimony. But a thorough review of the origin and growth of this statute from the first enactment on the subject throughout the revisions to the existing law leads us to favor that which Mr. Minor advisedly recognizes; that is, that the court may, by a special order in the sentence of divorce, cut off or bar curtesy or dower where the decree without such special order would not have that effect. And this is suggested in *Harris v. Harris* (Va.) 31 Grat. 13. The discretion given by our section 11, c. 64, to the court as to an order relating to the estate of the parties, is there denominated as "a broad and comprehensive one." Certain it is that the language formerly employed in the older statutes and recommended by the revisors for the Code of 1849 in this behalf expressly authorized the court to make an order affecting or barring curtesy and dower. Is not this power still retained by the broad and comprehensive discretion given to the court by section 11 relative to the making of any order it may deem expedient as to the estate of the parties or either of them? It seems so.

But we deem it unnecessary to decide the foregoing question, since in the decree before us there is no such special order of the court. As we view it, the decree is silent, as is the statute upon which it is based, in relation to curtesy in the property of the wife owned

at the time of the decree. The decree, following the statute, expressly bars curtesy as to after-acquired property. As to after-acquired property, the statute makes the decree of perpetual separation to operate as would a decree a vinculo matrimonii. A decree from the bonds of matrimony has the effect to bar curtesy or dower in existing property, even for supervenient cause. *Porter v. Porter*, 27 Grat. (Va.) 599. As to existing property, however, the decree under consideration does only what section 12 empowers the court to do in making an order of perpetual separation; that is, it protects the wife in the possession and control of the property during the separation. That protection is personal to her. It cannot exist after her death. Then it can be of no service to her. The decree is made for her. It is not intended as a protection to those who come after her. If the court had power under section 11 or other part of the chapter to bar the curtesy right in question, it has not done so. It could do so only by the use of plain terms. We are not justified in annihilating a sacred property right by strained construction, or in basing an act of such annihilation upon mere implication. As to existing property of the wife, the decree makes no reference to the curtesy of the husband therein. That curtesy still exists. The divorce was simply from bed and board. The bonds of matrimony were not dissolved. They existed until the death of Mary V. Hartigan. Though the parties were separated by legal decree, they were still man and wife. "No interest of the husband in the wife's lands, either during their joint lives or after her death, is taken from him by this divorce." 2 Blsh. on Mar. & Div. § 1678. "A decree of divorce a mensa et thoro pronounced against the husband does not bar him of the right of curtesy." *Smoot v. Lecatt*, 1 Stew. (Ala.) 590. "As a divorce a mensa et thoro does not destroy the relation of marriage, but merely suspends some of the obligations arising out of that relation, it follows that the right as regards succession to property is not impaired. * * * So a husband is tenant by the curtesy of his wife's lands." *Clark v. Clark*, 6 Watts & Serg. (Pa.) 87.

At the common law, unless for causes existing ab initio, an absolute divorce could only be obtained by act of Parliament. A parliamentary divorce, being for a supervenient cause, when a marriage not void ab initio had for a time existed with all attendant rights of the relation, did not have the effect to bar those rights unless there was a special provision in the act to that effect. "If an act of Parliament dissolving the marriage contract do not divest dower except a special clause excluding it be inserted, it is difficult to conceive upon what principle a judicial decree can have that effect in the absence of legislation providing that such shall be its operation." 2 Scribner on Dower, 543.

There is another reason justifying the holding that the husband's curtesy remained in the particular property in question, even if it could be held that the effect of the decree was to bar curtesy in all existing property of the wife but that expressly excepted. This decree expressly excepts from its force the property now in litigation. In the clause of the decree we have quoted, it will be observed that there are the words "except as hereinafter provided." Now, looking further to the decree to see to what this exception relates, we find that as to the very property now sought to be recovered the court expressly reserved "for future order * * * the question of the interests of each of the said parties in the said property." It is argued that this reservation relates to interests other than curtesy. But the language used is sufficient to include such marital interest. Curtesy is an interest—a contingent one it is true, and yet an interest, nevertheless. The word "interest" is usually construed as embracing a contingent interest. *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972; *Madigan v. Walsh*, 22 Wis. 501. Whatever may have been the cause for this reservation in the decree it is there. And by it the court expressly reserved the question of whether or not it would eventually end the husband's contingent curtesy interest in the property. That interest has not been taken away from James W. Hartigan, as is contended, even if the court had power to do so.

It cannot be seriously contended that in this case it is shown that the husband deserted his wife, and thereby lost, under Code, c. 65, § 16 (Code 1906, § 2945), his right of curtesy in her lands. The record and final decision of the divorce case negative this contention. They are before us in the agreed facts, and we look to them in this particular. The judgment will be affirmed.

BRANNON, J. I do not differ with Judge ROBINSON in his statement of law in this case. Code, c. 64, § 11, empowers a court to make decree in cases both of divorce from the bond of matrimony and from bed and board as to the property of the parties owned at the date of divorce, and to cut off by its decree right of curtesy and dower. That section, however, does not authorize it to do so in case of decree of perpetual separation as to property acquired after the decree. The Legislature deemed it advisable to give this power in such case, and by section 12 made such decree operate as would a divorce from the bond as to such after-acquired property. My doubt in this case is whether we should not hold the decree in this case, under its broad language, as made under both sections, cutting off curtesy as to both present and after-acquired property.

(65 W. Va. 451)

STATE ex rel. KELLER v. GRYMES.

(Supreme Court of Appeals of West Virginia. April 20, 1909.)

1. CORPORATIONS (§ 311*) — PROPERTY AND BOOKS—RIGHT OF DIRECTOR TO EXAMINE.

Each member of the board of directors of a private corporation is clothed by law with equal rights and powers, and each has a right, at all reasonable times, to make an investigation of the property and funds, books, correspondence, and papers of his corporation, which are in the possession of its agent or general manager, and to make copies thereof for his own information as such director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1375½; Dec. Dig. § 311.*]

2. CORPORATIONS (§ 311*) — PROPERTY AND BOOKS—RIGHT OF DIRECTORS TO EXAMINE.

The right conferred by general law on an individual director to make such investigation is not abrogated by section 2276 of the Code of 1906.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1375½; Dec. Dig. § 311.*]

3. STATUTES (§ 239*)—CONSTRUCTION IN FAVOR OF PRESERVING RIGHT.

If a statute is susceptible of two constructions, one consistent with pre-existing rights and the other in derogation thereof, the courts will give to it that construction which preserves the pre-existing rights.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. § 239.*]

(Syllabus by the Court.)

4. CORPORATIONS (§ 311*)—"BOARD OF DIRECTORS."

The words "board of directors," as used in Code 1906, § 2276, providing that the books of a corporation shall be subject to investigation by the board of directors, applies to the board, both as a unit and also to each individual member composing the board of directors; and each individual director is entitled to inspect the corporate books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1375½; Dec. Dig. § 311.*]

For other definitions, see Words and Phrases, vol. 1, p. 813.]

Error to Circuit Court, Kanawha County.

Mandamus by the State, on the relation of one Keller, to compel J. C. Grymes to give relator full access to all the correspondence, books, records, and papers of the Wake Forest Mining Company. A peremptory writ was awarded, and Grymes brings error. Affirmed.

Brown, Jackson & Knight, for plaintiff in error. Price, Smith, Spillman & Clay, for defendant in error.

WILLIAMS, J. This is a proceeding by mandamus in the circuit court of Kanawha county, and involves the question of the right of a director of a corporation, who is also one of its stockholders, to inspect and make copies of so much of the books, records, accounts, and correspondence of such corporation as he may desire. The relator is a stockholder and director in the Wake Forest Mining Company, a West Virginia corporation, engaged in the business of mining and

selling coal in Kanawha county. Its capital stock consists of 250 shares of the par value of \$100 each. Relator owns 30 shares, and is one of the directors, of whom there are 5, and has been a stockholder and director since the formation of said company in the year 1902. J. C. Grymes, another stockholder, is also one of the directors, and is president, treasurer, and general manager of the company, and keeper of the records, contracts, papers, and correspondence of the company. Relator filed his petition in the circuit court of Kanawha county on the 27th day of August, 1907, praying for a writ of mandamus against said Grymes to compel him to give relator "full and free access to all correspondence, books, records, and papers of said company." He alleged in his petition that his sole purpose in making the demand "was in order to ascertain whether the affairs of said Wake Forest Mining Company were being honestly and economically administered in the equal and impartial interests of all its stockholders, and to ascertain facts which it was his right and duty to know as a director of said company; and that he had, and has now, no interests adverse to those of said company in any way." The alternative writ issued, and the defendant moved to quash it, which motion was overruled. Respondent then answered, admitting many of the facts recited in the writ and denying others. He admits that relator was not permitted to examine the "pay rolls and general books, including journals, ledger, and cash books of the Wake Forest Mining Company, the daily and monthly cost sheets showing operating expenses and the general books of the company and other of its records showing the cost of producing coal, the salary and wages paid, and the other items of expenses charged against the gross proceeds of sale of coal." Respondent attempts to justify his refusal to permit the inspection of such records, etc., on the ground that relator and W. R. J. Zimmerman, another stockholder and director, desire the information for the purpose of harassing and annoying the management of the said company by trying to force the other stockholders to buy their shares of stock at an extravagant price, or to force the other stockholders to sell to them their shares of stock. He alleges that Zimmerman and relator are brothers-in-law, and are friendly to each other and unfriendly to the management of said company; that they are employed by rival coal companies, the said Zimmerman being employed by the New River Consolidated Coal Company and the said Keller by the Sandy Creek Company; that the former of said companies is selling its coal in competition with the coal sold by the Carbon Fuel Company; and that the latter rival coal company owns or controls mines in the Kanawha coal fields and in the state of Ohio, and also produces and

sells coal in competition with the Carbon Fuel Company. But it is not alleged that either relator or Zimmerman has any interest in said rival companies other than that derived from their employment. He alleges that if said rival coal companies employing relator and Zimmerman could obtain the information which relator seeks, it would be of great detriment to the Carbon Fuel Company and the companies whose coal it sells, including the Wake Forest Mining Company; but respondent does not allege that relator is seeking the information for the purpose of disclosing it to said rival companies, or that he would so disclose it, if he could get it. Relator demurred to respondent's return to the writ, and the court sustained the demurrer; and, respondent not desiring to make any other or further answer, a peremptory writ was awarded on the 11th day of November, 1907. To the judgment of the circuit court granting this writ respondent obtained a writ of error from this court. T. A. Bartlam, vice president and secretary of the Wake Forest Mining Company, and J. R. Thomas, another director, were also named as defendants in relator's petition. But they made their separate returns, expressing their willingness to permit relator to examine any and all records and books pertaining to the business of the company, and the proceeding was discontinued as to them.

The question which this record presents for our decision is: Has a director in a private corporation a right to know all the details of the business affairs of his corporation? The question would seem to answer itself. A director directs, guides, manages. He is one of the trustees, intrusted with the direction and management of the business pertaining to his corporation. Then is it not necessary that he should have all the information in regard to the affairs of his company that he can obtain, in order that he may direct its operations intelligently and according to his best judgment in the interest of all the stockholders whom he represents? Of what value to his company would his judgment and services as director be if the keeper of its accounts and records should withhold from him all information in regard to the details of the business? Can the general manager of a corporation, even though he be a director, withhold the books, records, and papers of which he is only the custodian, and which are the property of the whole corporation? We say not. The general manager is the creature of the directors, and his powers cannot exceed theirs. The creature is not greater than his creator. The director is a trustee or agent of his corporation. He is the trusted representative of all the stockholders, and is entitled to all the information belonging to his company that will enable him to manage and direct the affairs of his corporation to its best in-

terests. His duties and responsibilities, and consequently his rights, are much greater than those of a mere stockholder, and at the common law even a stockholder was permitted to inspect the books and records of the corporation, provided he did so without interfering with its business operation, and, in order to defeat his right to do so, it was necessary to show that he wanted the information for some improper purpose. Cook on Stock and Stockholders (3d Ed.) § 511, thus states the law: "The stockholders of a corporation had at common law a right to examine at any reasonable time any one or all of the books and records of the corporation." And in the same section, in regard to the right of a director, he says: "A director has an absolute right to examine all the books of the company, even though he is hostile to the corporation. But in Connecticut a contrary rule is laid down where he is seeking information in order to organize a rival company"—citing the case of *Hemlinway v. Hemlinway*, 58 Conn. 443, 19 Atl. 766. This was an action for an assault brought by one director against another for an assault committed on him in taking from his possession a letter file which he was using for the purpose of copying the contents. It appears that there were only these two directors, and that they constituted the company, each owning one-half the stock, and that the one who complained of the assault was seeking the information for the purpose of forming a rival company. The assault was justified on the ground (1) that no more force was used than was necessary to take from him the papers; and (2) that the party assaulted was seeking to get the information for a purpose detrimental to the corporation. The right of a director to inspect the records of his company is thus stated in 10 Cyc. 770: "Every director has a right to inspect the books and records of the corporation in order to ascertain what the corporation is doing, and the majority of the board cannot lawfully exclude a minority from this right." The same doctrine is held in the following cases, viz.: *Stone v. Kellogg*, 62 Ill. App. 444; *Phoenix Iron Co. v. Commonwealth ex rel. Sellers*, 113 Pa. 563, 6 Atl. 75; *State v. St. Louis, etc., Co.*, 124 Mo. App. 111, 100 S. W. 1126; *People v. Central Fish Co.*, 117 App. Div. 77, 101 N. Y. Supp. 1108; *People ex rel. Muir v. Throop*, 12 Wend. (N. Y.) 183; *Lewis v. Brainerd*, 53 Vt. 519; *Huyilar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 2 Atl. 274; *People ex rel. Richmond v. Pacific Mail Steamship Co.*, 50 Barb. (N. Y.) 280. See, also, *High on Extraordinary Remedies*, § 308; 2 Cook on Corp. (6th Ed.) § 511; *Hellwell on Stock & Stockholders*, § 337; 7 *Thomp. Corp.* § 8480; 5 *Cur. Law*, 834; and 2 *Clark & Marshall on Corp.* 1646.

But it is insisted by counsel for plaintiff in error that this common-law right of a director or a stockholder to inspect the rec-

ords and papers of a corporation has been very much modified and limited in West Virginia by statute. Relator is both a stockholder and a director; but, inasmuch as he is seeking this information in his capacity as director, it is not necessary for us to decide, nor do we mean to decide, how far the common-law rights of a stockholder have been limited by our statute. We shall confine our observations alone to relator's right to have the inspection of the records and papers as a director. It is claimed that sections 43, 46, 47, 49, 51, 52, and 60 of chapter 53 of the Code (Code 1906, §§ 2272, 2275-2277, 2279, 2280, 2288) define the powers and duties of the board of directors of such a corporation as the one in which relator is director, and limit the actions, rights, and duties of the board of directors, and require that all action shall be by the board as a unit. If section 47 does not limit the common-law right of a director, none of the other sections referred to do so. It reads as follows: "The property and funds, books, correspondence, and papers of the corporation, in the possession or control of any officer or agent thereof, shall at all times be subject to the investigation of the board of directors, or a committee appointed for the purpose by a general meeting of the stockholders. The minutes of the resolutions and proceedings of the board shall for thirty days before the annual meeting of the stockholders, be open to the inspection of any committee appointed, in writing, by the holders of at least one-twentieth part of the total value of outstanding shares, or by the holder or holders of such number of shares. They shall be produced when required by the stockholders at any general meeting." What is the proper construction of the words "board of directors," as used in this section? It is claimed that, by the words "board of directors," the Legislature meant to limit the right of investigation to the board as a whole or as a unit, and that this section takes away the right of an individual member of the board to make such investigation, except at a board meeting; that, if such had not been the intention of the Legislature, the statute would have contained the words, "or any individual member thereof," following the words, "the board of directors." We do not think the Legislature intended to deny the right of individual investigation, nor do we think the statute should be given such an effect by construction. This court has announced the following rule in reference to the construction of statutes: "If the sense of a statute be doubtful, such construction should be given, if possible, as will not conflict with general principles of law." *B. & L. Ass'n v. Sohn*, 54 W. Va. 101, 46 S. E. 222. "Statutes changing the common law are strictly construed, and it is not further abrogated than the language of the statute clearly and necessarily requires." *Lewis'*

Suth. Stat. Const. (2d Ed.) § 573, and to the same effect is the case of *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847.

The statute says the books, correspondence, and papers, etc., "shall at all times be subject to the investigation of the board of directors." This evidently means that the officer or agent of the corporation who has charge of such records, papers, etc., shall be ready at any reasonable time within business hours to exhibit them to any individual director who may desire to see them. Each director must see for himself. The board of directors, as a whole, could not make the investigation. They could not all conveniently read the same book or paper at one and the same time; and it is clear that the Legislature intended that each member should at some time have the right to investigate, with his own hands and eyes, and for himself, and it would be unreasonable to hold that it meant that each one could investigate only when they were all together, each examining in turn, until all had completed the investigation. Then, if each one has the right to inspect all the records with his own eyes at some time, what possible reason could there be for not permitting him to do so at a time which might best suit his own convenience, provided his doing so does not unnecessarily interfere with the business operation of his corporation? If there is no right of individual investigation by each director, and if the time and manner of making investigation must depend upon the action of the entire board at a meeting, the law would, in effect, give the majority members the power to deny to the minority the right to investigate certain parts of the record, papers, and correspondence at any time by voting down any resolution providing for an investigation that might be offered by the minority. The statute was not intended to have this effect, and to give it such would be an unreasonable construction.

There are other reasons apparent in the law why the right of individual examination of the records and papers should be given to each member of the board. The Constitution of 1872 evidently intended that the minority stockholders should have representation on the board of directors by providing cumulative voting in the election of directors. And why provide for this representation on the board if the advantage to be given by such representation is to be nullified by putting it in the power of the majority of the directors to deny the minority certain information with regard to the business of the corporation which might be of greatest importance to them in enabling them to guard the interests of those by whom they were elected? Furthermore, the

law charges the directors with an important duty, and places upon them certain liabilities, and it may often be essential that they should have all the information concerning the business management of the corporation in order to protect themselves against individual liability as well as to enable them to discharge their duties as the agents, trustees, or directors of the corporate affairs. Again, the statute requires an annual report to be made each year by the board of directors of the business of the corporation for the benefit of its stockholders, which duty is upon the board as a whole. But the board is made up of individual members, each acting and casting his vote according to his best judgment and belief upon the information which he possesses. How, then, can he be expected to subscribe to a report dependent upon, and largely made up from, the more minute affairs and business details of the corporation, concerning which he has no individual knowledge? The law certainly requires each director to discharge his duty to his corporation with fidelity, and to the best of his ability, and does not intend that one member of the board should be charged with any greater duty, or held to any greater responsibility, than another, and designs that all the directors shall have equal rights. We construe the words "board of directors," as used in section 47, c. 53, Code, to apply to the board, both as a unit and also to each individual member composing the board of directors, and we hold that each individual director has the right to inspect "the property and funds, books, correspondence and papers of the corporation" at all reasonable times, and within reasonable hours, without unnecessarily interfering with the business operations of their company. It is not necessary for us to decide in this case nor do we decide, whether or not this right of examination by a director could be lawfully refused in the event it is shown that he sought the information for a purpose detrimental to the interest of the corporation, because this question does not arise in the case. Respondent's return to the writ does not allege that relator sought to make the investigation for the purpose of using the information he would obtain in a manner detrimental to his company. It is therefore unnecessary for us to decide what our holding would have been if it had been alleged that it was his intention to use the information for such a purpose. The question was decided on demurrer and the allegations of the return must be taken as true; but it is nowhere alleged that relator intended to use the information to the injury of his corporation.

We find no error in the judgment of the lower court, and will affirm it.

(66 W. Va. 476)

TOWNER v. TOWNER.(Supreme Court of Appeals of West Virginia.
April 20, 1909.)**1. CANCELLATION OF INSTRUMENTS (§ 37*)—BILL—SUFFICIENCY—MENTAL INCAPACITY.**

A bill to set aside and cancel a deed of trust on the ground of mental incapacity in the grantor to execute it, charging, with reasonable certainty as to time and relation to the event, committal of the plaintiff to an asylum for the insane, and not admitting or in any way disclosing a discharge therefrom or a lucid interval, is sufficient as to the allegation of mental incompetency.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 75; Dec. Dig. § 37.*]

2. CANCELLATION OF INSTRUMENTS (§ 37*)—BILL—SUFFICIENCY.

It is not essential to the sufficiency of such a bill that it allege fraud or undue influence in procurement of the execution of the deed.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 75-78; Dec. Dig. § 37.*]

3. EQUITY (§ 147*)—BILL—MULTIFARIOUSNESS.

Such a bill is not rendered multifarious by the incorporation therein, by way of inducement, argument, or aggravation, of foreign and immaterial matter which, set up in a bill for a different purpose, would afford ground for relief wholly different in character from that sought.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 147.*]

4. APPEAL AND ERROR (§ 518*)—RECORD ANSWER—PLEADING AS PART OF RECORD.

An answer, filed at rules, is a part of the record of the cause, and presumed to be a part of the foundation of the final decree, though not mentioned in any order in the cause, if process has been executed and sufficient time to regularly mature the cause has elapsed, and nothing to the contrary appears in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

5. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—INFORMALITY IN PROCEEDINGS.

A decree will not be reversed at the instance of a party who has taken depositions for an informality in the proceedings when it appears that there was a full and fair hearing upon the merits, and substantial justice has been done.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1043.*]

6. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR—WANT OF REPLICATION.

If the defendant has taken depositions as if a replication to his answer had been filed, a decree against him will not be reversed for want of a replication.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

7. DEEDS (§ 196*)—MENTAL CAPACITY—PRESUMPTIONS AND BURDEN OF PROOF.

Mental incompetency is presumed in respect to a deed executed by a person after he has been adjudged insane and before his discharge from the hospital in which he was confined, although, at the time of its execution, he was at home, under a permission or furlough, given by the hospital authorities; and the bur-

den of proof is on the grantee to prove it was executed in a lucid interval.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 196.*]

8. DEEDS (§ 211*)—MENTAL CAPACITY—LUCID INTERVAL.

To sustain a deed as having been executed in a lucid interval the proof must be clear, going to the mental state and habit of the grantor, not merely to an accidental interview, or the degree of self-possession in a particular act. It must show the power and restriction of mind deemed necessary in general to the disposition and management of affairs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 639; Dec. Dig. § 211.*]

9. COSTS (§ 238*)—ON APPEAL—PARTY INTRODUCING ERROR.

An appellant who in the court below induced an error, consisting of failure to insert a saving clause, by introducing in his answer a matter foreign to the bill, and failing to ask for a reservation of his rights, respecting the same, may have the error corrected in the appellate court, but will not be allowed costs for such error alone.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 238.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Doddridge County.

Bill by John Towner against Maggie Towner and another. Decree for complainant, and Maggie Towner appeals. Modified and affirmed.

G. W. Farr, A. F. McCue, and L. W. Chapman, for appellant. Jas. A. Watson, Freer & Robinson, and J. W. Stuck, for appellee.

POFFENBARGER, J. On the 11th day of January, 1905, John Towner entered into a contract, by which he agreed to pay his wife, Maggie Towner, \$1,000, without interest, in installments of \$100 each, the first of which was to become due on the 15th day of December, 1905, and the others on the 15th days of each succeeding December, until all should be paid. The agreement further provided for a separation of the parties. On the 14th day of January, 1905, Towner executed a deed of trust on his farm, containing 79 acres and 40 poles, to secure the payment of said sum, and made L. W. Chapman trustee therein. The trustee published a notice of a sale of the property, to be made on the 31st day of March, 1906; default having been made in the payment of said first installment. Thereupon Towner presented in the circuit court of Doddridge county his bill in equity against Maggie Towner and the trustee, praying an injunction to prevent the sale, setting up fraud in the procurement of the deed of trust and his mental incompetency to execute the same, and prayed cancellation thereof. An injunction in conformity with the prayer of the bill was awarded on the 16th day of March, 1906. At May rules, 1906, defendant, Maggie Towner, filed her demurrer and answer to the bill. Deposi-

tions having been taken, the case was submitted to the court on the 17th day of May, 1907, when a decree was pronounced, canceling, annulling, and setting aside the deed of trust and perpetuating the injunction, from which decree the said Maggie Towner has appealed.

The first assignment of error is predicated on the overruling of the demurrer. Under this heading it is said (1) the bill does not sufficiently charge insanity; (2) it does not sufficiently charge the exercise of undue influence; (3) it is multifarious; (4) the charge of fraud is insufficient; (5) it is unintelligible and uncertain, allegations purporting to charge matters resting in the knowledge of the plaintiff and those stated to be upon information and belief being so intermingled as to be inseparable. The bill charges that prior to the 16th day of January, 1905, on the ——— day of ———, 1904, plaintiff's mind became affected, and he was by legal proceedings committed to an insane asylum, where he remained as a patient and inmate until December, 1905. It further says that while his mind was thus affected and weakened "he was wholly unable to transact business, but had no power to exercise mental thought or consideration." These charges or statements are substantially repeated in the bill. We think they amount to a sufficient allegation of insanity. The bill says the plaintiff had been adjudged insane and committed to an asylum. In the absence of any showing to the contrary, it is presumed that his insanity continued. *Eakin v. Hawkins*, 52 W. Va. 124, 129, 43 S. E. 211. There is no intimation of restoration to sanity. The allegations as to undue influence are somewhat lacking as regards specification of improper conduct on the part of the defendant. For the most part they are general, saying she obtained advantages over him by her power and persuasion, while he was mentally weak, in fact, insane, and that he was persuaded and induced by his wife while in that condition to execute the deed of trust. In other places it charges generally that she cheated, defrauded, and robbed him of his money and property while he was absolutely insane, and while she knew him to be so, and susceptible to her influence as a child would be. Whatever may be said of this as a defect, or whether it is one or not, a sufficient ground for relief sustaining the action of the court is found in the charge of insanity. The charge of multifariousness is based on certain clauses, imputing desertion, abandonment, and other improper conduct to the defendant. These clauses, however, do not purport to state a cause of action. No prayer for relief is predicated upon them. Neither a divorce nor any other judicial action respecting the marital relation of the parties is sought. We think there is nothing in the other grounds of demurrer assigned. The bill is intelligible, and the distinction between matters stated upon the

plaintiff's knowledge and those stated upon information and belief is reasonably clear.

There is nothing in the complaint founded on alleged failure to give time for an answer after the overruling of the demurrer. As has been stated, the answer was filed at rules. The statute permits this, and, as it is found in the record and depositions were taken and filed, it must be treated as in the case and raising the issues, although it is not mentioned in any decree, nor replied to. Nor is the decree reversible for failure to recite the cause was heard on the answer, or for want of a general replication. As process was issued and executed, the bill and answer filed and depositions taken, and sufficient time elapsed to mature the cause for hearing, it is presumed it was regularly matured for hearing, nothing to the contrary appearing on the record. *Riggs v. Lockwood*, 12 W. Va. 133; *Linsey v. McGammon*, 9 W. Va. 154. If any aid to this presumption is necessary, it is found in the recital, saying the cause was heard "upon all former orders, decrees, and proceedings" had therein. This harmonizes with the last clause of section 4, c. 134, Code 1906 (section 4035), saying: "Nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done." No decree can be reversed for want of a replication to the answer if the defendant has taken depositions as if one had been filed. Code 1906, c. 134, § 4 (section 4035); *Chalfants v. Martin*, 25 W. Va. 394; *Richardson v. Donehoo*, 16 W. Va. 685. As we have said, the adjudication of insanity raised a presumption against the defendant. Ordinarily there is a presumption of sanity placing the burden upon the party attacking the conveyance on the ground of insanity; but, if the grantor has been previously adjudged insane, or general mental derangement established by proof, it is presumed the infirmity continued, and the burden is cast upon the party endeavoring to uphold the deed. Neither presumption is conclusive. Either can be overthrown. Besides, some insane persons have lucid intervals, and, if a deed be executed or a contract made in such an interval, it is valid. *Beverage's Committee v. Ralston*, 98 Va. 625, 37 S. E. 283; *McPeck v. Graham*, 56 W. Va. 200, 49 S. E. 125; *Bishop on Con. § 959*; *Fishburne v. Ferguson's Heirs*, 84 Va. 87, 107, 4 S. E. 575. In order to sustain the burden so thrown upon him, the party relying upon the deed or other instrument must clearly prove mental competency at the date of execution; and the proof must go to the state and habit, not to the accidental interview or the degree of self-possession in any particular act. *Fishburne v. Ferguson*, cited. A leading case on this subject is *Attorney General v. Parther*, 3 Bro. 5, 441, in which Lord Thurlow said: "The evidence in support of a lucid interval,

them; but for a single offense committed by such an agent or servant in violation of the rules of such company, and contrary to its positive instructions, this court has held in at least two cases, and we think rightly, that the railroad company is not liable. *State v. B. & O. R. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803; *Hall v. N. & W. R. R. Co.*, 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757.

The finding and judgment of the court below will therefore be set aside and reversed, and judgment of acquittal entered here, and the defendant discharged from further prosecution in this behalf.

(65 W. Va. 74)

HALL v. MCGREGOR et al.

(Supreme Court of Appeals of West Virginia.
Feb. 2, 1909. Rehearing Denied May
14, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 453*)—JUDGMENT—INDIVIDUAL JUDGMENT.

A judgment against one styled as executrix, without recovery to be had from goods and chattels in her hands to be administered, is not a judgment against the estate, but an individual judgment against the person so styled.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1899, 1902; Dec. Dig. § 453.*]

2. EXECUTORS AND ADMINISTRATORS (§ 111*)—ATTORNEY'S FEES—LIABILITY OF REPRESENTATIVE.

A personal representative is individually liable for compensation to an attorney for services rendered on behalf of the estate, at the instance of such representative.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 448-462; Dec. Dig. § 111.*]

3. EQUITY (§ 269*)—BILL—AMENDMENT.

If the identity of the originally intended cause of suit is preserved, the particular allegations of a bill in equity may be changed by amendment, in order to cure imperfections and mistakes in the manner of stating plaintiff's case.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 552-556; Dec. Dig. § 269.*]

4. JUDGMENT (§ 414*)—EQUITABLE RELIEF—GROUNDS.

A judgment cannot be assailed in equity upon pleadings which fail to show affirmatively some reason, founded in fraud, surprise, accident, mistake, or adventitious circumstance beyond the control of the party complaining, why the defense was not made at law.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 780; Dec. Dig. § 414.*]

5. CREDITORS' SUIT (§ 16*)—EXECUTION.

As a basis of suit in equity to enforce a judgment against real estate, an officer's return of no property found, on an execution, is conclusive between the parties, unless in case of fraud and collusion in the procurement of such return for the purpose.

[Ed. Note.—For other cases, see *Creditors' Suit*, Dec. Dig. § 16.*]

6. EQUITY (§ 438*)—DECREE—EXECUTION.

By statute, an execution may issue on a decree for the payment of money.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 1055; Dec. Dig. § 438.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County.
Bill by Cyrus Hall against Matilda McGreggor and others. Decree for complainant, and defendants appeal. Affirmed.

F. H. McGreggor and S. A. Powell, for appellants. Freer & Robinson, for appellee.

ROBINSON, J. A clear disposition of the case demands a statement somewhat in detail. The plaintiff claimed compensation for services rendered as an attorney of the estate of David McGreggor, deceased, upon employment therefor by Matilda McGreggor, the executrix. Upon such cause of action plaintiff recovered a judgment before a justice of the peace for the sum of \$300. The action proceeded against Matilda McGreggor, "executrix of the last will and testament of David McGreggor, deceased." Executions on the judgment, in like form, were returned by a constable "No property found." Thereupon plaintiff instituted his suit in equity for the enforcement of his judgment against the lands of which David McGreggor died seised and possessed. In the bill these lands were alleged to have been devised by the will to the said Matilda McGreggor. The judgment was alleged to be a lien on the lands aforesaid. For its payment a sale of the lands was prayed. Between the time of the rendition of the judgment and the institution of the suit for its enforcement against the lands, Matilda McGreggor and the children of David McGreggor, deceased, who were litigating as to the estate, compromised their controversy. Matilda McGreggor's title to portions of the real estate was defined. She quitclaimed to the children as to other portions of it. She resigned as executrix. The plaintiff's bill for the sale of the lands named her as late executrix, widow, and devisee. The children were parties to the bill. With Matilda McGreggor they answered after their demurrer had been overruled, resisting the enforcement of the judgment, alleging that it was obtained by fraud. The substance of this charge was that, after instituting the action, plaintiff had represented to Matilda McGreggor that he would not proceed to judgment therein; that he thereby caused no defense to be interposed. Special replications were filed and evidence was taken. At this point it seems conceded that a ruling of the court brought to the attention of counsel the fact that the judgment, in its form aforesaid, particularly upon such cause of action, was merely a personal one against Matilda McGreggor. There was reference to a commissioner to ascertain what real estate, if any, the judgment was a lien upon, to whom that real estate belonged, and other pertinent matters. The commissioner reported that the judgment was a lien on the real estate of Matilda McGreggor, and described that real estate. The greater part of this real estate, it would ap-

pear, was that allotted to her by the compromise. That part was real estate of which David McGregor died seised and possessed, and that part, at least, was real estate which the bill sought to subject to the payment of the judgment. Numerous exceptions to the report were indorsed by these defendants. It appeared that proper and necessary parties, holders of vendors' liens as to some of said real estate, were not before the court. The exceptions at the time were not passed upon, and the case was remanded to rules, with leave to the plaintiff to amend the bill by making new parties, and any additional allegations necessary and material for the proper presentation of his cause. The bill was amended. Complete new process issued thereon, and the cause again matured. The amended bill fitted the case to the findings of the commissioner, and prayed for the enforcement of the judgment against the lands of Matilda McGregor as a personal judgment against her, and not as a judgment or claim having to do with the real estate of the decedent. Demurrer to the amended bill being overruled, specific answer was made on the part of Matilda McGregor, and separate answer as to said children. She denied that the judgment was one against her personally. It was further asserted that the plaintiff never intended his judgment to be personal against her, and that he had never so treated it until the aforesaid ruling of the court was made; that she had been misled in believing that the judgment was not being sought against her personally, but against the estate of which she was executrix at the time, and that she therefore made no defense to it. It was further alleged that the returns on the executions did not apply to her personally, and that she had property out of which the executions could have been made. The judgment was attacked as being rendered without notice to her. Any debt of Matilda McGregor to plaintiff was denied, and an injunction against the enforcement of the judgment was asked. To these answers special replies were made. Depositions were taken relative to matters raised upon such issue. Then followed a decree adjudicating that the judgment was a valid and existing lien on the real estate of Matilda McGregor; that said judgment was a personal one against her; that the words "executrix of the last will and testament of David McGregor, deceased," were merely descriptive. The relief prayed for in the answers was denied. The report of the commissioner was set aside. Reference was had to a special master for ascertainment and report of the real estate of Matilda McGregor upon which the aforesaid judgment was a lien, the nature of her estate therein, and other proper matters. Upon the report being returned there was final decree in the case for the amount of the judgment, its interest and costs, in favor of the plaintiff against Matilda McGregor, providing for a renting of the real estate ascertained to be

owned by her in the event she should not pay the same within the day fixed. It is from these decrees that we now have this appeal.

There is much in the record that should not be there. Extended evidence has been produced, the greater part of which is improper or irrelevant to a proper conception of the case. Our consideration of the record shall be limited to those matters upon which correct decision turns.

Is the judgment a personal one against Mrs. McGregor? Yes, clearly so. *Thompson & Lively v. Mann*, 53 W. Va. 432, 44 S. E. 246; *Hanson v. Blake*, 63 W. Va. 560, 60 S. E. 589. This is true, not only because of the form of the judgment and the statement of the account filed before the justice upon which it is based, but it is forcibly true by reason of the very substance of the cause of action. A personal representative is individually liable for compensation to an attorney for services, rendered at the instance of such representative, on behalf of the estate. 2 *Woerner's American Law of Administration*, § 356; 18 Cyc. 882; *Crim v. England*, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 828. The representative has recourse for reimbursement for reasonable expenditures in such behalf, in his settlement with the estate.

The amendment to the bill was not absolutely essential to the enforcement of the judgment as a personal one against Mrs. McGregor. The original bill set forth this judgment so that its legal effect was most apparent, and asked that it be enforced out of the lands of which David McGregor died seised and possessed. These lands were therein alleged to have been devised to Mrs. McGregor. Yet the amendment was regular and proper. It cured imperfections in the manner of stating plaintiff's case. It made no new case. The identity of the original cause of suit was preserved. That cause of suit was the enforcement of this same judgment against this same real estate, or real estate of which that mentioned in the amended bill is a part. The same parties remained involved. The end sought by the amendment is precisely the same as that originally intended by the plaintiff—the collection of his judgment. In *Hanson v. Blake*, supra, we recently held: "So long as the form of action is not changed, and the court can see that the identity of the originally intended cause of action is preserved, the particular allegations of the declaration may be changed by amendment in order to cure imperfections and mistakes in the manner of stating plaintiff's case." Certainly the rule is not more rigid in equity. Indeed it is the same. *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852; *Hogg's Equity Procedure*, § 327. The rule in equity demands simply that a new, substantive cause of suit be not introduced; that the identity of the cause of suit be preserved. By this amendment the plaintiff's case was simply made to conform to the real equities in his favor which the progress of the cause disclosed as those re-

lated to his originally intended object of that suit. That object was to collect his judgment out of the lands. If it appeared that the real character and force of the judgment was mistakenly or imperfectly alleged, it was right to correct this error by amendment. And even if it appeared that the ownership of the lands was erroneously set forth, there could properly be amendment as to this fact, so long as the original object was sought—the collection of the same judgment from the same real estate, and especially as between the same parties. The demurrers were rightly overruled.

There would be little finality and stability to judgments were it possible to overthrow them upon the facts alleged in the answers in this case. As to the charge of fraud in the original answer, it suffices to note that there is no denial of notice of the judgment within the time for appeal therefrom, nor anything making a case of fraud, surprise, accident, mistake, or adventitious circumstance sufficient to affect the force and validity of the judgment in view of the failure of Mrs. McGregor to take advantage against it directly at law. The allegations of the answer to the amended bill, calling for affirmative relief, do not make a case of fraud, surprise, accident, mistake, or adventitious circumstance beyond control of the party complaining, as against this judgment. Such case is necessary to relief in equity from a judgment at law. This principle needs no citation of authorities. It has become a maxim of equity. The judgment from its rendition had a legal effect. Its legal import was that of a judgment against Mrs. McGregor. She is chargeable with knowledge of this import. Failure to be properly advised in the premises in time to destroy the legal effect of the judgment, if it was erroneous, was her own act. Diligence on her part in seeking advice of good counsel would, if there was error, have saved her. Equity cannot excuse lack of diligence, which is only another name for negligence. But the case set up by her in this answer is in truth overcome by the facts disclosed as a whole therein. She, in effect, assumes and admits the judgment to be one properly payable by the estate. Viewing the judgment as she does in this answer, she, as executrix, admitted, by making no defense to the claim in the manner provided by law, that the cause of action was a just one. And the facts stated by her show that, if the original cause of action upon which the judgment is based was just, then because of its nature she is liable personally. The effect of her answer is to say that the plaintiff did render the services as attorney to the estate for which she was executrix, at her instance, for which he should be paid by that estate, and not by her. Yet this very statement shows her liability for the same individually, and supports the validity of the judgment as a personal one against her. She cannot defeat a judg-

ment that appears from her pleading itself to be right.

It seems that Mrs. McGregor was misadvised in the premises. That fact cannot overthrow a proper decree. It is simply unfortunate. Costs have been incurred unnecessarily. And it clearly appears that the plaintiff was also erroneously advised concerning the true purport of his judgment for a time. However, since in the latter stages of the case it is practically admitted that there is no controversy as to the amount and justice of plaintiff's claim for services, but only as to who should pay it, it does not appear inequitable or unjust in any particular that the decree should have applied the correct legal rule as to individual liability on the part of the executrix.

As to the contention that the returns of no property found do not relate to Mrs. McGregor individually, and that she had sufficient personal property out of which the amount of the executions could have been made, we must view these returns in the same light as we do the judgment. And a return of no property found, as a basis of right to proceed in equity for enforcement of a judgment against land, we hold to be conclusive as between the parties. 17 Cyc. 1379; *Smith v. Triplett*, 4 Leigh (Va.) 590. The statute is: "The lien of a judgment may be enforced in a court of equity after an execution of fieri facias thereon has been duly returned, to the office of the court or to the justice from which it issued, showing by the return thereon that no property could be found from which such execution could be made." Code 1899, c. 139, § 7 (Code 1906, § 4147). This statute demands a return showing no property found, nothing more, as a basis of suit. Here we have such showing by returns on the executions that were issued on the judgment. Can we say that the statute requires more? It merely requires the showing of such return. It does not demand that there shall in fact be no property. If the officer is derelict, there is complete remedy on his bond. And the return cannot be attacked by showing that sufficient property existed, because the plaintiff has done all required by the statute when he shows such return. It is not a question of the existence of sufficient property, but the existence of such return of an officer. Fraud and collusion in making such return, for the purpose of basing a suit thereon without resort to personal property, may alter the rule. *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244. But nothing short of such fraud and collusion does alter it. No sufficient case in that particular has been made, although insisted upon and argued. The plaintiff has not been successfully impugned in connection with the making of the returns on the executions upon his judgment. The officer may have been at fault.

Complaint against the decree because it

provided for executions to issue thereon as at law is without merit. By statute, decrees for land or specific personal property, and for the payment of money, are placed on the same footing as are judgments therefor. Code 1899, c. 139, §§ 1, 2 (Code 1906, §§ 4141, 4142). An execution may issue on such decree. This law is indeed old. *Tate v. Liggett*, 2 Leigh (Va.) 101; *Windrum v. Parker*, 2 Leigh (Va.) 369; 4 *Minor's Inst.* (3d Ed.) 984.

In the light of the foregoing observations, which, we think, sufficiently dispose of the various assignments of error, we affirm the decrees.

(65 W. Va. 564)

SCHILB v. MOON et al.

(Supreme Court of Appeals of West Virginia.
April 27, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 342*) —
SALE OF REALTY—PAYMENT OF DECEDENT'S
DEBTS.

If, pending a suit to subject land to the payment of a judgment, the judgment debtor dies, and his heirs to whom the land descended are made parties, the suit thus becomes one to sell the land of the heirs for the debt of the decedent, and, before a sale is decreed, the accounts of the administrator of the decedent must be settled and the unadministered assets, if any, ascertained and administered by the court in relief of the realty descended to the heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1438; Dec. Dig. § 342.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by Jacob Schilb against Eliza Hendrickson and others. Decree for plaintiff, and one of the defendants appeals. Reversed.

V. B. Archer and William Beard, for appellant. McCluer & McCluer, for appellee.

ROBINSON, J. A former decision in this case is reported in 50 W. Va. 47, 40 S. E. 329. The decree complained of in that appeal was reversed. It was a decree subrogating the plaintiff to the rights of the Second National Bank of Parkersburg as to the judgment paid that bank by him, and giving him a personal judgment for the amount thereof against Anna Moon and others. It was held error to have pronounced such decree without the bank's having been a party to the cause. The right of subrogation as decreed was upheld. After that decree had been entered, Anna Moon died. The appeal was prosecuted and the reversal procured by her administrator. The cause was remanded. Thereafter the bank and the heirs of Anna Moon were made parties. Amended bills were filed, and the cause was prosecuted to a decree for the sale of the land owned by Anna Moon at the time of her death, for the payment of the judgment to which plaintiff was subrogated. One of the heirs, who had not appeared, and

as to whom the cause had been heard upon the bill taken for confessed, moved pursuant to section 5, c. 134, Code 1899 (Code 1906, § 4036), at a subsequent term, to set aside and reverse the decree for errors. This motion was overruled. That party has appealed from the decree for sale of the land which descended to her and others from Anna Moon, still relying upon the errors assigned in her motion to reverse below.

The decree for sale must be reversed. It is plainly erroneous. It directs the sale of the real estate of a decedent to pay a judgment lien before the accounts of the administrator have been settled, and the unadministered assets, if any, have been ascertained and administered by the court in relief of the realty descended to the heirs. *Laidley v. Kline*, 8 W. Va. 218; *Boggs v. McCoy*, 15 W. Va. 344; *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562; *Kilbreth v. Root*, 33 W. Va. 600, 11 S. E. 21. There was no allegation by the plaintiff that there was absolutely no personal estate applicable to the judgment. Therefore that fact has not been taken for confessed as to the defendant now complaining. On the other hand, the plaintiff by his own pleadings shows that there was some personal estate. This fact clearly appears throughout the record. The administrator answered that there was ample personal estate to pay the debt. Unless the contrary had been confessed by the nonappearance of the defendant who brings this appeal, it was, as to her, plain error to disregard the existence of this personal estate and make decree, in the very teeth of the fact, reciting that it appeared that decedent had no personal estate "out of which the judgment * * * could be made." Perhaps the judgment could not have been made wholly out of the personal assets; but it was a certainty that assets existed which could be and should have been applied on the judgment before the entry of any decree for sale of the land of the heirs. At any rate, the fact that no personal assets existed was not alleged, and was not confessed as to appellant. Hence it was the court's duty toward her to ascertain, by a settlement of the accounts of the administrator, whether or not such assets existed, and, if they did exist to any extent, to apply them properly toward the relief of the realty. Appellant can surely complain that her land has been charged with a decree for a larger sum than it should pay. She cannot, to relieve her real estate, be compelled to pay off that which the personal assets of the decedent, though ever so small in amount, should pay. This is old law. It is soundest equity. The land descended to the heirs subject only to the amount of the debts of decedent remaining after the personal assets are applied thereon. This decree has subjected that land to sale for the payment of a larger debt than it should pay. Even in suits on a vendor's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lien against land of a decedent the personal assets must be settled and administered before a sale of the land is ordered. *Bierne v. Brown's Adm'r*, 10 W. Va. 748; *Sommerville v. Sommerville*, 26 W. Va. 482. In any case where land descends to an heir, it can be charged as against him with only the amount of debts of the decedent which the personality fails to pay.

The court heard the cause upon the report of a commissioner made before Anna Moon's death and before appellant was a party to the cause. This was error as to appellant, except as to such matters relied upon in that report which were alleged in the pleadings against her and confessed by her nonappearance. After Anna Moon died and the heirs were made parties, the suit, by the very force of events, assumed an entirely different character from that which it had when that report was made. The report should not have been relied upon in view of the new phase of the suit, and of the new parties whose rights could not be prejudiced by such finding. It was not pertinent to that which the suit had in fact become—one to sell the land of a decedent, descended to heirs, for that decedent's debt. We do not specifically inquire what harm was done appellant by the court's reliance upon this old report of a commissioner. It is enough to say that the looking to it, after there was a complete change in the character of the suit and the parties thereto, was not consistent with the rights then to be determined.

The mandate will be that the decree for sale be reversed, and that the cause be remanded for further proceedings to be had pursuant to the principles herein announced and according to equity.

(65 W. Va. 120)

DEPUE et al. v. MILLER et al.

(Supreme Court of Appeals of West Virginia.
Feb. 3, 1909. Rehearing Denied
May 14, 1909.)

1. HUSBAND AND WIFE (§ 48*)—CONVEYANCES BETWEEN.

If a husband convey land directly to his wife, and she, in turn, attempt to reconvey it directly to him, by executing a deed to him, and after her death he convey it to a third person, and then die, the equitable title is in the heirs of the wife by descent, and the legal title in such third person or his successors in title.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 242, 243; Dec. Dig. § 48.*]

2. APPEAL AND ERROR (§ 917*)—REVIEW—PRESUMPTION IN FAVOR OF CORRECTNESS OF DECISION.

A general demurrer to a bill in equity challenges its sufficiency in all respects, and a decree sustaining such a demurrer is presumed, in the appellate court, to rest upon any sufficient ground disclosed by the bill, even though it was not assigned in writing, as a ground of demurrer, while others, not well taken, were.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3708; Dec. Dig. § 917.*]

3. APPEAL AND ERROR (§ 854*)—WRONG REASON FOR CORRECT DECISION.

A sound decree, sustaining a demurrer, should not be reversed merely because the trial court assigned an erroneous or incorrect reason therefor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3408, 3411; Dec. Dig. § 854.*]

4. EQUITY (§ 19*)—JURISDICTION—EQUITABLE TITLE.

A purely equitable title cannot be maintained in a court of law, and, for that reason, all relief, respecting the same, must be sought in a court of equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 46, 47; Dec. Dig. § 19.*]

5. LIMITATION OF ACTIONS (§ 5*)—EQUITABLE RIGHTS.

The statute of limitations never runs against a right, the vindication of which belongs to the exclusive jurisdiction of the equity courts.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 13, 15; Dec. Dig. § 5.*]

6. EQUITY (§ 17*)—ADVERSE POSSESSION (§ 106*)—LEGAL ESTATES—RECOGNITION.

Courts of equity recognize legal estates and titles, and in such courts such titles prevail over equitable ones. A title to land, acquired by adverse possession, is respected in courts of equity as well as in courts of law.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 39, 40; Dec. Dig. § 17;* *Adverse Possession*, Cent. Dig. § 605; Dec. Dig. § 106.*]

7. EQUITY (§ 71*)—LACHES.

Laches will bar a purely equitable demand, and the period of delay allowed depends upon the peculiar circumstances of the case.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 204; Dec. Dig. § 71.*]

8. EQUITY (§ 72*)—LACHES.

If the right of the plaintiff is clear and not dependent upon oral evidence, and no injury or prejudice to the defendant has resulted from the delay, as by the death of parties, change of conditions, loss of evidence, or the like, the cause of action is not barred by laches, unless the lapse of time and the circumstances are such as to raise a presumption of intent, on the part of the plaintiff, to abandon or relinquish the right.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 212-226; Dec. Dig. § 72.*]

9. EQUITY (§ 71*)—LACHES.

Mere forbearance to compel rendition of a just debt or other right, the existence of which is clear beyond doubt, does not prejudice the party from whom it is due, and it is not inequitable to enforce rendition thereof after long delay; but if the length of time be long enough in itself, or with the aid of circumstances and conduct, to satisfy the chancellor that the plaintiff had abandoned his right before he brought suit to enforce it, his demand will be regarded as stale and lost by laches.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 209; Dec. Dig. § 71.*]

10. EQUITY (§ 71*)—LACHES.

Delay, for a period less than 20 years, in the assertion of an exclusively equitable demand, fully proven by documentary evidence, under circumstances not in any way operating to the prejudice of the defendants, and tending to negative the inference of intent on the part of the plaintiff to abandon or relinquish the right, will not bar relief.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 204; 206; Dec. Dig. § 71.*]

11. EQUITY (§ 75*)—LACHES.

Moral as well as legal considerations, such as ignorance of law or regard for the feelings of relatives, will be considered and given weight in determining whether the plaintiff has abandoned his cause of action; but such considerations do not relieve from, or stay, the statute of limitations, nor excuse delay, working prejudice by death of parties, loss of evidence, or other similar circumstances.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 227; Dec. Dig. § 75.*]

12. CURTESY (§ 8*)—ESTATES SUBJECT TO.

A husband has an estate by the curtesy, after the death of his wife, in lands which he had voluntarily settled upon her, if he did not, in express terms or by plain implication, relinquish such right in the instrument of conveyance.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 27; Dec. Dig. § 8.*]

13. CURTESY (§ 11*)—ESTATES SUBJECT TO.

As the husband's estate by the curtesy in his wife's real estate is given by the law for reasons of public policy, and not created by contract between the husband and wife, no presumption of intention to preclude it arises from the mere fact of a conveyance from the former to the latter, however it may have been effected.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 35; Dec. Dig. § 11.*]

14. EQUITY (§ 150*)—BILL—MULTIFARIOUSNESS.

If, under the circumstances stated in point 1 of this syllabus, the husband, after the death of the wife, has conveyed a portion of the land to persons who have, in turn, conveyed it, in separate portions, to others, so that it constitutes two tracts claimed by different persons, the heirs may assert their rights as to both of such tracts against all the interested parties in a single suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 371; Dec. Dig. § 150.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Roane County.

Bill by Hal. H. Depue and others against H. W. Miller and others. Decree for defendants, and complainants appeal. Reversed and remanded.

Cunningham & Harper, for appellants.
Pendleton & Boggess, for appellees.

POFFENBARGER, J. In the circuit court of Roane county a demurrer to the bill of Hal. H. Depue and others, heirs at law of Henry Depue, was sustained and the bill dismissed. From this decree the plaintiffs have appealed.

The object of the suit is the cancellation of a number of deeds to clear the alleged title of the plaintiffs from cloud and obtain an accounting for timber taken from the land. They are out of possession, but the bill proceeds upon the theory of an equitable title only in the plaintiffs, which will not sustain an action at law for the recovery of possession. The facts alleged are substantially as follows: The ancestor being the owner of two tracts of land, the home place, containing 275 acres, and the Ward land, containing 433 acres, made a deed, on the 21st day of December, 1880, by which he conveyed

both of said tracts directly to his wife, Anna B. C. Depue. Thereafter they resided together on the home place, until the death of the wife about July 19, 1889; but on the 25th day of May, 1889, about two months before her death, the wife attempted directly to reconvey all the land back to her husband. In neither transaction was there a conveyance from both husband and wife to a trustee and then a conveyance by the trustee back to one of them. More than two years after the death of the wife, the husband, by deed, dated October 2, 1891, conveyed 103 acres out of the 433-acre tract to Julia A. Bridwell and Walter Bridwell. On the 9th day of June, 1892, the Bridwells conveyed to John C. and Ira S. Bartlett 35¼ acres of the land so conveyed to them. On the residue thereof they executed a deed of trust to Walter Pendleton, trustee, to secure a debt due to H. W. Miller, under which it was sold; Miller purchasing it. On February 23, 1903, the Bartletts conveyed their part of the 103-acre tract and some other land to Sidney Wine, who has possession thereof, while the other is in the possession of Miller. Both tracts have been denuded of their timber by these purchasers. Henry Depue died about the 3d day of January, 1907, and this suit was commenced on the 16th day of February, 1907.

If it shall appear that the plaintiffs have only an equitable title to the land, a court of equity is the only forum in which it can be vindicated, and the bill should have been entertained, unless it is multifarious or relief is barred by laches. No other conceivable grounds of defense appear on its face. If, on the contrary, they have the legal title, giving a right of action at law, they have no standing in a court of equity to recover possession, for they do not need its aid, nor to remove a cloud from the title because they are out of possession. In order to maintain a bill to remove cloud from title, the plaintiff must have not only the legal title, but possession of the land as well. Mackey v. Maxin, 63 W. Va. 14, 59 S. E. 742; Harr v. Shaffer, 45 W. Va. 709, 31 S. E. 905; Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 353; Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682.

Indubitably the deed from Henry Depue to his wife vested in her the equitable title to the land (McKenzie v. Ohio River R. R. Co., 27 W. Va. 306), and the deed from the wife back to the husband was utterly void (Smith v. Vineyard, 58 W. Va. 98, 51 S. E. 871; Austin v. Brown, 37 W. Va. 634, 17 S. E. 207; Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216). Obviously at the date of the death of the wife she held the equitable title and the husband the legal title. On her death the former went to the plaintiffs by descent. If the legal title remained in the husband until his death, it also passed to them on his death, and, the legal and equitable titles being so united in them, their rem-

edy at law would be clear and adequate; but, as to the land involved here, he conveyed that title to the Bridwells, long before he died. Though he may have had no moral right to do so, he had the power, and did it. Though the conveyance was in violation of the trust, he made it, and his deed passed such title as he had. *Atkinson v. College*, 54 W. Va. 32, 43, 46 S. E. 253; *Patteson v. Horsley*, 29 Grat. (Va.) 262. This being true, the legal and beneficial estates remained separate after the death of Henry Depue, the former in the hands of the grantees, immediate and remote, and the latter in the hands of the heirs; and we have the situation presented in the case of *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147. Not having the legal title, the plaintiffs are utterly unable to obtain standing in a court of law to test the right of possession and title, and are wholly without remedy elsewhere than in a court of equity. In all such cases there is of necessity jurisdiction in equity. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682; *Blake v. O'Neal*, cited; *Kinports v. Rawson*, 36 W. Va. 242, 15 S. E. 66; *Swick v. Reese*, 62 W. Va. 557, 560, 59 S. E. 510.

Multifariousness, charged against the bill, would preclude an adjudication on the merits, if sustained; but we are of the opinion that the plaintiffs could properly proceed against both tracts of land in one suit. Their demand as to each is founded upon the same title, and the primary relief sought as to each is the same. The differences relate merely to the parties defendant and the subsidiary or sequential matter of accounting. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682, has been invoked as a precedent, applying the doctrine of multifariousness under the conditions here presented; but there are material differences which comparison will reveal. All the defendants are alike interested in the vital questions presented, title, appropriateness of the remedy, and sufficiency of the bill. In *Moore v. McNutt*, the titles were strange and hostile. We think *Gains v. Chew*, 2 How. (U. S.) 619, 11 L. Ed. 402, in which the objection was overruled, is more in accord with this case in its facts, circumstances, and relation of parties.

More than 15 years elapsed between the date of the deed to the Bridwells and the bringing of this suit, and on this disclosure the defense of laches is asserted here in argument, but was not brought to the attention of the court below by any written assignment thereof as a ground of demurrer. That this defense may be raised in this state by a demurrer has been long since firmly settled. *Whittaker v. S. West Virginia, etc., Co.*, 34 W. Va. 217, 12 S. E. 507; *Hogg's Eq. Prin.* p. 419; *Hogg's Eq. Proced.* § 304. Failure to assign laches as a ground of demurrer is made the basis of a contention that it was not passed upon by the trial court. The statutory rule, declared in section 29 of chapter 125 of the Code of 1899 (Code 1906, § 8349) would not apply for the reason that

certain other grounds were assigned, if it were ever applicable to demurrers in equity; but it affects only demurrers at law. *Hays v. Heatherly*, 36 W. Va. 613, 619, 15 S. E. 223. No causes of demurrer need be assigned in equity cases. It suffices to say the bill is not sufficient in law. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468. As such a demurrer challenges the sufficiency of the bill, it makes all the reasons available on the hearing. The trial court sustained the demurrer to this bill, because, in its opinion, there is an adequate remedy at law, as we perceive from the terms of the decree, saving to the plaintiffs their right of action at law. While this, as we have indicated, was an erroneous view of the status of the parties, it amounts only to the assignment of an erroneous reason for a correct decree, if the bar of laches exists, which does not vitiate it. If the judgment, decision, or ruling of the trial court is correct on any legal ground, it will be affirmed, although the reasons assigned by the court below are erroneous. *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170; *Easley v. Craddock*, 4 Rand. (Va.) 423; *Newell v. Wood*, 1 Munf. (Va.) 555; *Silshy v. Foote*, 14 How. (U. S.) 219, 14 L. Ed. 394; *Corning v. Troy, etc., Factory*, 15 How. (U. S.) 451, 14 L. Ed. 768. A correct ruling upon a demurrer will be sustained, though an insufficient reason for it has been stated. *Tatum v. Tatum*, 111 Ala. 209, 20 South. 341; *Sechrist v. Rialto Irrigation Dist.*, 129 Cal. 640, 62 Pac. 261.

Having concluded, upon the authorities and principles above stated, that the defense of laches was raised by the demurrer, it becomes necessary to determine whether it appears upon the face of the bill. The demand is purely an equitable one. In other words, it is cognizable only in a court of equity as we have stated. The statute of limitations therefore does not apply, and in such cases courts of equity do not recognize, and are not controlled by, the period of limitation fixed by the statute. *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625. Whether relief in equity is precluded by the delay is determined by the court, in such cases, according to equitable rules and principles. *Cramer v. McSwords*, 24 W. Va. 594. The bill presents no element of contract between the plaintiffs and the defendants, respecting the equitable title. They derived that by inheritance from their mother, who was no party to the deed executed to the Bridwells. The defendants contracted with the father alone. An allegation in the bill indicates the existence of an impression or belief, on the part of the plaintiffs, that they had no right of action or remedy at law or in equity until after the death of their father, and under the principles declared in *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 63 L. R. A. 562, they were not bound to sue until after the death of the father, if he had an estate by the curtesy in the land. Having voluntarily settled the land upon his wife, by the

deed executed to her, he had no such estate, as tested by certain Virginia decisions. *Sayers v. Wall*, 26 Grat. (Va.) 354, 21 Am. Rep. 303; *Irvine v. Greever*, 32 Grat. (Va.) 411; *Dugger v. Dugger*, 84 Va. 130, 4 S. E. 171; *Jones v. Jones*, 96 Va. 753, 32 S. E. 463; *Ratliff v. Ratliff*, 102 Va. 887, 47 S. E. 1007. However, none of these decisions are binding upon us, and they are against the great weight of authority throughout the country. In no other state, so far as we have observed, do the courts so hold. There are some decisions, construing deeds and wills, in which the terms used plainly indicate intention to exclude the husband from curtesy and give effect to such intent. *Rigler v. Cloud*, 14 Pa. 361; *Stokes v. McKibbin*, 13 Pa. 267; *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. 854; *Poole v. Blake*, 53 Ill. 495. But when there are no such terms in the deed from husband to wife or to a trustee for her separate use, he is not deprived of his curtesy anywhere except in Virginia. 8 Am. & Eng. Ency. Law, 522; *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; *Deming v. Milles*, 35 Neb. 739, 53 N. W. 665, 37 Am. St. Rep. 464; *Tremmel v. Kleibolt*, 6 Mo. App. 549, affirmed in 75 Mo. 255; *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95; *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239; *Kerr*, Real Prop. p. 682, § 850; 12 Cyc. 1010, 1011. Curtesy is an estate given by the law for weighty reasons of public policy, not by mere contract. It aids the father in maintaining, caring for, and controlling his children in case of the death of the mother. Such power is given for public as well as private benefit. Believing the general rule more consonant with reason and the principles of law, and better sustained by authority, than that declared by the Virginia court, we adopt it and hold that the grantor in the deed under consideration did not relinquish his curtesy. Reputable courts have held that, under such circumstances as are disclosed here, the remainderman may sue in equity to remove cloud from his title before the expiration of the life estate. *Hogan v. Kurtz*, 94 U. S. 773, 24 L. Ed. 317; *Robinson v. Pierce*, 118 Ala. 273, 24 South. 984, 45 L. R. A. 66, 72 Am. St. Rep. 160; *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438. There may be authority to the contrary; but, granting, for the sake of argument, that the reversioners could have sued in equity to cancel the deed to the Bridwells, as a cloud on their title, their impression that they could not do so was no misapprehension or ignorance respecting any matter of fact, and, though ignorance of law does not excuse anybody's conduct, it bears on the question of intention of the parties, so far as that may be material. They brought their suit promptly after the death of the father. He died in January, 1907, and this suit was brought in February, 1907. The relationship of parents and children existed. The plaintiffs were once infants, we know. When they became adults, the bill does not

disclose. They may have been under the disability of infancy during the greater portion, or practically all, of the period of delay. We perceive also that the relation subsisting between them and their father and the defendants may, and most likely did, influence their conduct. No suit could have been instituted by them without involving him. Successful prosecution thereof might have precipitated an action against him for breach of his covenant of warranty. They might have been decidedly averse to involving him in trouble and annoyance, and so delayed action until after his death without any intention to relinquish their right. It is apparent that all the material facts are not disclosed by the bill. It is equally obvious, considering the allegations of that paper, that no element of estoppel or loss of material evidence exists. The defendants do not appear to have improved the land or expended money on it on the faith of the silence of the plaintiffs, nor does it appear that any change has taken place which made it inequitable upon their part to refrain from assertion of their rights. The right involved is disclosed by documentary evidence. Nothing is dependent upon oral testimony. The vital question is purely legal.

Under these circumstances, many of the principles of the doctrine of laches are inapplicable. The case is one in which the only circumstance relied upon is lapse of time, and this is accompanied by other circumstances tending to negative the existence of any intention to abandon or relinquish the claim. Elements favoring of estoppel or loss of evidence, when they exist, reduce the length of time and apply the bar of laches after the lapse of a very short period. Under some circumstances, delay of only a few months, or even a few weeks, suffices; but these short periods are never adopted in the absence of such, or similar, circumstances. In the case of *Cranmer v. McSwords*, 24 W. Va. 594, Judge Snyder made an exhaustive examination of the authorities bearing on this question, and, after having done so, said that when none of these elements, death of parties, loss of evidence, or dependence upon oral testimony for the ascertainment of the rights of the parties, exists, and the court is satisfied that justice can be certainly attained notwithstanding the lapse of time, relief has been granted after a period longer than 20 years. In the syllabus of that case the court said: "If important facts rest upon mere parol testimony, this will be a consideration of much weight, but if upon written or documentary evidence it will be entitled to very little weight." The same doctrine was enunciated in *Pusey v. Gardner*, 21 W. Va. 469. In that case the effect of mere lapse of time, without more, was ascertained and declared. In point 7 of the syllabus the court said: "Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver." That proposition was deduced

by a very able author from the English decisions. Kerr on Fraud & Mistake, 305. Among the cases cited for it is that of *Pickering v. Stamford*, 2 Ves. Jr. 582, in which heirs were allowed to recover from trustees after a lapse of 30 years. The time and all the circumstances were considered, and, as it was found that nobody had been prejudiced by the delay, the further and vital inquiry was whether it appeared that the plaintiffs intended to relinquish or abandon their right. Like the plaintiffs in this case, they had been under an erroneous impression as to the state of the law. The Master of the Rolls said: "Upon full consideration I am satisfied that it is impossible by any fair presumption to infer that these parties being cognizant of their rights slept upon them, or ever intended to relinquish what I must say upon the whole complexion of the case they never knew they had a right to. That is a presumption the circumstances almost afford, for, if they had released, it is impossible not to suppose the trustees, who have kept such accurate accounts, would have had a release from them of this right as well as of their legacies and as well as they had from the heir. The law was very little known. Sir John Strange first determined it about 14 years after the statute. If before that time parties not knowing the law had permitted the trustees to dispose of the property, I think a court of equity would not have punished them. This will was made seven years afterwards. All the circumstances show the parties did not know it. * * * No jury could, I think, infer that this demand was released. If that is so, the next question is: What inconvenience would arise, that ought to bar? The plaintiffs do not demand the interest already distributed through their default. If the accounts of the personal estate could not be now obtained, and it was impossible to know to what the plaintiffs were entitled, that is a sufficient reason for saying they should not have it, and rob the charity, because they could not tell what belonged to them and what to the charity; but that is unfortunately not the case. Then the only inconvenience will be that the charity will now cease to have the benefit of so much. That is certainly to be lamented, but it will not involve any person in difficulties to be attributed to the neglect of the plaintiffs. Therefore desiring to be understood by no means to give any countenance to these stale demands, any more than I did in *Hercy v. Dinwoody*, or Lord Camden in *Smith v. Clay*, or Lord Thurlow in *Lord Deloraine v. Browne*, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favor of the plaintiffs."

The whole doctrine of laches, as it is understood and applied in this country, was developed by the English decisions. The opin-

ion just quoted from reviews and analyzes the former decisions rendered by Lords Camden and Thurlow, and clearly points out all the elements of it. It shows that when nothing appears but lapse of time and circumstances, not working prejudice or injury to the defendant, in case relief should be granted, the only inquiry is whether, in view of all the facts, the plaintiffs have abandoned or relinquished their right. Substantially this doctrine was stated in *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221. It is also asserted and applied in *Southern Railway Co. v. Gregg*, 101 Va. 308, 43 S. E. 570, holding as follows: "Laches is only permitted to defeat an acknowledged right on the ground that it affords evidence of the abandonment of the right. The doctrine therefore can have no application to a case where a demand has been continuously asserted and as continuously acknowledged." In *Bell v. Wood*, 94 Va. 677, 27 S. E. 504, the court said: "Generally, if the sum sought to be recovered is certain, the transaction has not become obscure, and there has been no such loss of evidence as will be likely to produce injustice, a court of equity will not refuse relief merely because there has been delay in asserting the claim." For the proposition that ignorance of law, superinducing delay in the assertion of a right, may operate to preclude a finding of laches, or to excuse it, if mere lapse of time be considered laches, *Cranmer v. McSwords* is authority. It says: "While ignorance of law will not prevent the operation of the statute of limitations, the rule is different in equity, a court of conscience. In such court moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it resulted from ignorance of law." This is reiterated in *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866. For the proposition that family relationship, which may have induced delay out of mere tenderness to the feelings of parties, will operate in the same way, *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726, and *Roberts v. King*, 10 Grat. (Va.) 184, are authorities. These decisions emphasize the importance of the element of intention when the circumstances are such that the court is able to see that justice may be done between the parties, notwithstanding the lapse of time or delay in the assertion of the right. The distinction between laches and the statutes of limitation is as broad as the difference between courts of equity and courts of law. The very object and purpose of the whole system of equity jurisprudence is relief from the hardships inherent in the fixed and inflexible rules of the common law. If courts of equity should now adopt rules equally fixed and inflexible, such as the statutes of limitation, or adopt the fixed rules of the common law, the very purpose of their existence would be defeated. They must keep themselves free from such rules and retain the power to do justice in each case accord-

ing to its circumstances, subject to certain general principles, equitable in their nature and operation, and the limitations set by law.

The decisions of this court afford a number of instances of preclusion from relief by comparatively short periods of delay; but they are all cases in which parol evidence was relied upon to establish mistake, or fraud, or other grounds of relief from contracts by way of rescission, cancellation, or like. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Whittaker v. S. W. Va., etc., Co.*, 34 W. Va. 217, 12 S. E. 507; *Curlett v. Newman*, 30 W. Va. 182, 3 S. E. 578; *Walker v. Ruffner*, 32 W. Va. 297, 9 S. E. 215; *Trader v. Jarvis*, 23 W. Va. 100. But these precedents are inapplicable, under the circumstances of this case, and, as Judge Snyder said of cases of the class to which they belong, they have no direct bearing on the question under consideration.

What has been said here upon the subject of laches is predicated upon the facts disclosed by the bill. What may be developed by the answer and the proof, if the case should proceed to a hearing on the evidence, we are unable to foresee. As the bill only partially develops the facts and circumstances, we do not decide finally whether the defense of laches can be made in such a case as this.

In respect to the authorities invoked in support of the contention that relief is barred by the statute of limitations (*Jones v. Lemon*, 26 W. Va. 629; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Mullan's Adm'r v. Carper*, 37 W. Va. 215, 16 S. E. 527; *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579; *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309; *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040; and *Ruckman v. Cox*, 63 W. Va. 74, 59 S. E. 760), it may be repeated that the statute does not run against a purely equitable demand, and that the right set up in the bill is of that character. Against such a right, however, a title acquired by adverse possession under color of title may be set up. The decisions cited in the brief for appellee enunciate this proposition, but the statute does not begin to run against the equitable demand from the time of the accrual thereof. If a trust is established, whether it be an express or a constructive one, and there is a breach of it, or an equitable cause of action for any reason accrues under it, the statute of limitations has no application and does not run against the cestui que trust, unless his demand is of such a nature that he could sue upon it in a court of law. However, in the case of a trust in respect to real estate, there may be a disavowal and renunciation, and on this there may be commenced the process of acquiring good and complete independent title by adverse possession; but the process of acquiring such new title begins, not with the mere disavowal of the trust. It requires

something more. There may be, at the time of the disavowal, actual possession of the land, and often the repudiation itself consists of the giving of notice of hostile possession thereof. If the breach of the trust occurs before there is such possession, the statute does not then begin to confer new title, but if, after the disavowal of the trust, or contemporaneously therewith, and in pursuance thereof and under the instrument of disavowal, it being a deed by the trustee to a stranger, such possession be taken and continued for the period of 10 years, a new and independent title, superior to that of the equitable title, is thereby acquired and will prevail over it and defeat it, even in a court of equity, for courts of equity were never devised for the purpose of overriding or disregarding the law of legal estates, nor vested with power to do so. They have a wide field of operation within the law and accomplish results without in any way overturning, unsettling, or swerving common-law rules, or denying legal rights; but no such title can be made out in this case. The possession was not adverse until after the death of Henry Depue, and this suit was brought in less than two months after his death.

For the reasons stated, the decree complained of is clearly erroneous, and must be reversed, and the cause remanded for further proceedings.

(66 W. Va. 461)

DUDLEY v. G. W. NISWANDER & CO. et al.
(Supreme Court of Appeals of West Virginia.
April 20, 1909.)

1. DISCOVERY (§ 1*)—NATURE OF REMEDY.

Equity has jurisdiction of a bill seeking to substitute an equitable for a legal forum when there is prayer for discovery, and there are averments showing the indispensability thereof.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. EQUITY (§ 267*)—AMENDED OR SUPPLEMENTAL BILL—DISCRETION OF COURT.

Amendment or supplement to a bill in equity fitting the developments of the case, if the identity of the cause of suit is preserved, may in the sound discretion of the court as to the propriety and time of the same be allowed.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 545; Dec. Dig. § 267.*]

3. EXECUTORS AND ADMINISTRATORS (§ 433*)—ACTIONS—PARTIES—INTERVENTION—PERSONS ENTITLED.

In a suit in equity by an administrator for the recovery of a fund belonging to the estate of his decedent, it is proper to allow a creditor seeking to charge the fund with the payment of a debt of the decedent to intervene by petition.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1774; Dec. Dig. § 433.*]

4. EQUITY (§ 232*)—DEMURRER TO BILL GOOD IN PART.

A demurrer to a bill as a whole is properly overruled if the bill is good in part.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 506; Dec. Dig. § 232.*]

5. EVIDENCE (§ 596*) — WRIGHT AND SUFFICIENCY—VARYING WRITING.

Though, in a written contract under seal, an admission, invoked merely as evidence in favor of one claiming no rights under the contract, and invoked not as having acquired the essentials of an estoppel in his behalf, may be explained or qualified by parol testimony, even to the extent of contradicting the terms of the contract in which it is contained; but cogent proof is required in the premises.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2448; Dec. Dig. § 596.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by J. W. Dudley, administrator of the estate of Mary J. Plumb, deceased, against G. W. Niswander & Co. and others. Decree for complainant, and defendants appeal. Affirmed.

McCluer & McCluer, for appellants. C. A. Kreps, for appellee.

ROBINSON, J. A mercantile firm, doing business in Parkersburg, under the style of G. W. Niswander & Co., became indebted to Mary J. Plumb in the sum of \$1,400 for money borrowed. The firm was composed of G. W. Niswander and W. C. Plumb. The latter was the son-in-law of the former and the son of Mary J. Plumb. Several months before the maturity of the note given her by the firm for the money Mary J. Plumb died. She was survived by D. S. Plumb, her husband, and W. C. Plumb, her only child and heir at law. She left a will, devising, in general terms, practically all of her property to her son. No provision whatever was made therein for her husband. This will, known to both father and son, was not probated. No administration of the estate was sought by them. On the day of the maturity of the note, Niswander, together with his son-in-law and partner, and the father of the latter, adjusted the payment of the note by the following writing:

"A statement showing the monies in my hands, the amounts which I have paid out, and the statement of account between M. J. Plumb, deceased, and W. C. Plumb.

By amount received as belonging to M. J. Plumb.	\$1,484 00	
To amount paid Bently & Gerwig for funeral expenses	\$ 65 00	
To Varley Bros. for carriages, funeral expenses	16 00	
To digging grave.....	7 00	
To Dr. W. J. Davidson, medical services.....	14 50	
To C. A. Smith, legal services	12 00	
To McCluer & McCluer, legal services, preparing statement of account....	5 00	
	\$119 50	\$1,484 00
Leaving a balance in my hands of said fund of...		\$1,364 50

—one-third of which amount, to wit, \$454.83 D. S. Plumb will be entitled to, less the amount due from him to the store of \$26.11. This will leave the amount net due D. S. Plumb out of the amount aforesaid of \$428.72 which is the net amount, which the said D. S. Plumb is entitled to receive out of the above fund as his interest.

"And whereas, by an agreement between G. W. Niswander and D. S. Plumb, on account of said G. W. Niswander become his security on an appeal bond and decision rendered against him by E. F. Wilson, justice of the peace, in favor of the Star Grocery Co., to the circuit court of Wood county, it was agreed between him, and the said D. S. Plumb, that he should retain \$100 to indemnify him, the said G. W. Niswander until it should be ascertained whether the said justice of the peace should be reversed, and whether the said D. S. Plumb should have the costs to pay or not, and in event the said G. W. Niswander does not have the costs to pay, then the said D. S. Plumb is to receive this \$100, which the said G. W. Niswander was permitted to retain out of the fund aforesaid, which would leave the amount now which the said D. S. Plumb would be entitled to receive the sum of \$328.72, leaving the \$100 for the determination of the suit in the circuit court of Wood county.

"And it is further agreed on the part of the said D. S. Plumb that the receipt of the \$328.72, which he hereby acknowledges is in full of all claims against the said W. C. Plumb on account of the fund aforesaid, and the \$100 will be left in the hands of the said G. W. Niswander for the determination of the suit in the said court.

"And it is further understood and agreed between the said W. C. Plumb and D. S. Plumb that the said W. C. Plumb is entitled to the sum of \$900.66, which the said W. C. Plumb agrees is in full of all his claim for the above fund.

"And it is mutually acknowledged between them, that this is a full and complete settlement between them, of all claims of one against the other with reference to the fund of \$1484.00 left by M. J. Plumb, now deceased.

"Witness the following signatures and seals this the 1 day of Jan'y, 1903.

"[Signed] W. C. Plumb. [Seal.]
"D. S. Plumb. [Seal.]"

Two copies of this writing were made; one copy being retained by each party thereto. By the firm's checks Niswander made distribution of the amount of the note as expressed in the writing recited above. The check to his partner was indorsed back to the firm for that partner's credit therein. It will be observed that this distribution was directly according to the statute of descent and distribution.

Soon after this transaction, D. S. Plumb called upon the officers of the Traders' Building Association, to which Mary J. Plumb was indebted at the time of her death, and told them of the note and what had been done in the premises. He suggested to them that there was an opportunity to make the money due the association, that his deceased wife had left the amount of the note, and that it had not gone into a proper administration of her estate. Later he exhibited to the officers of the association his copy of the writing. Thereupon the estate of Mary J. Plumb was committed for administration to the sheriff of Wood county. As such administrator he instituted this suit in equity against the firm of G. W. Niswander & Co., its individual partners, and D. S. Plumb, alleging that they had combined together to defraud the estate of Mary J. Plumb and creditors thereof by agreeing to make and by making the division of the proceeds of the note, as above set forth, without the intervention of an administrator. The bill avers that some one without authority delivered the note into the possession of Niswander, or into the possession of the firm. It further avers that these parties, "though acknowledging that they had such note, declined to deliver the same to complainant, and declined and refused to permit plaintiff to have a copy thereof or to see and inspect the same, or to give him any memorandum thereof; and complainant says that he has been unable to get any description of said note or of the exact amount thereof, or the date thereof, or the time of payment thereof, or who the real makers of said note were, and consequently he has been unable to file any suit at law upon said note for want of the proper description of the date and of the parties to said note, and hence it has been necessary for him as he is advised and believes to come into a court of equity for a discovery and for such general relief in the premises as to equity appertains in such cases." It is distinctly alleged that the attempted payment and distribution of the proceeds of the note were void and constituted no discharge of the makers thereof, and that the acts of the defendants are fraudulent and void as against the creditors of the estate of Mary J. Plumb and plaintiff's rights as administrator thereof. Accordingly the bill prays that G. W. Niswander and W. C. Plumb may be required to produce and surrender said note which they, as individuals or as a firm, executed, and to make full disclosure in reference thereto; that the distribution of the assets by the writing aforesaid and the surrender of the note may be set aside and canceled as void against plaintiff and the creditors of the estate represented by him; that there be an accounting as to the proceeds of the note by the defendants; and that the fund may be distributed rightfully in the cause.

Defendants, in resistance, maintain that the note, for valuable consideration, had been assigned by Mary J. Plumb in her lifetime to her husband; that the proceeds of the note actually belonged to him; that, the note being a negotiable one and properly indorsed, the firm owing the same is acquitted of the indebtedness by a payment of the obligation to one having possession; and that the amount paid to W. C. Plumb therefrom was merely in settlement of what his father owed him. D. S. Plumb answered, and testified that he gave the information to the officers of the building association, and surrendered to them a copy of the writing, because he was drinking and had become angry with his son and wanted to give him trouble, but that he was a bona fide owner of the note by purchase from his wife before her death.

Sufficient has been said for an understanding of the controversy. It is useless to detail more. A decree has been made substantially as sought by plaintiff. From that decree comes this appeal. We shall briefly consider the assignments against the correctness of the decree.

The demurrer to the original bill was properly overruled. Sure ground of equity cognizance is set forth. A necessity for resort to equity is shown. Defendants contend that the bill does not allege that the discovery asked is indispensable, because there is exhibited the writing hereinbefore recited, showing the amount of the proceeds of the note. But that writing does not show what the plaintiff seeks to ascertain; that is, who actually, the firm or its individual members, should be called to account. It gave plaintiff no safe information for an action at law. The bill shows the materiality and indispensability of a discovery. It does not allege the same in terms, but sets forth the facts from which such materiality and indispensability appear. This meets the rule applicable to this case that "if the demand of the plaintiff be legal, and therefore not cognizable in a court of equity except on the ground of discovery, it must be averred in the bill that the discovery is indispensable for lack of other evidence." Hogg's Eq. Pro. § 164. By this rule it is not meant that the mere assertion of the fact must be made in the bill, but that the averments must be such as to show that it exists. Where a plaintiff "asks chancery for both discovery and relief, as his demand is proper for the law court and seeks to transfer it to the court of chancery, he must show cause for going into chancery and that is by showing that only by discovery can be recover." *Thompson v. Whitaker Iron Co.*, 41 W. Va. 580, 23 S. E. 797. "In a bill to substitute an equitable for a legal forum, a prayer for a discovery, without any averment, showing its materiality or necessity, is naught." *Armstrong v. Huntons*, 1 Rob. (Va.) 323. Plaintiff in the case under con-

sideration clearly shows cause for going into chancery by showing that only through a discovery can he assert his rights.

It was not error to overrule the objections to the filing of plaintiff's amended and supplemental bill, and to the petition of the creditor, the Traders' Building Association. The court has sound discretion in permitting amendment or supplement to fit the developments of a suit in equity, and such discretion as to the propriety of the time of filing the same. Hogg's Eq. Pro. §§ 172, 321 et seq. The rule demands that the identity of the cause of suit be preserved. It was preserved in this instance. And it was quite proper to allow a creditor to intervene by petition. A fund was sought to be recovered by an administrator which that creditor claimed the right to charge with debt. Equity, having acquired jurisdiction to recover the fund, will go on, if asked, to adjust rights of creditors relating to it. *Yates v. Stuart's Adm'r*, 39 W. Va. 124, 19 S. E. 423; *Hotchkiss v. Plaster Co.*, 41 W. Va. 357, 23 S. E. 576; *Barton's Ch. Pr.* § 102. The bill sought not only to recover the fund, but also to distribute it properly. The petition was consistent with the object of the bill. "Where a petition, sought to be filed in a pending suit, sets forth such interest in the subject-matter thereof as to make the petitioner a proper party to the suit, and he seeks by such petition to be made a party to it, it is the court's duty to entertain the petition and have him made a party to the suit." Hogg's Eq. Pro. § 227.

Demurrers to the amended and supplemental bill and to the petition were not well taken. What we have said as to the filing of these papers applies here. It may be true that an administrator cannot set aside the act of his decedent on the ground of that decedent's fraud. But the averments in the amended and supplemental bill that, if an assignment of the note to D. S. Plumb was actually made by Mary J. Plumb in her lifetime, it was in fraud of creditors, does not destroy that pleading in its correct particulars. The demurrer to the amended and supplemental bill was to the whole thereof, a part of which bill was good; therefore it was properly overruled, even if part of the bill was bad. *Barton's Ch. Pr.* § 110. At any rate, the allegation complained of is wholly immaterial, since the decree is sustained by the reasonable purport of the evidence, and the correct inferences therefrom that no assignment of the note ever took place. But the similar allegation in the petition of the creditor was not out of place. A creditor could assert such fraud. Nor are these pleadings multifarious as joining several distinct actions in one and asking relief against separate and distinct defendants. They simply tend to one end—the relief sought by the original bill.

The assignment that the final decree is not sustained by the evidence must also be denied. That decree finds that the note in

question belonged to Mary J. Plumb at the time of her death; that Niswander and W. C. Plumb had notice of such fact at the time of their pretended payment thereof, and that the distribution of the proceeds thereof, as is represented in the writing exhibited, was illegal and void, and constituted no payment of the debt by the firm of G. W. Niswander & Co., the makers of said note, to the estate of Mary J. Plumb. It adjudges that the firm pay to the plaintiff administrator the amount of the note, less the funeral expenses and medical services paid therefrom, and refers the cause to a commissioner for ascertainment of the matters proper for a settlement of the estate and distribution of the assets. A thorough consideration of the evidence, a review of all which it will avail nothing to make here, convinces us that this decree is by no means wrong. It is strongly sustained by the formal terms of the contract between D. S. Plumb and W. C. Plumb, which was prepared by the direction and under the immediate view of Niswander. That contract is wholly inconsistent with the claim which all these parties now make in this suit. "Anything said by the party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony." 2 Wigmore on Ev. § 1048. But it is claimed that this contract was executed by mistake; that it was overlooked that counsel had drawn it so as to denominate the note as belonging to Mary J. Plumb at her decease; that it was not intended to express therein the fact that the fund was "left by M. J. Plumb, now deceased," or that the amount was "received as belonging to M. J. Plumb." And it is insisted that the other indicia which appear in that paper evidencing that Mary J. Plumb was the owner of the note when she died are mistakenly there, and that they were never intended by the parties. The admission in the contract that the note belonged to the estate of Mary J. Plumb, deceased, may be explained or overcome by parol testimony, as was sought to be done by defendants. 1 Enc. of Ev. 396. The contract is introduced solely as evidence of this admission of the parties thereto and Niswander who took part in having them make it. The contract is not invoked as between the parties to it, but as evidence of an admission favorable to the claim of a third party. In other words, it is invoked merely as evidence of an admission, not as a contract under which rights are claimed. Being so offered, merely as evidence, and not as a contract, it may be rebutted by parol or other competent evidence, even to the extent of explaining, modifying, or contradicting its terms. And the same is true notwithstanding the writing is under seal. 1 Greenleaf's Evidence, § 211. The rule against explaining, modifying, or contradicting a written contract by parol does not apply here, since we are not dealing with the contract for the

assertion of rights thereunder, but we are dealing with it solely as evidence of an admission. The facts therein admitted may be denied and shown not to have existed. Non-contractual and nonjudicial admissions not made under such circumstances as to constitute an estoppel are not conclusive, but are open to explanation, and may be rebutted or controlled by other proper evidence. This principle generally applies, though such admissions are made under oath. 1 Elliott on Ev. § 242; 2 Wigmore on Ev. § 1058. Such admissions are mere evidence which may be rebutted. Their weight depends upon their character, and the circumstances under which they are made. Yet "admissions deliberately made and clearly proved are very strong and satisfactory evidence against the party making them." 1 Enc. of Ev. 611; 17 Cyc. 814. Being of such strong character, deliberate admissions, clearly established, particularly those in writing, can only be explained or overthrown by convincing proof. "Admissions may be explained or qualified, and the party is at liberty to show that the fact admitted by him did not exist, but cogent proof is required in order thus to overcome a deliberate admission, especially a written admission." 17 Cyc. 816. It has been held that written admissions, when made by a party before a controversy arose, outweigh his oral testimony to the contrary given after the controversy has arisen. *Moore v. Grayson*, 132 Cal. 602, 64 Pac. 1074; *Buford v. McGetchle*, 60 Iowa, 298, 14 N. W. 790. It is at least consonant with reason to say that when an admission in writing, especially in an instrument executed with the solemnity of seals, is clearly established against a party, he should not be permitted to contradict it by evidence other than that which is clear, full and precise. In *re Irvine*, 102 Cal. 607, 36 Pac. 1013; *Rice v. Bank*, 26 Tenn. 39; *Spurlock v. Brown*, 91 Tenn. 241, 18 S. W. 868. "Language expressing more than a preponderance is generally used in declaring the degree of proof necessary in order to vary or contradict the terms of a written instrument by parol evidence." 17 Cyc. 773. Now, the evidence by which it is sought to overcome the admission in the written contract that Mary J. Plumb was the owner of the note at the time of her death is not of such convincing character or degree as to have that effect. Mistake, as claimed, in the execution of that document, signed by father and son and open to Niswander, who had it drawn, has not under the light of the whole case been established. There is no such positive proof as is required to overthrow the plain admission by that writing that the note belonged to Mary J. Plumb's estate. This admission within a sealed instrument was deliberately made. It is clearly proved. The execution and existence of that instrument is admitted. Nis-

wander had direct knowledge of its contents and purport. The admission contained in it likewise binds him. To give this admission in that writing a meaning wholly different from that which its language imports, a positive degree of proof is required. Such degree of proof is lacking in this case. Aside from the recitals of that writing, not satisfactorily explained, that the fund thereby dealt with was "received as belonging to M. J. Plumb," and that it was "left by M. J. Plumb, now deceased," it is indeed significant that W. C. Plumb should therein have released his right to the fund if he had no interest in it, as was true if the note belonged to D. S. Plumb, or that it should have been necessary for D. S. Plumb, if he was the owner of the note as it is claimed, thereby to acknowledge the amount he received as "in full of all claims against the said W. C. Plumb on account of the fund aforesaid." And also significant is it, taken in connection with this writing, that this father and son should have been disputing about the estate in a lawyer's office, the father at one time declaring the will of the wife's property to the son to be a forgery, and later on the very day the note became due entering into a distribution exactly in the proportions provided by statute, after obtaining the note from the depositary with whom they had mutually left it for safe-keeping, evidently until it should become due. The indorsement of the note in blank by Mary J. Plumb in her lifetime is only a circumstance to be considered with the whole of the evidence. Notes are often indorsed, and yet not actually transferred. And the fully proved acts and declarations of D. S. Plumb in taking the writing to the creditor and imparting the information upon which this suit was begun, and the strong rebuttal of his excuse of drunkenness at the time, count mightily in the evidence.

The reference of the cause to a commissioner was appropriate. It was essential to the end sought by the plaintiff and the petitioning creditor.

We affirm the decree, remanding the cause for the execution of the reference, and such further proceedings as may be proper or as to equity may appertain.

(82 S. C. 562)

DUNCAN v. E. JONES CO.

(Supreme Court of South Carolina. May 20, 1909.)

PLEADING (§ 193*)—DEMURRER—GROUNDS.

A complaint setting forth several causes of action in form as a single cause of action is not demurrable on the ground that several causes of action have been improperly united.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 193.*]

Appeal from Common Pleas Circuit Court of Lexington County; J. W. De Vore, Judge.

Action by Walter O. Duncan against the E. Jones Company. From an order overruling a demurrer to the complaint, defendants appeals. Dismissed.

E. L. Asbill and Graham & Sturkie, for appellant. Eford & Dreher, for respondent.

GARY, A. J. This is an appeal from an order overruling a demurrer to the complaint on the ground that several causes of action have been improperly united. His honor, the presiding judge, ordered "that the demurrer be overruled for the reason that the complaint appears to state several causes of action jumbled in one." The allegations are set forth in form as a single cause of action, and the ruling of the circuit judge is sustained by the case of *Marion v. Charleston*, 68 S. C. 257, 47 S. E. 140.

Appeal dismissed.

(82 S. C. 563)

Ex parte FERGUSON.

FERGUSON et al. v. FERGUSON et al. (Supreme Court of South Carolina. May 20, 1909.)

APPEAL AND ERROR (§§ 95, 107*)—DECISIONS REVIEWABLE—ADMINISTRATIVE ORDER.

An order that certain persons be made parties, that certain other persons comply with an order appointing them trustees, and that the proceeding be referred to a referee to take testimony and report conclusions of fact and law on the issues, except as they are determined by the order, is merely administrative, and not appealable at such stage of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 651, 735; Dec. Dig. §§ 95, 107.*]

Appeal from Common Pleas Circuit Court of Pickens County; J. C. Klugh and G. W. Gage, Judges.

Ex parte proceeding by James M. Ferguson, in the case of James M. Ferguson, trustee, and others against John Ferguson and others, heirs at law of Mrs. H. M. Ferguson, deceased. From an order, defendants appeal. Dismissed.

J. J. McSwain, for appellants. F. F. Beatie and E. M. Blythe, for respondents.

GARY, A. J. This is an ex parte proceeding, in re the case mentioned in the record. Upon hearing the petition his honor Judge Klugh made the following order: "That James M. Ferguson and Frank Ferguson do show cause before me at chambers, in Greenville, S. C., on March 24, 1908, at 11 o'clock a. m., or at such time as may be designated by the court, why the sum of \$3,965.79, and the further sum of \$1,661.66 should not be paid to James M. Ferguson, or his attorneys, and to further show cause why trustees should not be appointed to take charge of the said sum of \$2,500, to invest the same and pay over the interest thereof annually to the

said James M. Ferguson." The appellants made return to the rule to show cause, whereupon the circuit judge made an order, which concludes as follows: "That John Ferguson, Annie Wardlaw, Janie White, Hattie Valentine, Henry Grady Ferguson, and Mattie Ferguson be made parties to this proceeding, and a copy of this petition be forthwith served upon them; the nonresident parties to be served by publication. Further ordered that James Ferguson and Frank Ferguson do comply with the order of Judge Ernest Gary, appointing them trustees, within 10 days from the date of this order, and that in the event they should fail to do so, the referee do recommend two suitable persons, for the appointment of trustees of the said James M. Ferguson by the court. Further ordered that this proceeding be referred to T. J. Mauldin, Esq., of Pickens, S. C., as special referee, to take the testimony and report his conclusions of law and of fact, upon the issues raised by the petition and return herein, except as to those issues determined by this order, and that said referee have leave to report any special matter." This order was merely administrative, and not appealable at this time. This court is therefore without jurisdiction to determine the questions presented by the exceptions.

Appeal dismissed.

(82 S. C. 565)

McLEES et al. v. CITY OF ANDERSON.

(Supreme Court of South Carolina. May 22, 1909.)

MUNICIPAL CORPORATIONS (§ 816*)—INJURIES FROM DEFECTS IN STREETS—PLEADING—CONTRIBUTORY NEGLIGENCE.

In an action against a city for injuries received by one of the plaintiffs caused by a defect in a street, the complaint alleged that "the plaintiffs did not in any way bring about such injuries by their own negligent act, nor did they negligently contribute thereto." Held, that such allegation was a material allegation of fact and dispensed with the necessity on the part of defendant of setting up contributory negligence, and is not demurrable for failure to state facts on which to base the allegation that the injuries were not caused by contributory negligence; for, if the plaintiffs did nothing to cause the injury, there was no necessity for further allegations in order to lay a foundation for proof of a negative.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 816.*]

Appeal from Common Pleas Circuit Court of Anderson County; Geo. E. Prince, Judge.

Action by Mrs. Anna A. McLees and George R. McLees against the City of Anderson, in which plaintiff filed the following complaint:

"The complaint of the plaintiffs respectfully shows:

"(1) That the plaintiff Mrs. Anna E. McLees is a married woman, the wife of her coplaintiff, George R. McLees, who is joined with her in this action in compliance with

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the requirement of the statute in such case made and provided.

"(2) That the defendant, the City of Anderson, is a municipal corporation under and by the laws of the state of South Carolina, and is empowered by the act incorporating it to sue and be sued in the courts of this state.

"(3) That, as such municipal corporation, defendant was and is charged by law with the duty of keeping its streets, causeways, bridges, and public ways in proper repair and safe condition for the use of the public on foot and by vehicle.

"(4) That previous to the 11th day of March, 1907, the defendant, the City of Anderson, its officers, agents, servants, and employes, negligent and unmindful of their duty in the premises, negligently and carelessly allowed a defect to become and remain in West Market street, which is a street under the control of the said city, and within its corporate limits, to wit, a long, narrow, dangerous, and deep hole, and allowed the same to remain in the said street in the roadway thereof for many days after the said city, its officers, agents, servants, or employes had notice thereof, or should, with the exercise of ordinary diligence and reasonable care as was their duty, have had notice thereof.

"(5) That on or about the said 11th day of March, 1907, the plaintiff Mrs. Anna E. McLees, and her husband, George R. McLees, and their infant grandchild, were driving in a buggy along said West Market street in the said city of Anderson, S. C., when the front wheel of the buggy dropped into the said deep and dangerous hole, and in consequence of said wheel falling into the said hole, which was a defect in the said street, which was under the control of the said defendant corporation, the plaintiff Mrs. Anna E. McLees was thrown with great violence from the buggy, falling upon the axle thereof between the body and wheel of the buggy, thereby greatly injuring and bruising her leg and other parts of her body. That she hung for a time upon the said axle until she was thrown to the ground where the wheel of the buggy passed over her body, inflicting upon her many grievous bruises, wounds, and hurts.

"(6) That in consequence of being so as aforesaid thrown violently to the ground from said buggy, so as aforesaid caused by the said defect in the said street, the plaintiff Mrs. Anna E. McLees suffered an injury to her leg which was terribly wounded and bruised and hurt, from which there came a virulent running sore or abscess, which threatened the loss of her leg, and which caused her great pain and suffering, and from which she was confined to her bed and house for many months, during which time she was almost wholly incapacitated to attend to her household duties, or to do any

work of any kind to her great loss and suffering.

"(7) That plaintiffs were put to much expense for medical attention and attendance for the said Mrs. Anna E. McLees for the hire of help to perform the labors which she was accustomed to do and which she could not do because of the injuries thus inflicted upon her, for the hire of persons to wait upon her and attend her, for medicine, appliances, and other expenses incidental to the treatment of her injuries and made necessary thereby, and suffered much loss because of the loss of time from her accustomed duties.

"That said defect existed before the injuries complained of occurred, but plaintiffs' load did not exceed the ordinary weight, that such defect was occasioned by the neglect and mismanagement of the defendant corporation in allowing the said deep and dangerous hole to be worked into the street and to remain there, and that plaintiffs did not in any way bring about such injuries and damages by their own negligent act, nor did they negligently contribute thereto. That by reason of such negligence and mismanagement of the said defendant corporation, as hereinabove set forth, the plaintiffs have been injured in the sum of five thousand dollars (\$5,000).

"Wherefore plaintiffs demand judgment against the defendant corporation for the sum of five thousand dollars (\$5,000) and the costs of this action."

From an order overruling a demurrer to the complaint, defendant appeals. Appeal dismissed.

John K. Hood, for appellant. Bonham, Watkins & Allen, for respondents.

GARY, A. J. This is an appeal from an order overruling a demurrer to the complaint (which will be set out in the report of the case) on the ground that it does not state facts sufficient to constitute a cause of action.

The first ground of the demurrer was "because the complaint shows on its face that the injury complained of was the result of the plaintiffs' own negligent act, or that they negligently contributed thereto." The complaint alleges that "the plaintiffs did not in any way bring about such injuries by their own negligent act, nor did they negligently contribute thereto." Even in cases when such words constitute no part of the cause of action they are construed as material allegations of fact, and dispense with the necessity on the part of the defendant of setting up in the answer the defense of contributory negligence. *Long v. Railway*, 50 S. C. 49, 27 S. E. 531. For a stronger reason they must be regarded as material allegations of fact, when, as in this case, they constitute a part of the plaintiffs' cause of action. *Walker v. Chester*

County, 40 S. C. 342, 18 S. E. 936. For the purpose of the demurrer, these allegations must be deemed to be admitted. This ground of the demurrer was therefore properly overruled.

The second ground of demurrer was: "Because the complaint does not state facts sufficient to constitute a cause of action, in that no facts are pleaded on which to base the allegations that plaintiffs did not, in any way, bring about such injuries by their own negligent act, nor did they negligently contribute thereto." If the plaintiffs did nothing (as they allege) to cause the injury, it is difficult to conceive in what respect there was a necessity for further allegations in laying the foundation for proof of a negative.

Appeal dismissed.

(82 S. C. 577)

SPERRY & HUTCHINSON CO. et al. v. CITY OF COLUMBIA et al.

(Supreme Court of South Carolina. May 25, 1909.)

INJUNCTION (§ 118*)—GROUNDS—ADEQUACY OF LEGAL REMEDY.

A petition to show cause why a criminal proceeding should not be enjoined will be denied, where it does not show on its face that petitioner has no other adequate remedy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 238; Dec. Dig. § 118.*]

Original application for an injunction by the Sperry & Hutchinson Company and another against the City of Columbia and others. Application denied.

Lyles & Lyles, for petitioners.

PER CURIAM. This is an application for a rule to show cause why a criminal proceeding should not be enjoined. The petition does not show upon its face that the petitioner has no other adequate remedy, and the application is therefore refused.

(82 S. C. 569)

SULLIVAN v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. May 25, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 69*)—DELAYING DELIVERY OF MESSAGES—LIABILITY FOR PUNITIVE DAMAGES.

Where the proximate cause for the delay in the delivery of a telegram was a strike by the employees of the telegraph company, punitive damages were not recoverable.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. Dig. § 69.*]

2. TELEGRAPHS AND TELEPHONES (§ 53*)—DELAY IN DELIVERY OF MESSAGES—CAUSE.

Where the direct cause of the delay in the delivery of a telegram was a strike of the employees of the telegraph company, the company was not liable for the damages sustained.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 53.*]

Appeal from Common Pleas Circuit Court of Anderson County; Geo. E. Prince, Judge.

Action by C. S. Sullivan against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Bonham, Watkins & Allen, for appellant. Hood & Sullivan, for respondent.

GARY, A. J. This action was commenced in a magistrate's court to recover actual and punitive damages. The following statement is set out in the record: "Plaintiff brought action for \$100 damages for delay in the transmission and delivery of a telegram from Newberry, S. C., to Anderson, S. C. He alleges: That the telegram was filed with defendant's agent at Newberry, S. C., between 10 and 11 o'clock a. m., September 10, 1907; that at the time of filing the message plaintiff asked if the message could be got through at once, and was assured that it could be; that the telegram was not delivered until the morning of the 12th of September; and that plaintiff suffered damages, as set out in the complaint. Defendant answered at the trial, admitting the filing and sending and delivery of the telegram as alleged. Further answering, defendant said, if there was any delay, it was not due to defendant's negligence, or its agents, employees, and servants, but was due to strikers or others acting against the law, or to the act of God or the public enemy, and to unavoidable delay, and interruption in the working of its line, and that plaintiff signing the blank, on which the message was written, agreed to the provision on the back of the blank that defendant should not be so liable under such circumstances. At the close of the testimony for the plaintiff, defendant's attorney moved for a nonsuit on the whole case, because there is no evidence tending to show that the damages alleged in the complaint were such proximate damages as were occasioned by the delay in delivering the message. This motion was overruled. At the close of the whole testimony, defendant moved for a nonsuit on the whole case, in so far as the charge of willfulness, wantonness, and recklessness was concerned, on the ground that there was no evidence tending to sustain such allegations. This motion was overruled. The magistrate found for plaintiff \$100. Defendant appealed to the circuit court, and Judge Prince sustained the magistrate. In due time defendant gave notice of intention to appeal, and does now appeal from this court from the order of Judge Prince."

The order of his honor, Judge Prince, is as follows: "After hearing the argument on the appeal in the above-entitled cause, it is ordered: That the grounds of appeal be and the same are overruled, the appeal dismissed, and the judgment and verdict of

the magistrate sustained. As matters of fact, I find: That a preponderance of the evidence shows neither negligence nor willfulness in the handling of said telegram at Newberry, S. C., nor at Anderson, S. C., but that said telegram was intentionally and willfully intercepted, by one of defendant's operators, who was at the time an agent of defendant company, and said agent's scope of employment by said company included the sending and receiving of telegrams, general authority over one of defendant's telegraph offices, and control of defendant's telegraphic instrumentalities, usually found in connection with such offices; that said agent was at the time also in the employ of a railroad company, being an agent of the said railroad company, as well as an agent of defendant; that by reason of said agent's authority to send and receive telegrams, and general control of defendant's telegraphic instrumentalities as aforesaid, said agent intentionally and willfully intercepted said telegram as aforesaid, and said willful act was within the scope of said agent's employment by defendant. I therefore conclude and find as a matter of law that defendant is liable for its said agent's willful act as aforesaid, because I find that said act was within the scope of said agent's employment by defendant as aforesaid."

We will first consider the exceptions raising the question whether his honor the circuit judge erred in overruling the ground of appeal assigning error on the part of the magistrate in refusing the motion for nonsuit, as to punitive damages. The uncontested testimony, even that of the plaintiff, shows that there was a strike at the time the message was delivered for transmission; and as the circuit judge found as matter of fact that there was neither negligence nor willfulness in the handling of the telegram at Newberry, S. C., nor Anderson, S. C., the only reasonable inference from the testimony is that the strike was the proximate cause of the delay. The case of *Oxner v. Tel. Co.*, 63 S. E. 545, shows that under such circumstances punitive damages are not recoverable. The exceptions raising this question are sustained.

The next question that will be considered is whether the circuit judge erred in not concluding that, where a strike is the direct cause of delay in the transmission of a telegram, the company is not liable. The rule is thus stated in section 360 of Jones on Telegraph & Telephone Companies: "Under the ancient rule, carriers were not exonerated for losses caused by the acts of mobs, or other riotous persons; but the stringency of this rule has been somewhat relaxed by the more modern authorities. They are still held liable for all losses caused by such acts, but are not liable for loss in the transporta-

tion of goods by any delay caused thereby. There is a difference, however, in the application of this rule to carriers and to telegraph and telephone companies. As a general rule, the latter companies are not liable for losses arising from acts of mobs and other riotous persons. The acts of the mob stand, with respect to these companies, in almost the same category as those of the public enemy. The different means and instrumentalities through which they accomplish their respective corporate purposes bring about the difference in the application of this rule. It is never presumed that mobs intend to take possession of goods and convert them to their own use; and the tangible property to such being in the custody of the carriers, they are more liable to protect and deliver them safely to the consignee; and, as has been said, they are not liable for losses caused by such delay. On the other hand, the main and principal objects of mobs and other riotous persons, who interfere with the business of telegraph companies, is to prevent and obstruct the transmission of news; especially until they shall have accomplished some particular purpose. As has often been said, they are never liable as insurers, unless an express agreement has been entered into to that effect. And for the reason that they are not in possession of the tangible property of the message in transit, they do not have the same opportunity to protect it, as the carrier has his goods. It is the duty, however, of these companies, where they have been thus interfered with, to make a reasonable effort to transmit the telegram by other lines or by other means; and on failure to do so they will be liable for all losses suffered." In section 361 of the same work it is said that "the same rule applies where the mob is composed of employees of the company who are on a strike." The testimony shows that the delay was the result of an unavoidable cause, in so far as the company was concerned. The exceptions raising this question are also sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(82 S. C. 559)

MESSERVY v. MESSERVY et ux.

(Supreme Court of South Carolina. May 20, 1909.)

1. HUSBAND AND WIFE (§ 325*)—ENTICING AND ALIENATING—RIGHT OF ACTION BY WIFE.

A wife has a right of action for maliciously enticing her husband away from her and depriving her of his comfort, society, and aid.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. § 325.*]

2. HUSBAND AND WIFE (§ 330*)—ENTICING AND ALIENATING—ACTION BY WIFE—FARTIES.

In an action by a wife for maliciously enticing her husband away from her and depriving her of his comfort, society, and aid, the husband is not a necessary party.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1122; Dec. Dig. § 830.*]

Appeal from Common Pleas Circuit Court of Charleston County; D. E. Hydrick, Judge.

Action by Pearl C. Messervy against John W. Messervy and wife. From a judgment overruling a demurrer to the complaint, defendants appeal. Affirmed.

See, also, 80 S. C. 277, 285, 61 S. E. 442, 445.

The following is the order of the court below:

"This is an action to recover damages of the defendants for maliciously enticing the plaintiff's husband away from her and depriving her of his comfort, society, and aid. The defendants demur to the complaint on two grounds: (1) That it does not state facts sufficient to constitute a cause of action. (2) Because the husband of the plaintiff is not joined with her in the action.

"Upon the right of the wife to maintain an action upon the grounds stated, the authorities are conflicting. It is denied in *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79, where the cases are revised, and some cogent reasons given why the right of the wife to the society of the husband should not be held to be the same in kind, degree, and value as his right to her society. It is shown how the wife is often deprived of the society of the husband from the exigencies of business life, and it is said that to establish this right of action in favor of the wife 'would be the most fruitful source of litigation of any that can be thought of.' That may be so, but it is not sufficient to deny to any person redress for wrongs unlawfully inflicted. The boast of the law is that there can be no wrong without a remedy. Is it wrong for one maliciously to entice a woman's husband away from her and deprive her of his comfort, aid, and society? I apprehend there cannot be two opinions upon that question. It is a legal wrong for which the law ought and does afford a remedy. The right to maintain the action is sustained, in my opinion, by the weight of reason and authority. *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, 6 Am. & Eng. Ann. Cas. 658; *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683, 8 Am. & Eng. Ann. Cas. 813. In *Bennett v. Bennett*, supra, the point was made, as in this case, that the husband was not made a party plaintiff. The court held that he was not a necessary party, resting the decision partly upon the construction of

the New York Code and the long practice that had prevailed under it, and partly upon the ground that the right of action was the separate property of the wife. The word 'property' is defined by Code Civ. Proc. 1902, § 445, to include 'things in action.' So that, if the right of action for a tort is 'a thing in action,' in the sense in which those words are used in the Code, then the wife may clearly maintain the action alone. In 3 Am. & Eng. Enc. (1st Ed.) at page 235, it is said in defining the words 'chose in action' 'that it' includes the right to recover pecuniary damages for a wrong inflicted upon the person or property, citing *Gillet v. Fairchild*, 4 Denio (N. Y.) 80; *McKee v. Judd*, 12 N. Y. 622, 64 Am. Dec. 515; *Wins Per Profs.* 4. In *Bennett v. Bennett*, supra, the court say: 'And while a right of action for a personal injury may not be within the definition, as frequently given, of a chose in action, that term, in its broadest sense, does embrace it.' See, also, the cases cited in note 2, page 4, 6 Am. & Eng. Ency. L. (2d Ed.).

"The law is said to be the 'perfection of reason.' In view of the sweeping changes made by modern legislation in regard to the property and personal rights of married women, I fail to see any reason why the plaintiff's husband should be joined with her in the action. In the first place, under the circumstances alleged, and they are admitted by the demurrer to be true, it is not to be supposed that he would consent to be made a plaintiff. If he refused, all that the plaintiff could do would be to allege his refusal, and make him a defendant, under section 140 of the Code of Civil Procedure of 1902. What benefit could that be to any of the parties? Nil frustra agit lex.

"It is therefore ordered that the demurrer be overruled, with leave to defendants to answer."

Legare, Holman & Baker, for appellants.
Logan & Grace, for respondent.

GARY, A. J. This is an appeal from an order overruling a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The order of his honor, the presiding judge, is affirmed for the reasons therein stated.

(150 N. C. 627)
BAILLIERE et al. v. ATLANTIC SHINGLE COOPERAGE & VENEER CO. et al.
(Supreme Court of North Carolina. May 13, 1909.)

1. EVIDENCE (§ 11*)—JUDICIAL NOTICE—MATTER OF HISTORY.

The court knows as a matter of history that the city of Wilmington is one of the oldest municipal corporations in the state, and that the public streets have been laid out and used in its corporate limits for more than a century.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

2. DEDICATION (§ 19*)—STREETS—PLAN OF CITY.

The owners of property in a city petitioned for a sale of a lot and a partition of the proceeds, on which petition a portion of the lot was sold. Thereafter on a like petition the balance was sold. Acts Gen. Assem. 1870-71 (Priv. Laws 1870-71, p. 22, c. 3), directed the aldermen of the city to cause a plan of said city to be made and recorded, which plan mentioned the streets as described in the partition proceedings and was known to petitioners. In the partition proceedings the land was described as bounded by the same streets, and the deed of the commissioner referred to the plan of the city, and the second petition contained the phrase "according to the plan of the city" 30 times. *Held*, that the owners had dedicated the streets mentioned to the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

3. DEDICATION (§ 34*)—STREETS—ABANDONMENT OF RIGHTS.

Where by partition proceedings the owners of city property have dedicated certain of the land to the public as streets, at which time there was no public necessity for using the streets, the city 12 years afterwards, there being a necessity to use the streets, may rightfully take control and assert their easement.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 67; Dec. Dig. § 34.*]

Appeal from Superior Court, New Hanover County; Lyon, Judge.

Action by Fred H. Bailliere and others against the Atlantic Shingle Cooperage & Veneer Company and others. From a judgment for plaintiffs for nominal damages, defendants appeal. Reversed, and judgment directed.

Plaintiffs claim title to a strip of land within the corporate limits of the city of Wilmington: Beginning at low-water mark on the eastern shore of the Cape Fear river, A; running thence eastwardly 726 feet to the southern line of Front street, B; thence northwardly along the line of said street 66 feet to C; thence westwardly 726 feet to the low-water mark of said river, D; thence the same course to the channel of the river, E; thence southerly 66 feet, F; thence westwardly to the beginning. Plaintiffs, and those under whom they claim, were, prior to August 22, 1892, the owners of a lot in the city of Wilmington. On the said day they instituted a special proceeding in the superior court of New Hanover county for the purpose of obtaining a decree for sale of said lot and making partition of the proceeds. In the petition in said proceeding they described the said lot as follows: "Beginning a stone P. K. D. and T. K. M. at the foot of Meares street; thence S. 89° 5 m. E. 114 chains to a stone, P. K. D. and T. K. M.; thence N. 1 E. 4 chains and 82 links to a stone P. K. D. E. B. D.; thence N. 88° 35 m. W. 103 chains to the western line of Front street at a point 119 feet and 3 inches from its intersection with the southern line of Wright street; thence with said western line of Front street northwardly 386 feet;

thence S. 78¾ degrees west about 1,650 feet to the channel of the river; southwardly about 643 feet to a point bearing S. 79¾ degrees west from the stone marked P. K. D. and T. K. M. first above named as the beginning corner; and thence N. 79¾ degrees E. 800 feet more or less to the beginning." This description includes the locus in quo, as will be seen by reference to the map. The petition was duly verified by the plaintiff Evelina M. Bailliere. A decree was duly made in said proceeding ordering a sale of the property and appointing Daniel O'Connor, Esq., a commissioner to make said sale. The portion of the decree material to this appeal is in the following language: "And it is hereby ordered that so much of the said land as is bounded on the north by Wright street, on the south by Meares street, on the east by Front street, and on the west by the Cape Fear river, be sold by the commissioner," etc. On November 5, 1892, the commissioner made report that, pursuant to said decree, he had sold the "land which lies between the Cape Fear river on the west and Front street on the east and Wright street on the north and Meares street on the south" to David C. Gaslin, who transferred his bid to Stephen L. Cowan, etc. Said sale was duly confirmed; the description of the land in the decree is in the language of the report. On November 7, 1892, the commissioner executed a deed for the lot sold to Cowan, containing the following description: "Lying and being in the city of Wilmington aforesaid, and beginning at low-water mark on the eastern shore of the Cape Fear river, at the intersection of the southern line of Wright street with said river, and running thence eastwardly along said line of Wright street sixteen hundred and fifty feet, more or less, to the western line of Front street; thence southwardly along said line of Front street three hundred and ninety-six feet to the northern line of Meares street; thence westwardly along the said line of Meares street sixteen hundred and fifty feet, more or less, to the low-water mark of the Cape Fear river, and thence northwardly with the river three hundred and ninety-six feet to the beginning; the same being all of blocks or squares numbers 15 and 16 according to the official plan of said city, together with, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining." The commissioner collected the purchase money and paid same to the petitioners, less the cost and expense, filing their receipts therefor. On March 22, 1900, plaintiffs instituted a second special proceeding in said court for the purpose of bringing the remainder of said property to sale for partition. In the petition filed in said second proceeding the land is described

in separate lots as bounded by the streets as they are laid out on the official map of said city. Block 29 is described as: "That certain lot or lots beginning at the intersection of the northern line of Wright street with the western line of Surry street, running thence north, along said western line of Surry street, one hundred and fifty-six feet; thence in a westerly or southwesterly direction to the eastern shore of the Cape Fear river, at a point 252 south from the southern line of Dawson street; thence southwesterly along the shore of the Cape Fear river, about one hundred and forty-four feet to the northern line of Wright street; thence eastwardly, along the northern line of Wright street, to the western line of Surry street, the point of beginning, being part of lot 4 and all of lots 5 and 6, in block 29, according to the official plan of said city. That certain lot or lots beginning at the intersection of the northern line of Wright street with the eastern line of Surry street, running thence east with said northern line of Wright street three hundred and thirty feet to the western line of Front street; thence along said western line of Front street two hundred and eight feet; thence west * * * degrees south three hundred and thirty-two feet, more or less, to a point in the eastern line of Surry street, 173 feet north from the northern line of Wright street; thence along said eastern line of Surry street, south, 173 feet to the point of beginning in the northern line of Wright street, being part of lots 3 and 4 and all of lots 5 and 6 in block 30, according to the official plan of said city."

After completing the description of the property, included in said petition, the following language is used: "But so much of the said property as is contained in blocks 15 and 16 of the present plan of the said city are excepted as having been conveyed by one Daniel O'Connor, commissioner, to Stephen L. Cowan." Mr. O'Connor was again appointed commissioner, and made sale of a number of said lots. He reported that he had made sale of the portion of blocks 29 and 30, covered by description in the petition, to Malcolm McKenzie, describing the same as follows: "Beginning at the intersection of the southern line of what is designated on the plan of the city of Wilmington as Wright street and the low-water line of the eastern shore of the Cape Fear river, running thence an easterly course with the southern line of the so-called Wright street as shown on said plan, 1,650 feet, more or less, to the western line of Front street, thence northwardly along the western line of said Front street 266 feet and 9 inches, thence south 78 $\frac{1}{4}$ degrees west about 1,650 feet, more or less, to the channel of the said river southwardly about 247 feet, more or less, to a point in said river channel where it would intersect with the southern

line of said so-called Wright street if extended into the river, thence an easterly course to the point of beginning on the eastern shore of said river. The above embraces the two tracts described in the petition as numbers 20 and 21, with the intersecting streets and river channel, which streets have never been laid out." The commissioner, thereafter, reported that: "It has been ascertained that a portion of said property is involved in a complication relative to the ownership of the parties to this proceeding, as to certain lands on what is called Wright street according to the official map of the city of Wilmington, between the river frontage and Front street." He reports that the purchaser is unwilling to take said property until the question is settled, unless a reduction in the price is made. Thereupon a decree was made directing the commissioner to convey to the purchaser the portion of said property exclusive of the "so-called Wright street" at a reduced price. The official map of the city of Wilmington referred to in the petition, and introduced in evidence, was made pursuant to an act of the General Assembly in 1870 (Priv. Laws 1870-71, p. 22, c. 3). It shows all of the streets in said city, with number of blocks and lots in each block. His honor found, in addition to the foregoing, the following facts: "There has been no legal proceeding had by the defendant city to condemn the locus in quo in this action to the public use as a street; and the court finds that the defendant city has never opened the same as a street; that the defendants, or those under whom they claim, have never in fact by any acts accepted the dedication of the same as a public street, unless the deed of Daniel O'Connor, commissioner, to Stephen L. Cowan, bearing date the 2d day of October, 1892, operates by law to dedicate as a public street the locus in quo; and that the public has never used the same as a public street."

The defendant shingle company claims under S. L. Cowan. The defendant has trespassed on said land. His honor upon these findings of fact, was of the opinion that the deed of Daniel O'Connor, commissioner, to Stephen L. Cowan, hereinbefore mentioned, does not operate in law to dedicate the locus in quo as a street; and thereupon adjudges that the plaintiffs are the owners of the strip of land described in the complaint, and that defendant shingle company has trespassed thereon. Judgment was rendered for nominal damages. Defendants excepted and appealed.

H. K. Bryan, for appellant Cooperage Co. M. Bellamy, Jr., for appellant City of Wilmington. Meares & Ruark, for appellees.

CONNOR, J. (after stating the facts as above). Judgment was rendered upon the pleadings against the defendant city of Wil-

mington at a former term of the court, and exception duly noted. The appeal, by both defendants, was argued at this term. Before discussing the merits of the case, it will be well to notice the distinction between this and several cases in our Reports relied upon by the plaintiffs.

In *Boyden v. Achenbach*, 79 N. C. 539, the plaintiff was seeking to establish a right to a private way. It is true that in the opinion something is said about the manner in which a public right of way could be acquired by prescription, but there was no suggestion that such a right of way in that case was dedicated. In *Kennedy v. Williams*, 87 N. C. 6, the right to a public pathway was asserted by reason of long user. In both cases the principle was announced and enforced that, before the lands of a private citizen could be subjected to an easement for a public road or highway, the assertion by the public authorities of such claim must be shown by working, etc.

The claim of the defendants in this case is founded upon an alleged dedication by the owners of the land to the public as a street. We know, as a matter of history, that the city of Wilmington is one of the oldest municipalities in the state; that the public streets have been laid out and used in its corporate limits for more than a century. It appears from the evidence in this record that at the session of the General Assembly of 1870-71 (Priv. Laws 1870-71, p. 22, c. 3), an act was passed directing the aldermen to cause a plan of said city to be made on which should be designated the lines of such streets and public alleys as then existed and of such as might be established by them. The act directed that two copies be made, one of which should be deposited in the office of the Secretary of State, and the other in the office of the clerk of the superior court of New Hanover county. It further appears, by reference to a copy of the map in evidence, that Wright street, Front street, and Meares street are laid out and run through plaintiffs' property. This was known to plaintiffs in 1892 when they filed their petition for a sale of the land for partition. The beginning point is located at a marked stone "at the foot of Meares street." A line is called for on "the western line of Front street," and another at "the intersection with the southern line of Wright street." In the decree directing the sale, a specific portion of the property is directed to be sold for a fixed sum—"bounded on the north by Wright street, on the south by Meares street, and on the east by Front street." The plat shows that this property thus described consists of blocks 15 and 16. The same description is set forth in the report of the commissioner and the decree of confirmation. The commissioner, in the deed which he executed to Cowan, gives a more specific description, concluding with the words, "being all of blocks, or squares, 15 and 16, accord-

ing to the official plan of said city." The plaintiffs insist that the use of these words by the commissioner was without authority and did not bind them. Conceding that the commissioner could not, by his deed, extend or change the boundaries as contained in the decree, it is manifest that he has not done so; he has only made more specific and certain the description of the land sold by him. Whatever doubt may have arisen from the language used in the first proceeding is removed by the description contained in the second. The portion of the land not sold is described in separate blocks or squares, each paragraph concluding with the words, "according to the official plan of said city." This language is repeated 30 times in the petition, and in concluding the description it is said: "So much of said property as is contained in blocks 15 and 16 of the present plan of said city are excepted as having been conveyed by Daniel O'Connor, commissioner, to Stephen L. Cowan." Thus we have the most unmistakable recognition of the existence of the official map and the sale of lots described in accordance with it. The land covered by streets is carefully excluded from the description of the lots conveyed. It does not appear what, if any, use or acts of ownership have been exercised over the strip of land 276 feet in length and 66 feet in width, now claimed by plaintiffs, since the sale of blocks 15 and 16 to Cowan in 1892 until the institution of this action in 1904. Conceding the facts found by his honor, what, if any, effect did the conduct of plaintiffs, in respect to the sale of the property, have upon the right of the city to use, whenever the public necessity demanded, the locus in quo as a street?

In *Shea v. Ottumwa*, 67 Iowa, 39, 24 N. W. 582, it appeared that lots had been sold according to a map "dividing the property into town lots, and dedicating the streets to public use." Thirty years thereafter the city proposed to open the streets. The map was not recorded as the statute required. Plaintiff sought to recover damages from the city for entering upon and grading the streets. Beck, C. J., after saying that the execution of deeds "bounded according to the description of the plat" would establish the *animus dedicandi* sufficient to establish a way or street, said: "But it is urged that there was no acceptance of the dedication by the public, or by the city for the public, for more than 30 years after the dedication, when the street was graded. It is shown that the street remained uninclosed; that the land was rough and hilly, and, for that reason, it was used but little by the public. It appears that, when the wants of the public demanded it, the city proceeded to grade the street at the point in dispute. It would not do to hold that city streets dedicated to the public over hilly, rough land would revert to the dedicator if they

were not improved and used by the public until the wants of the public travel demanded it. * * * They have not been used for the reason that, until graded, they are incapable of use. The dedication will be presumed to have contemplated this state of things, and imposed no condition on the public to use the streets until the public wants demanded and secured their improvement."

Bennett, J., in *Schneider v. Jacob*, 86 Ky. 101, 5 S. W. 350, says: "These principles apply primarily in the interest of purchasers of lots who invest their money upon the faith of the assurances of the seller that the streets and alleys which are defined in the plat, and which are called for in the deeds of conveyance, are dedicated to the use of the purchasers and to the public. The purchasers invest their money with the assurance that they shall have all the advantages arising from the streets and alleys as defined and delineated in the plat or plan of the newly created town; and that these streets and alleys, as soon as lots are purchased, with clear reference to them, become irrevocably dedicated, not only to the personal convenience and necessities of the purchasers, but to the use of the public. And although they may not be actually opened by the authority of the city or town, although they may be repudiated as public thoroughfares by the city, as in this case, and different streets and alleys opened up in their stead, yet the purchasers of the lots, with clear reference to the streets and alleys as defined in the map or plan, are entitled, as between them and the seller, to the benefits of the dedication. * * * Where the land is laid out in town lots with streets, and the owner sells a lot which fronts on a street, and the deed calls for the street as the front boundary of the lot, he receives a full consideration for the street in the increased value of the lot."

So, in *Sherer v. Jasper*, 93 Ala. 536, 9 South. 585, it is said: "The general rule that where a landowner lays off his land into blocks and lots, setting apart and designating certain portions as streets, with a view of establishing a town, a sale of lots with reference to a map defining and delineating the streets is a complete dedication thereof to the use of the purchasers and the public, governs when the proprietor of land sells and conveys lots in conformity and with reference to a city map on which his land is so laid off. Such sales and conveyances are a recognition and adoption of the maps, and amount to a dedication of the designated street to public use, of which the purchase of lots is an acceptance. It is not necessary that the street should be opened at the time of the sale and conveyance."

In *Trustees, etc., v. Hoboken*, 83 N. J. Law, 13, 97 Am. Dec. 696, Depue, J., says: "When, there being a city map on which the land is so laid off, the owners adopt such maps by a

reference thereto, his acts will amount to a dedication of the streets."

In *Vanatt v. Jones*, 42 N. J. Law, 561, the owners of land as tenants in common filed proceedings for partition, adopting and recognizing a map on which streets had been laid out. Partition was made. Held, that the streets were dedicated to public use.

In *Derby v. Alling*, 40 Conn. 410, streets were laid out on a map, but not opened, and lots sold calling for them. Seymore, C. J., said: "The public enter upon a part in the name of the whole, to enjoy the parts as, from time to time, such enjoyment of them becomes necessary. This is carrying into effect the manifest intent of the grantor, and of those for whose benefit the grant is made, and we see no difficulty in allowing this intent to prevail and to call it a dedication in present, to be carried into effect in futuro." *Henshaw v. Hunting*, 67 Mass. 203; *Mayor, etc., v. Canal Company*, 12 N. J. Eq. 547; *Wright v. Tukey*, 57 Mass. 290.

The decisions of this court, while not exactly in point, are in harmony with the uniform current of the authorities cited in holding that a sale of lots in accordance and recognition of a map or plat in which streets are laid out constitutes a dedication of the streets to the use of the purchasers and the public. In *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681, the streets were laid out and the lots sold by the town. It was held that the owners of lots were entitled to have them kept open. *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479, and *Conrad v. Land Co.*, 126 N. C. 776, 36 S. E. 282. In *Collins v. Land Co.*, 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720, the court held that, when the lots were sold and conveyed by referring to a plat in which streets were laid out, the map became a part of the deed as if it were written therein. In *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956, 47 S. E. 462, it was held that, where the deeds conveying the lots referred to a map, the purchasers' rights were not affected by the acceptance or nonacceptance of the dedication. It was held in that case that the town authorities could not, as against an abutting owner, by resolution or ordinance, narrow the street as laid out on the plat or map. The more recent decisions of this court cite these cases with approval. The intention to dedicate the land covered by the streets, as indicated on the map, is manifested in the most unmistakable manner. For what other purpose did the parties in the partition proceedings carefully exclude the streets from the description in the deeds? It cannot be contended, with reason, that they intended to sell off town lots and hold the strips of 66 feet between them for the purpose of preventing ingress and egress to and from the lots. Without the streets, lots of 66 feet width were of little value. It will be observed, by referring to the map, that the

blocks are 396 feet in width and are divided into six lots making each 66 feet wide. Having sold the lots by reference to the official city map, the dedication is complete and irrevocable. *Elliott on Roads and Streets*, 131. The dedication is not confined to a mere private way or easement; it is to the public, to be enjoyed under the control of the city authorities who have charge of the streets. *Trustees v. Hoboken*, *supra*. The attempt to limit the dedication made in 1892 by the use of the words "so-called Wright street" cannot affect the rights of the city or the owners of the lots.

Upon the facts found by his honor, judgment should have been rendered for defendants. The legal title of Wright street is in plaintiffs, subject to an easement in the city to use the land as and for a public street to be opened and subjected to regulation as the growth of the city demands. The defendant corporation, in using it in the manner described in the complaint, did not commit a trespass. The judgment will be set aside and judgment entered in the superior court of New Hanover that defendants go without day, etc. Let this be certified.

Reversed.

(150 N. C. 642)

SETTLE et al. v. SOUTHERN RY. CO. et al.
(Supreme Court of North Carolina. May 19, 1909.)

1. TRIAL (§ 165*)—TAKING CASE FROM JURY—MOTION FOR NONSUIT — EFFECT OF EVIDENCE.

On a motion for nonsuit, plaintiff's evidence must be accepted as true, and construed in the light most favorable to him.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 374; Dec. Dig. § 165.*]

2. EXPLOSIVES (§ 12*)—INJURIES FROM BLASTING—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for damages to plaintiff's house from blasting operations conducted by defendants, evidence held sufficient to warrant the submission of the case to the jury.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 12.*]

Appeal from Superior Court, Buncombe County; Ward, Judge.

Action by Thomas Settle and others against the Southern Railway Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wells & Swain, for appellants. J. C. Martin, J. H. Merrimon, and J. G. Merrimon, for appellees.

BROWN, J. This action was originally instituted against the Southern Railway Company and the above-named defendants, Yandle Bros., Chas. Yandle Company, and Charles Yandle, contractors, for damages to plaintiff's house from blasting operations conducted by the said contractors, in constructing a track for the railway company. The

suit was not prosecuted against the latter, and judgment was obtained against the contractors. The jury found that the defendants were guilty of negligence, and that the property of plaintiffs had been injured by reason thereof. The only exception is to the refusal of the court to nonsuit the plaintiffs. On such motion the plaintiff's evidence must be accepted as true, and construed in the light most favorable to him. *Milhelser v. Leatherwood*, 140 N. C. 235, 52 S. E. 782. There is much more than a scintilla of evidence in this case. The plaintiff's house was injured by concussions and vibrations, which were the result of blasting. Rocks weighing 200 pounds were hurled a great distance, and across the French Broad river. No attempt was made to confine the blasts, or to smother them. In making the blasts as much as eight kegs (over 200 pounds of powder) and 20 sticks of dynamite were used at a time. The evidence is much stronger than the evidence in *Blackwell v. Railroad*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786, and *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778. We are not prepared to say that there is no evidence of negligence sufficient in probative force to be submitted to a jury.

The motion to nonsuit was properly overruled.

No error.

WALKER, J., did not sit on the hearing of this appeal.

(150 N. C. 695)

FORTUNE et al. v. SOUTHERN RY. CO.
(Supreme Court of North Carolina. May 21, 1909.)

1. CARRIERS (§ 346*)—INJURY TO PERSON ACCOMPANYING PASSENGER — CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence held to show plaintiff, who accompanied her husband to a train upon which he was to depart, and who was injured in so doing, was not negligent.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 346.*]

2. CARRIERS (§ 304*)—PERSON ACCOMPANYING PASSENGER—DUTY OF CARRIER.

Though plaintiff was not a passenger towards whom the carrier was bound to exercise the highest degree of care, yet, it being a custom to allow persons to accompany passengers to trains, she was on the premises by the carrier's implied invitation, and was not a mere trespasser, and the carrier was bound to exercise ordinary care for her safety.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1111; Dec. Dig. § 304.*]

Appeal from Superior Court, Haywood County; Peebles, Judge.

Personal injury action by Connie E. Fortune and others against the Southern Railway Company. Findings for plaintiffs were set aside and a nonsuit allowed, and plain-

tiffs appeal. Reversed and remanded, with directions to enter judgment for plaintiff.

Action to recover damages for a personal injury alleged to have been received by plaintiff Connie E. Fortune caused by the negligence of the defendant. The cause was tried at July term, 1908, of the superior court of Haywood county, his honor, Judge Peebles, presiding. These issues were submitted.

"(1) Was the plaintiff C. E. Fortune injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff Connie E. Fortune by her own negligence contribute to her injury as alleged in the answer? Answer: No.

(3) What damage, if any, is plaintiff Connie E. Fortune entitled to recover? Answer: Three hundred and fifty dollars."

Thereupon his honor, upon the ground that he had committed an error in not sustaining defendant's motion to nonsuit, set aside the findings of the jury and allowed the motion, from which judgment plaintiff appealed. In this court it was agreed by counsel that, if the opinion of the court should be with the plaintiff, judgment should be entered for the sum assessed by the jury.

W. B. Ferguson, Frank Carter, and H. C. Chedester, for appellants. Moore & Rollins, for appellee.

BROWN, J. The evidence in this case tends to prove that the plaintiff accompanied her husband to defendant's station at Waynesville for the purpose of seeing him off as a passenger for Asheville. For the purpose of accommodating the increased travel in summer, defendant had daily an extra coach left at a certain place on the side track close to the station at Waynesville, which was attached to the train when it arrived at Waynesville from the West. It was customary to open this extra coach some ten minutes before train time, and to permit passengers to enter it. On the date of the injury the car was standing at the usual place on the side track where passengers were accustomed to board it. The plaintiff and her husband stepped on the platform of this car with the view of entering it, about two minutes before train time, but, finding the door locked, they were on the point of stepping off, when the collision occurred which caused the plaintiff's injury. They were not on the platform exceeding two minutes. At this time there was a large concourse of persons at the station waiting for the train. Under these conditions, and just as plaintiff and her husband were about to leave the platform, an engine was run into the side track at a dangerous rate of speed, variously estimated by the witnesses at from 15 to 30 miles an hour, and was caused to strike a car standing at the station platform, and to drive it against the car upon which plaintiff and her husband

were standing with such force that the ends of the two cars buckled and rose from the track, and the shock threw the plaintiff down and injured her.

The learned counsel for defendant in his argument before this court rested his defense very largely upon the defense of contributory negligence upon the part of the plaintiff in attempting to enter the car. We do not think there is any foundation for such defense upon the facts of the case. The evidence discloses no negligent conduct upon the part of the plaintiff while on the car which in the least degree contributed to the injury she received. It will not be contended in this day and generation that it is negligence for a wife to escort her husband to the station and to board a car momentarily to bid him good-bye. The defense must properly rest upon the theory that the plaintiff was on the car without defendant's consent, and that, being a trespasser, the defendant owed her no duty except to refrain from willful injury, and therefore as to her is guilty of no negligent conduct. This view of the evidence is properly presented under the first issue. It is undoubtedly true that if plaintiff had been a trespasser, stealing a ride, as in *Bailey's Case* (N. C.) 62 S. E. 912, or a huckster entering the train to sell his wares, as in *Peterson's Case*, 143 N. C. 263, 55 S. E. 618, 8 L. R. A. (N. S.) 1240, 118 Am. St. Rep. 799, she could not recover. But plaintiff was not in any sense a trespasser, and under the circumstances of this case her presence on the car platform was neither wrongful nor negligent. Her presence there was not wrongful, because a wife who escorts a husband or a husband a wife to a seat on a railway train is not a mere trespasser to whom the company owes no duty except to abstain from willful injury. It is true plaintiff was not a passenger towards whom the defendant was bound to exercise the highest degree of care, but she was on its premises by its implied invitation, and it was bound to exercise ordinary care for her safety. Railway companies owe this duty at least to those who in practice they allow to accompany passengers in order to see them off on trains without asking special permission. *Railroad v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48; *Packet Co. v. Wilson*, 95 Tenn. 1, 31 S. W. 737; *Hutchinson on Carriers*, § 237; *Whitley v. Railroad*, 122 N. C. 987, 29 S. E. 783; *Morrow v. Railway*, 134 N. C. 92, 46 S. E. 12; *Moore v. Railroad*, 119 Mich. 613, 78 N. W. 666. This implied invitation and consequent duty to those who impelled by ties of relationship and affection go to "welcome the coming or speed the parting guest" is founded on recognized social observances which have become a universal and inseparable concomitant of modern railway traffic.

Nor do we think the husband and wife

were wholly unwarranted in attempting to enter the car at the time and under the circumstances in evidence. The car was an extra coach brought up every morning from Asheville, and left at Waynesville for the afternoon train returning there. It usually remained at the station on the side track at the place the accident occurred. It was the defendant's custom to open the car at that place 10 minutes before train time, and passengers for Asheville at once boarded it, and, upon arrival of the train, it was coupled on. In accordance with this custom, inaugurated and permitted by defendant, plaintiff and her husband boarded the car two minutes before train time in order that he might secure a seat. Finding it locked, they started back to the station, remaining on the car platform in all not more than two minutes, but were caught in the collision. There is no evidence that they lingered on the platform unduly long or did any act that a person of reasonable prudence would not be expected to do under the circumstances. We think his honor's first impressions of this case were the best.

The cause is remanded, with direction to enter judgment for the damages (\$350) assessed by the jury.

Reversed.

(150 N. C. 644)

McDEVITT v. McDEVITT.

(Supreme Court of North Carolina. May 19, 1909.)

PARTITION (§ 94*)—PROCEEDINGS—REPORT OF COMMISSIONERS—OBJECTIONS.

Commissioners in partition divided the land and filed their report, and within 20 days thereafter defendant notified the clerk that he desired to file exceptions to the report, whereupon the clerk made and signed the following memorandum: "The defendant comes into court and objects to the report of the commissioners in this cause and asks that the same be not confirmed, this the — day of May, 1908." Thereafter amended exceptions setting out various grounds why the report should not be confirmed were filed with the clerk without objection. *Held*, that it was error for the clerk thereafter to confirm the report upon the ground that no exception had been filed within 20 days from the filing of the report.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 94.*]

Appeal from Superior Court, Madison County; Ferguson, Judge.

Action by Alfred McDevitt against George McDevitt. From an order of the clerk of court confirming a report of commissioners in partition proceedings defendant appealed to the superior court, where the order was affirmed, and defendant appeals. Reversed and remanded to the clerk, with directions to give notice to the parties fixing a day, and hear the report and exceptions thereto.

W. W. Zachary, for appellant. Cudger & McElroy, for appellee.

BROWN, J. This was a special proceeding begun before the clerk of the superior court of Madison county for the purpose of partitioning land between tenants in common. There was a decree entered up by consent appointing commissioners to divide the land. The commissioners proceeded on the 16th day of May 1908, to divide the lands and filed their report on the 20th day of May, 1908. During the month of May, 1908, and before the 20 days for filing exceptions had expired, the defendant went to the clerk and notified him that he desired to file exceptions to the said report, whereupon the clerk in the presence of the defendant made the following memorandum: "George McDevitt, the defendant comes into court and objects to the report of the commissioners in this cause and asks that the same be not confirmed, this the — day of May, 1908. J. H. White, C. S. C." On July 13, 1908, the defendant, through his counsel, filed amended exceptions setting out various grounds why the report should not be confirmed. The amended exceptions were received by the clerk without objection, and the matter remained in statu quo until October 15, 1908, when the clerk confirmed the report upon the ground that no exception had been filed within 20 days from the filing of the report. The clerk's judgment upon appeal was affirmed by the judge of the superior court.

This court has held in *Floyd v. Rook*, 128 N. C. 10, 38 S. E. 33, that exceptions must be filed within the 20 days after the report is filed. But we do not construe either the decision or the statute as forbidding amendments to the exceptions after the expiration of that time. Nor are we prepared to hold that the clerk upon good cause shown may not extend the time for filing exceptions. In this case, however, the defendant did except and object to the report within the 20 days, and later on filed amended exceptions without objection. They were received by the clerk and filed by him, thereby signifying his official consent to such amendments. They remained on file for several months, and, when the cause was heard on October 15th, the clerk erred in not considering them on their merits.

The cause is remanded to the clerk, with directions to give notice to plaintiffs and defendants, fixing a day, and hear the report and exceptions thereto.

Reversed.

(150 N. C. 688)

FOSTER et ux. v. LEE.

(Supreme Court of North Carolina. May 19, 1909.)

PERPETUITIES (§ 6*)—RESTRAINT UPON ALIENATION.

A will devised land to testator's daughter and her heirs forever, and provided in the next item that: "The above-described lands shall

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be disposed of but shall descend to the children of my above-mentioned daughter." Held, that the fee-simple estate conveyed to the daughter by the first item was not converted into a life estate by the subsequent provision, which gave no devise to the grandchildren, but was simply an attempted restraint upon alienation, void as against public policy.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-56; Dec. Dig. § 6.*]

Appeal from Superior Court, Polk County; Adams, Judge.

Action by R. M. Foster and wife against Joseph Lee. Judgment for plaintiffs, and defendant appeals. Affirmed.

S. Gallert and Simpson & Bomar, for appellant. J. E. Shipman, for appellees.

CLARK, C. J. The sole question presented by this appeal is whether Clara May Foster is owner in fee of the land contracted to be conveyed by her, and can convey a good title thereto. It is agreed that J. M. Hamilton died seised and possessed of the premises. By item 4 of his will he devised the land in question to his daughter "Clara May Foster, wife of R. M. Foster, and her heirs forever." By item 5 he provided that the "above-devised lands shall not be disposed of but shall descend to the children of my above-mentioned daughter." Item 4 gave the plaintiff Clara May a fee simple. The words of item 5 did not convert this into a life estate. There is no devise to the grandchildren. There is simply an attempted restraint upon alienation, which is contrary to public policy and void. This is settled by a long line of authorities, but it is sufficient to refer to *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444, a recent case in which the subject is fully discussed and authorities cited by Mr. Justice Walker. It is admitted that Clara May Foster has not incumbered or conveyed the premises. His honor properly held that she owned the land in fee, and had a right to convey the same, and rendered judgment against her vendee for the purchase money.

No error.

(150 N. C. 700)

VADEN v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. May 21, 1909.)

1. RAILROADS (§ 397*)—INJURIES TO PERSON ON TRACK—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for the death of plaintiff's intestate, who was struck by a car shunted onto a switch track, evidence that there was much passing by school children, factory hands, and citizens generally along the street near which the accident occurred, and in the vicinity thereof, was properly admitted, as it tended to show a condition that should have put the railroad company on notice as to the necessity for caution.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 397.*]

2. RAILROADS (§ 365*)—INJURIES TO PERSONS ON TRACK—FLYING SWITCH.

To make a "flying switch" on a railroad track across or along a street of a populous town is negligence per se.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1256; Dec. Dig. § 365.*]

Appeal from Superior Court, Guilford County; Long, Judge.

Action by Chas. E. Vaden, administrator, against the North Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. No error.

Wilson & Ferguson, for appellant. W. P. Bynum, Jr., and R. C. Strudwick, for appellee.

BROWN, J. The defendant in apt time entered a motion to nonsuit, which the court overruled, and defendant excepted.

The undisputed evidence tends to prove that the intestate, a boy 13 years of age, was struck and killed on defendant's tracks by a car which had been shunted onto the switch track, and was moving quite rapidly towards Tomlinson street crossing. The car had no brakeman on it, and had been "kicked" onto the track by the engine, thereby making what is called a "flying switch." The switch tracks were located in a populous part of the city of High Point, and the intestate was killed immediately in front of Tomlinson's factory, where he worked. The evidence for plaintiff tends to prove that he was killed about 30 feet from where Tomlinson street crosses the tracks. The evidence for defendant locates him further from the crossing. All the evidence shows that these switch tracks were situated in a populous part of the city, and adjacent to, and close by, factories where many persons of all ages were employed. At the time the intestate was killed, the factory had just closed for the day, and the employes were filling the streets and crossings. The court permitted evidence to the effect that there is much passing by school children, factory hands, and citizens generally along Tomlinson street, and in the vicinity of the accident, to which defendant excepted. We see no objection to this evidence. It tended to establish conditions that should have put the defendant on notice as to the necessity for caution in moving its cars at this point. *Railroad v. Smith*, 93 Ky. 440, 20 S. W. 392, 18 L. R. A. 66. This case presents none of the features of *Bailey's Case* (N. C.) 62 S. E. 912. The intestate in that case had wrongfully entered the switching yards, and climbed on the tender of an engine, and was killed in a collision. Making "flying switches" on the railway tracks and sidings running across and along the streets of populous towns is per se gross negligence, and has been so disclosed by all courts in this country, and by text-writers generally. It is

stated in one of the best known text-books that the use of a running switch in a highway, in the midst of a populous town or village, is of itself "an act of gross and criminal negligence on the part of the company." *Sherman & Red. Neg.* (3d Ed.) § 466; *Wilson v. Railroad*, 142 N. C. 333, 55 S. E. 257; *Allen v. Railroad*, 145 N. C. 214, 58 S. E. 1081; *Bradley v. Railroad*, 126 N. C. 742, 36 S. E. 181. In the voluminous notes to *Railroad v. Smith*, 18 L. R. A. 66, cited above, will be found innumerable cases selected from many courts of last resort, condemning the practice of making flying switches along the streets of towns and cities, and pronouncing such practice per se negligence.

Upon the issue of contributory negligence upon the part of a child 13 years of age we think his honor's instructions are clearly in line with what we have laid down at this term in *Baker v. Railroad*, 64 S. E. 506, and that in all respects he followed well-settled precedents.

We have examined all the exceptions, and think it would be of no value to discuss them seriatim. It would be traveling over ground that has been much traveled before.

We find in the record no reversible error.
No error.

(150 N. C. 634)

CURRIER v. W. M. RITTER LUMBER CO.
(Supreme Court of North Carolina. May 21, 1909.)

1. MASTER AND SERVANT (§ 42*)—COMPENSATION—WRONGFUL DISCHARGE.

Where an employé is engaged for one year, and is wrongfully discharged before the expiration of that time, he is entitled to damages for such wrongful discharge, less what he might have earned upon reasonable effort.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 54-56; Dec. Dig. § 42.*]

2. MASTER AND SERVANT (§ 20*)—TERM OF CONTRACT.

If no time is fixed in a contract of employment, and there is no stipulated period of payment, the contract may be terminated at the will of either party.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 19; Dec. Dig. § 20.*]

Appeal from Superior Court, Macon County; Peebles, Judge.

Action by C. C. Currier against the W. M. Ritter Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Robertson & Benbow and Busbee & Busbee, for appellant. Shepherd & Shepherd, Fred S. Johnston, and L. O. Bell, for appellee.

BROWN, J. The material points in this appeal are embraced in the second and fourth issues; that is to say, whether there was a contract of employment for the entire year of 1907. The action is brought upon the assumption that there was such a contract

of employment, and the plaintiff seeks to recover damages for the entire year, although he did no work after the first few days in July, 1907. If there were such a contract, and he was wrongfully discharged, he would be entitled to such damages, less what he might have earned upon reasonable effort. *Smith v. Lumber Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439. His honor instructed the jury that upon the letters and other undisputed testimony there was no such contract for the entire year of 1907, but that the employment was from month to month. It is admitted that the correctness of this ruling is the only question presented.

In contracts for personal service the English rule is that, when no time is fixed and no stipulation as to payment made, it is presumed to extend for a year. In this country, when no time is fixed, and no stipulated period of payment made, the contract is terminated at the will of either party. 20 A. & E. Cy. 14; *Solomon v. Sewerage Co.*, 142 N. C. 445, 55 S. E. 300, 6 L. R. A. (N. S.) 391; *Edwards v. Railroad*, 121 N. C. 490, 28 S. E. 137. The evidence of the contract is wholly in writing, in the form of correspondence, and there is no evidence of any other contract subsequent thereto. We think his honor's interpretation of the letters is correct, and in accord with the case of *Edwards v. Railroad*, 121 N. C. 490, 28 S. E. 137.

No error.

(150 N. C. 638)

GREENLEE v. GREENLEE et al.
(Supreme Court of North Carolina. May 19, 1909.)

1. REFERENCE (§ 100*)—REPORT—EXCEPTIONS—RIGHT TO WITHDRAW.

Where defendants filed exceptions to a referee's report, and demanded a jury trial, and plaintiff filed exceptions only, defendants could withdraw their exceptions and demand for a jury, and request a hearing on plaintiff's exceptions, and they were not precluded from doing so by plaintiff's withdrawal of objection to the demand for a jury.

[Ed. Note.—For other cases, see *Reference*, Dec. Dig. § 100.*]

2. APPEAL AND ERROR (§ 91*)—DECISIONS REVIEWABLE—SUBSTANTIAL RIGHTS.

No appeal lies from an order permitting parties to withdraw their exceptions to a referee's report and their demand for a jury, under Clark's Code, § 548, allowing an appeal from a judicial order, involving a matter of law or legal inference, which affects a substantial right, or which determines the action and prevents a judgment from which an appeal might be taken.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 612-641; Dec. Dig. § 91.*]

Appeal from Superior Court, McDowell County; Ferguson, Judge.

Action by J. M. Greenlee, administrator, against J. Harvey Greenlee and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. C. Avery and W. T. Morgan, for appellant. Pless & Winborne, for appellees.

CLARK, C. J. The defendants filed exceptions to the report of the referee, and demanded a jury trial. The plaintiff filed exceptions, but made no such demand. The defendants asked leave to withdraw their exceptions and demand for jury trial, and that the plaintiff's exceptions be heard. The plaintiff insisted that, although he had not asked for a jury trial, and had no exceptions which he desired submitted to the jury, yet because defendants had made such demand, and the plaintiff had consented to defendants' having it, the court could not permit the withdrawal of either the exceptions or the demand for the jury, and insisted that, although he was satisfied with the findings of fact, the defendants having said they were not, they had to fight further whether they so desired or not. This is the whole case. The plaintiff withdrew his objection to the defendants' demand for a jury trial. If this had any effect, it was against the plaintiff. It could not estop the defendants from withdrawing their exceptions or their demand for a jury trial. The plaintiff, having excepted to the order permitting the defendants to withdraw their exceptions and their demand for a jury, insisted on an immediate appeal. His honor properly ruled that no appeal lay from such order, but that the plaintiff could note his exception, which would come up for review on this appeal from the final judgment. Clark's Code (3d Ed.) § 548, pp. 733, 734.

Affirmed.

(150 N. C. 630)

MORGANTON HARDWARE CO. et al. v. MORGANTON GRADED SCHOOL et al.
(Supreme Court of North Carolina. May 19, 1909.)

MECHANICS' LIENS (§ 13*)—PROPERTY SUBJECT TO LIEN—PUBLIC PROPERTY.*

A public school building, title to which is vested in a board of trustees, is not subject to a mechanic's lien for material furnished for its construction; the statute not showing an intention to extend the lien to public property.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 15; Dec. Dig. § 13.*]

Appeal from Superior Court, Burke County; Ferguson, Judge.

Action by the Morganton Hardware Company and others against the Morganton Graded School and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Avery & Ervin, for appellants. Riddle & Huffman, S. J. Ervin, and J. T. Perkins, for appellees.

WALKER, J. The plaintiffs furnished materials to L. W. Cooper, who had contracted

to build a schoolhouse for the defendant the Morganton graded school, and they filed and now claim a lien upon the building for the materials so furnished.

The only question for our consideration is whether a public school building is subject to a statutory lien for materials furnished for its construction. This question we must answer in the negative, if we apply the principle declared in former decisions of this court, and are governed by the great weight of authority in other jurisdictions. *Snow v. Commissioners*, 112 N. C. 336, 17 S. E. 176; *Gastonia v. Engineering Co.*, 131 N. C. 363, 42 S. E. 857. In 27 Cyc. p. 25, it is said that such a lien does not attach to public school buildings, and many authorities are cited in the notes to sustain the proposition. In *Neal v. Trustees*, 121 Ga. 208, 48 S. E. 978, it is said: "As a general rule, in the absence of some expression in the statute making it evident that the Legislature intended it so to apply, a mechanic's lien statute will not be construed to give a lien upon public buildings or other public property devoted to public use. Thus a lien cannot be acquired or enforced against a public school building or the lot on which it is situated, a courthouse, a city hall, a public bridge which is part of a public highway, or the waterworks of a municipality. In some cases the reason given for this rule is that to hold otherwise would be contrary to public policy, while in others the rule has been considered to be based upon the fact that the ordinary methods provided by statute for the enforcement of the lien cannot be pursued against public property, and hence, there being no mode of enforcing the lien, it cannot exist; and it has also been held that the provisions of the mechanic's lien law could not be applied to public school buildings because the relation sustained by a school district to the school property was not that of owner within the meaning of the statute, and hence a contract with the district could not give rise to the lien"—citing 20 Am. & Eng. Enc. 295, 296. The counsel admitted that, as a general rule, a public building is not the subject of a lien for work done or materials furnished in the absence of some expression in the statute showing the intention of the Legislature to be otherwise; but they contended that the rule did not apply when the title to the property is vested in a board of trustees. This contention is fully answered in the case of *Neal v. Trustees*, just cited and especially in *Trustees v. City Counsel*, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151, where it is said: "In view of the legislation to which we have referred, there can be no question as to the public character of the institution originally. The property vested in the trustees was public property, and was committed to them for a public purpose. No private interest of any kind was acquired. The beneficial interest

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was in the public, and the trustees were merely agents of the state for the administration of the fund and the management of the institution. Since that time there has been no legislation changing the public character of the trust or parting with the control of the state over the institution of the fund connected with it. Mere noninterference with the control exercised by the trustees could not affect the rights of the state or divest the institution or the property of its public character."

The question is carefully discussed in *Fatout v. Board of School Commissioners*, 102 Ind. 232, 1 N. E. 394, where the court, citing *Board v. O'Connor*, 86 Ind. 531, 44 Am. Rep. 338, says: "In the mechanic's lien law of this state there is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use; and, in the absence of such a provision, we must hold in conformity with the weight of authority elsewhere that such a lien can neither be acquired nor enforced upon or against such property held for such use. The doctrine of the case last cited is decisive, as it seems to us, of the question we are now considering adversely to the validity of the mechanic's lien which *Fatout* claims to have acquired, and is seeking to enforce upon and against the public schoolhouse erected by him in the case in hand; for there is no public property held for a more sacred public use than a public schoolhouse of a public school corporation under the Constitution and laws of this state." In *Lessard v. Inhabitants of Revere*, 171 Mass. 294, 50 N. E. 533, the same conclusion was reached, which was based upon a full citation of the authorities. Holmes, J., for the court, said that "the general current of decisions is against the lien when the property upon which it [the lien] is asserted is held for public use." We do not find anything in our statute indicating a purpose on the part of the Legislature to change the general rule of law as thus established by the decisions of the courts in other states, and as we think, also, by the decisions of this court.

The court erred in adjudging upon the findings of fact that the plaintiffs had acquired any lien upon the property of the defendant the Morganton graded school, and its judgment as to that defendant is therefore reversed. Reversed.

(150 N. C. 862)

STATE v. LUNSFORD.

(Supreme Court of North Carolina. May 19, 1909.)

1. INDICTMENT AND INFORMATION (§ 71*) — SUFFICIENCY—CERTAINTY.

The indictment or warrant under which one is prosecuted must set forth the accusation with sufficient certainty to enable the court to determine what offense has been committed, and to know what punishment may be imposed in case of a conviction.

[Ed. Note.—For other cases, see *Indictment and Information*. Cent. Dig. §§ 193, 194; Dec. Dig. § 71.*]

2. INTOXICATING LIQUORS (§ 198*)—CRIMINAL PROSECUTION—WARRANT—SUFFICIENCY.

An affidavit and warrant, charging an unlawful sale of liquor in a city before prohibition became effective therein, must allege a sale without a license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 218; Dec. Dig. § 198.*]

3. MUNICIPAL CORPORATIONS (§ 639*)—VIOLATION OF ORDINANCES—WARRANT AND AFFIDAVIT—SUFFICIENCY.

A prosecution for the violation of a municipal ordinance cannot be sustained, where the warrant and accompanying affidavit do not set forth the ordinance nor describe it, nor refer to it in any way sufficient to identify it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1406-1409; Dec. Dig. § 639.*]

4. INTOXICATING LIQUORS (§ 198*)—CRIMINAL PROSECUTIONS—AFFIDAVIT AND WARRANT—SUFFICIENCY.

Where the warrant and accompanying affidavit charging an unlawful sale of liquor do not show whether the sale was in violation of the state law or a municipal ordinance, no valid judgment can be pronounced.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 218; Dec. Dig. § 198.*]

Appeal from Superior Court, Buncombe County; Ward, Judge.

Jim Lunsford was convicted of selling liquor contrary to law, and he appeals. Judgment arrested.

Indictment for selling whisky in the city of Asheville contrary to law, tried on appeal from police court of the city of Asheville. The procedure under which conviction was had is shown in the affidavit and warrant appearing in the record as follows:

"North Carolina, Buncombe County. City of Asheville, Police Justice's Court. Charge: Violation of Ordinance No. State. E. C. McConnell maketh oath that on the 26th day of September, 1908, in the city of Asheville, N. C., Jim Lunsford did unlawfully and willfully sell spirituous, vinous, and malt liquors to one Zeb D. Grant, in violation of City Ordinance No. State, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state. E. C. McConnell.

"Sworn to and subscribed before me this the 26th day of September, 1908. G. S. Reynolds, Police Justice.

"State of North Carolina to the Chief of Police or Any Policeman of the City of Asheville, or Other Lawful Officer of Said City—Greetings: We command you to arrest the body of Jim Lunsford, and him safely keep, so that you have him before me at 9 o'clock, a. m., on the 28th day of September, 1908, then and there to answer the charge above set forth. G. S. Reynolds, Police Justice.

"To the Chief of Police or Any Other Policeman or Other Lawful Officer of the City of Asheville—Greetings: You are hereby commanded to summon the following witnesses to appear before G. S. Reynolds, police justice of the city of Asheville, at the time and place named, for the return of the within warrant and summons, to testify as

to the charge contained in the within affidavit and warrant, and to testify on the matters mentioned in the within summons, and not depart from the court without leave: Zeb D. Grant, J. H. Fore, Frankie Davis, W. A. Webb. G. S. Reynolds, Police Justice.

"The within warrant received this 28th day of September, 1908. Executed 28th day of September, 1908, by arresting Jim Lunsford and bringing him before G. S. Reynolds, P. J., for trial at 9 o'clock, a. m., 28th day of September. E. C. McConnell, Policeman."

Under this procedure, the defendant was tried, convicted and sentenced by the police justice to pay a fine of \$100. Having appealed to the superior court, defendant was there again convicted and sentenced to imprisonment for eighteen months, and assigned to work the public roads during his term. From this judgment, defendant, having duly excepted, appealed to this court.

W. P. Brown, for appellant. The Attorney General, for the State.

HOKE, J. While the statutes in this state are full and sufficient to cure all formal defects in the procedure incident to a criminal prosecution, the requirement remains that in any and every such prosecution, whether by indictment or warrant, either alone or in connection with the accompanying affidavit, the defendant shall be informed of the accusation against him; and this accusation must be set forth with sufficient certainty to enable the court to say what offense has been committed, and to know what punishment may be imposed in case of conviction. *Hendersonville v. McMinn*, 82 N. C. 533; Clark's Criminal Procedure, 150. At the time of this occurrence prohibition had not gone into effect in the city of Asheville; and, in order to constitute a criminal offense in that locality for a violation of either the state or municipal law, it was required that the sale of spirituous liquors should have been without license. The procedure, therefore, under which this conviction was had is fatally defective, in that it contains no allegation of a sale without license. *State v. Holder*, 133 N. C. 709, 45 S. E. 862. Again, while the warrant and accompanying affidavit give indication that the offense charged was for the violation of some municipal ordinance, the ordinance is not set forth or described, nor is it referred to in any way sufficient to identify it, and, for this reason, a prosecution cannot be sustained under it as an offense against a municipal regulation.

Referring to this position, as well as that first stated, in *McMinn's Case*, supra, Ashe, J., for the court, said: "The process under which the defendant was arrested is so defective in form and substance as not to warrant the judgment pronounced upon him in the court below. It should have set out the ordinance, but instead of doing so it charges the defendant with the violation of one of the ordinances of the town of Hendersonville

—prohibiting the sale of intoxicating liquors—implying that there was more than one ordinance of the town on that subject. Which did he violate? If it was intended to be a criminal prosecution, the warrant is the indictment; and every indictment must state the facts and circumstances constituting the offense with such certainty, that the defendant may be enabled to determine the species of the offense with which he is charged, in order that he may know how to prepare his defense, and that the court may be in no doubt as to the judgment it should pronounce if the defendant be convicted. Archb. Cr. Pl. 42, 43." Further, in *State v. Lytle*, 138 N. C. 738, 51 S. E. 66, we have held that, under certain circumstances, one and the same act or sale may constitute distinct offenses, the one being in violation of a state law, and the other of a town ordinance requiring a municipal license; and, if it be conceded that such a condition obtains here, on conviction under this warrant as it now stands, the court is unable to determine whether the punishment should be imposed for the one offense or the other, and therefore no valid judgment can be pronounced.

For the reasons indicated, we are of opinion that the judgment against the defendant should be arrested, and it is so ordered.

Judgment arrested.

(150 N. C. 655)

McMANUS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 19, 1909.)

1. NUISANCE (§ 72*)—"PUBLIC NUISANCE"—PRIVATE RIGHTS—SPECIAL DAMAGES.

The doctrine that a private citizen can only recover damages by reason of a public nuisance by showing some injury peculiar to himself, and differing in kind and degree from that suffered by the public generally, applies only to that class of nuisances which are, in strictness, public nuisances, without more—i. e., an unlawful interference with a public right, a right enjoyed by the general public, as in case of user of a public highway; but the doctrine does not obtain where the nuisance, though public from its extent and placing, by its very existence involves the invasion of the personal and private rights of individuals.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 6, pp. 5799-5804.]

2. NUISANCE (§ 72*)—EVIDENCE—"MIXED NUISANCES."

In nuisances of this second class, sometimes termed "mixed nuisances," an actionable wrong arises in favor of all persons who come within its effects and influence, and whose rights of person or property, are injuriously affected, and it is not required, to sustain such an action, that the person injured should establish damage different in kind and degree from others in like circumstances, however numerous they may be. The right of action in such case is sustained by showing the existence of appreciable damage to the plaintiff, whether such damage be special or otherwise.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 5, p. 4547.]

3. NUISANCE (§§ 4, 71*)—IRREPARABLE INJURY—NOMINAL DAMAGES.

To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irreparable injury is threatened; and, unless this is made to appear, a right to nominal damages does not arise.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. §§ 4, 71.*]

4. NUISANCE (§ 76*)—ACTION FOR DAMAGES—ISSUES INSUFFICIENT—JUDGMENT—NEW TRIAL.

In an action to recover damages for a "mixed nuisance," where the defendant answered, denying the existence of the alleged nuisance, and also denying that the plaintiff was the owner or lawful occupant of property adjacent thereto, or within its influence, and two issues were submitted—(1) as to the existence of the nuisance; and (2) as to the existence of special damages—and the verdict on the first issue established the existence of the nuisance and on the second issue negatived the existence of special damage, the plaintiff was not entitled to judgment on such a verdict, because no damage to him of any kind was shown to exist, and so far as appears he may not own any property adjacent to the nuisance or injuriously affected by it; nor should the defendant have judgment, for the reason that, in order to sustain his action for the alleged injury, plaintiff is not required to show special damage—that is, damage differing in kind and degree from others injuriously affected by the nuisance—but only that the nuisance exists and that he has suffered damage thereby. The two questions submitted, therefore, did not determine all the essential and issuable facts involved in the action, and the cause should be referred to another jury on issues adequate and fully determinative of the controversy.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 76.*]

Brown, J., dissenting.

Appeal from Superior Court, Mecklenburg County; Council, Judge.

Action by R. G. McManus against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

There was allegation, with evidence, on the part of plaintiff, tending to show that plaintiff was the owner of a dwelling house and tenement property adjacent to the Old Rock Quarry, in the city of Charlotte, and that:

"(3) In or about the year 1890 the said defendant, or its grantors, leased and let the said tract or lot of land in the city of Charlotte for the purpose of opening a rock quarry, and the said defendant has knowingly, carelessly, and unlawfully permitted, allowed, and tolerated its lessee, the city of Charlotte, to open up a rock quarry on said tract or lot of land, and to maintain a nuisance upon said premises, and is now permitting, allowing, and tolerating a nuisance to exist and to be maintained on said premises, as hereinafter set out in this complaint.

"(4) That the city of Charlotte, about the year 1890, commenced to open up a rock quarry on defendant's said tract or lot of land, and continued to so use said premises as a rock quarry until some time during the

year 1906, when it ceased to use said premises as a rock quarry.

"(5) That while operating the rock quarry on said premises the city of Charlotte used violent explosives, blasting the rock, throwing large pieces of rock upon the house of this plaintiff, which blasting of rock damaged plaintiff's dwelling by causing the plastering to fall from the walls, by making great holes in the roof, and by damaging the outside walls, the said excavation reaching within a few feet of the plaintiff's premises on South College street, and, at the time of ceasing to use said premises as a rock quarry a large and dangerous excavation was left open, said excavation being from 40 to 50 feet deep, and about 100 yards wide, and about 125 yards long; the said excavation being left exposed and unprotected.

"(6) That since the city of Charlotte abandoned the use of the rock quarry, the defendant has permitted water to collect and remain in said excavation from 5 to 30 feet in depth, much of the water being emptied from different parts of the city, which water in said excavation becomes stagnant, emitting an unwholesome odor, to the discomfort and annoyance of this plaintiff and his tenants.

"(7) That after the city abandoned the use of said rock quarry, the defendant permitted, allowed, and tolerated the city to haul and throw into said excavation street cleanings, rotten eggs, decayed fish, dead chickens, dead cats, and various other filth, and dead carcasses, from all portions of the city, which, together with the stagnant water, sent forth and emitted nauseous and loathsome odors, making the plaintiff's property almost uninhabitable, causing sickness, making the plaintiff's tenants to abandon the property, and greatly reducing the rental value of all the plaintiff's property.

"(8) That besides a good dwelling house, the plaintiff has on said lot a small dwelling house, and several other buildings for business purposes; and, on account of the nuisance allowed and permitted by the defendant on said adjoining lot, as above set out, this plaintiff has been unable to rent or get any substantial income from some of these buildings.

"(9) That the defendant is guilty of a wrongful and unlawful act in maintaining, permitting, and allowing said nuisance, above set out, to exist on its lot or tract of land, on account of which this plaintiff has suffered, and continues to suffer, special and peculiar damages, being an adjoining lot owner, and not only has he been damaged in his health, but he has been, and is, greatly damaged in his property rights and interests, in that the market value of his said property and the income therefrom has been greatly decreased and diminished on account of the maintenance of said nuisance—all to his great damage in the sum of \$2,000."

There was general denial on the part of defendant of the essential portions of the complaint, and evidence tending to support

same. On issues submitted, the jury rendered the following verdict:

"(1) Did the defendant maintain, or permit to be maintained, on the premises a public nuisance as alleged in the complaint?

"Answer: 'Yes,'

"(2) What special damages, if any, has the plaintiff suffered on account of said nuisance?

"Answer: 'Nothing.'"

On the verdict, both plaintiff and defendant having moved for judgment, the court signed judgment for plaintiff, ordering an abatement of the nuisance within 10 months, and defendant, the Southern Railway, excepted and appealed.

W. B. Rodman and Tillett & Guthrie, for appellant. Plummer Stewart and Burwell & Causler, for appellee.

HOKE, J. (after stating the facts as above). It is very generally held, uniformly so far as we have examined, both here and elsewhere, that in order for a private citizen to sustain an action, by reason of a public nuisance, he must establish some damage or injury special and peculiar to himself, and differing in kind and degree from that suffered in common with the general public. *Pedrick v. Ry.*, 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554. This limitation on a right of action, so expressed in many well-considered decisions, must be understood to apply in strictness where the wrong complained of consists in the unlawful interference with some public right, a right held by a plaintiff in common with all members of a community, and does not obtain when a public nuisance involves also the invasion of the private right of the litigant. In these cases a person who is injured in some substantial right of person or property is not deprived of his action because the wrong done is so extensive, and of such a character and placing, that it amounts to an indictable offense. This apparent exception may perhaps be referred to the more general rule, at first stated, by considering that any and all persons, who come within the sphere and influence of a nuisance to an extent that subjects them to an injury of the kind stated, suffer the special or peculiar damage required to the maintenance of an action by the individual. Mr. Wood, in his work on Nuisances, so treats the question (*Wood on Nuisances* [2d Ed.] § 16), referring cases coming within the exception to the head of mixed nuisances; public "in that they produce injury to many persons, or all the public, and private because at the same time they produce a special and particular injury to private rights, which subjects the wrongdoer to indictment by the public, and also to damages at the suit of the person injured."

The distinction to which we were adverting is very well brought out in the case of *Wesson v. Washburn*, 95 Mass. 95, 90 Am. Dec. 181, in which it was held: "Private Action for Nuisance General in Its Operation.—Action will lie against owners of a mill for in-

juring plaintiff's dwelling by shaking and jarring the same, and surrounding it with noisome odors and vapors, although all the other residents of that locality have suffered like injury. The rule that, where the right invaded or impaired is a common and public one, which every subject of the state may use and enjoy, an individual action does not lie does not apply to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their comfort destroyed, by the carrying on of offensive trades, or the creation of noisome smells or disturbing noises, no matter how extensive or numerous may be the instances of discomfort or injury to persons or property thereby occasioned." And in the opinion Chief Justice Bigelow, speaking to this question, said: "Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created, by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with, and in derogation of, the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree, but in kind, from that which is done to the whole public by the nuisance. But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place, and in such manner, that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

* * * The real distinction would seem to be this: That when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." See *Manufacturing Co. v. Railway*, 117 N. C. 579, 23 S. E. 43.

The nuisance established by the verdict on the first issue is of the kind considered in the opinion just quoted, and would give a right of action to any and all persons who come within its influence and effect, to the extent of suffering injury to their private rights, either of person or property; but plaintiff is not entitled to the judgment given him by reason of the verdict on the second issue, to the effect that no special damages have been suffered by plaintiff on account of the nuisance, and for the lack of any finding or fact established in the record showing that plaintiff has suffered either injury or damage of any kind done or threatened. There is evidence on the part of plaintiff tending to show both, but neither has been authoritatively established, and the court is not at liberty to infer or act upon it till this is done.

Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our state is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the court on the subject. *Revisal 1905, § 825; Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267; *Pedrick v. Railway*, supra; *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761, 65 L. R. A. 930, 102 Am. St. Rep. 555; *Manufacturing Co. v. Railway*, supra; *City of Raleigh v. Hunter*, 16 N. C. 12; *Tarboro v. Blount*, 11 N. C. 384, 15 Am. Dec. 526; *Railway v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739. But in wrongs of the kind presented here, not involving any physical interference with the personal or proprietary rights of another, a recovery cannot be had, even for nominal damages, by simply showing that a nuisance has been created or maintained; but plaintiff must go further, and show that it has injuriously affected him in some substantial right, or there is imminent danger that it will do so. Where the essential or issuable facts are referred to a jury for decision, and there are

no additional facts admitted in the pleadings, or otherwise, and none of the kind of which a court takes judicial notice, the judgment must follow as a conclusion of law upon the verdict. In the case before us the defendant in its pleadings has denied that plaintiff is the owner of any property adjacent to this alleged nuisance, or that any property of his is injuriously affected thereby; and, while a perusal of the evidence discloses that no debate was made on that point in the trial below, the court, as stated, is not at liberty, in a case of this kind, to act upon the evidence, but can only award or refuse relief upon facts established in some authorized way, and, so far as appears, there are no facts so established which show that plaintiff's property comes within the influence and operation of the alleged nuisance, and no damages, special or otherwise, have been shown which in any way affect him.

Nor do we think that defendant is entitled to judgment on the verdict as rendered, for the reason that the issues are not fully responsive to the pleadings. As we have heretofore endeavored to show, the nuisance alleged in the complaint, and established by the verdict on the first issue, is of a kind and character which involves the invasion of the rights of all owners, or lawful occupants of adjacent property, whose individual rights are injuriously affected; and a right of action on any one of them is in no way impaired because the injury done him is the same, or similar in kind, to that of all others in like circumstances, however numerous. Such owner is not required to establish the existence of damage or injury special and peculiar in reference to the injury generally suffered by other adjacent owners who are similarly situated. As to them, therefore, or any one of them, the second issue imposes a greater burden than is required to establish an actionable wrong against the defendant; and in view of the kind of nuisance alleged and established, we are of opinion that the verdict is not sufficiently full and responsive to entitle either the plaintiff or defendant to judgment, in that it does not determine all the issuable facts embraced in the pleadings, and the cause should be referred to another jury. *Bryant v. Ins. Co.*, 147 N. C. 181, 60 S. E. 983.

For the error indicated, the judgment in favor of the plaintiff will be set aside, and the cause remanded that a trial may be had on issues determinative of the rights of the parties involved in the action.

New trial.

BROWN, J. (dissenting). I feel constrained to dissent from the opinion of the court because I am convinced that upon the issues as answered by the jury the action should be dismissed. One question only is presented: Can the plaintiff maintain this action on the complaint, answer, and verdict? In

his complaint the plaintiff alleges, in substance, that the defendant is maintaining a public nuisance in respect to a large abandoned rock quarry, in permitting the city of Charlotte to throw filth and refuse into it, whereby plaintiff is damaged. Why plaintiff does not sue the city of Charlotte is not stated. Upon the trial these issues were submitted by consent, without exception or objection, as being the only issues raised by the pleadings:

"(1) Did the defendant maintain, or permit to be maintained, on the premises a public nuisance as alleged in the complaint?"

"Answer: 'Yes.'"

"(2) What special damages, if any, has the plaintiff suffered on account of said nuisance?"

"Answer: 'Nothing.'"

The defendant moved for judgment dismissing the action. The court denied the motion, and defendant appeals, assigning such refusal as error. There is no other question presented upon this appeal.

A plaintiff cannot have judgment abating a public nuisance when the jury have found that he has suffered no special damage. The remedy is by indictment. *Pedrick v. Railroad*, 143 N. C. 496, 55 S. E. 877, 10 L. R. A. (N. S.) 554. Special damage is such damage as is not common to the public. *Pedrick v. Railroad*, *supra*. In regard to a public nuisance, Mr. Justice Connor says in that case: "It is elementary learning that no private citizen may sue therefor, unless he suffers some damage which is not common to the public; or, to express it affirmatively, he may sue by showing that he sustained some special peculiar injury, different in kind from the public." In *Manufacturing Co. v. Railroad*, 117 N. C. 587, 23 S. E. 43, the same principle is recognized as well settled in a learned opinion by Mr. Justice Avery, who says in opening: "The most interesting question presented by this appeal is whether the plaintiff in any aspect of the evidence has shown such special damage as would entitle him to redress by civil action for a public nuisance." This special damage, as the learned judge proceeds to demonstrate, need not be confined to one person. It must be unusual, extraordinary, but not necessarily singular. Mr. Wood says: "The rule is well established that no person can maintain an action (on a public nuisance) unless he sustains a special damage therefrom differing from that sustained by the rest of the public." Section 645, Wood on Nuisances. That this has been recognized law from the earliest times to the present is shown by an examination of text-writers and decisions too numerous to quote. *Coke Inst.* 560; *Williams' Case*, 5 *Coke*, 72; *Joyce on Nuisances*, 267-281; *Reyburn v. Sawyer*, 135 N. C. 336, 47 S. E. 761, 65 L. R. A. 930, 102 Am. St. Rep. 555. Not only do the averments of the complaint state facts which constitute a pub-

lic nuisance, but plaintiff admits it by consenting to the force of the first issue. That being so, and the jury having found that plaintiff suffered no special damage, it would seem that ordinarily the action would be dismissed without much controversy.

Although the plaintiff has not excepted or appealed, the court orders a new trial of the whole case because the issues submitted, it is said, are not determinative of the issues raised by the pleadings. And this is done *ex mero motu* by the court, although neither appellant nor appellee asks for it, and notwithstanding that the cause is before us solely upon the motion of defendant for judgment upon the issues. If defendant is not entitled to it, then the judgment, it seems to me, necessarily stands affirmed. There are two answers to the position of the court which appear to me to be conclusive. The first is that the form of the issues were agreed upon, and if they are not full enough, or if they are not properly worded, it is plaintiff's fault. He should have excepted and tendered others. This has been decided repeatedly. *Clark's Code*, § 395. In *MacDonald v. Carson*, 95 N. C. 377, it is held that where issues are submitted, a party cannot be heard to assign error that the court did not submit an issue on a particular question upon which he did not tender an issue. "It is too late," says Smith, C. J., "after the trial to complain that certain issues were not submitted to the jury, if they were not asked for in apt time." In the case at bar neither party complains of the issues submitted, and the form in which they are expressed are in strict accord with the precedents I have cited. But it is said by the court that, as these issues are not determinative of the issues raised by the pleadings, no judgment whatever can be rendered for either party. It is very singular that no such thought seems to have occurred to the counsel for plaintiff or defendant, both of whom were represented in this court by some of the ablest lawyers in the state. I am sure they, as well as the learned judge below, will be surprised to learn that the issues they all agreed upon are deemed so wholly insufficient that no judgment for either party can be rendered upon them.

There are only two questions or issues raised by the pleadings, one is the nuisance, and the other is the damage, and both were submitted to the jury. The court has not pointed out any other issues raised by the pleadings than those I have named. But the court says, in effect, that the damages are not to be confined to special damages, and that the plaintiff may recover judgment if he "has suffered either injury or damage of any kind done or threatened." While this proposition, I submit, is against all of our own precedents (*Pedrick's Case*, *supra*) yet, admitting it, the fact remains that an

issue in respect to damages was submitted, and the form of it was approved by plaintiff. If it was confined erroneously to special damages, it was plaintiff's own fault, and if he does not complain, why should this court find fault? Surely two issues as to damages should not have been submitted, but if an additional issue in respect to some other kind of damage was proper, it was incumbent on plaintiff to tender it.

It is perfectly evident that the learned and astute lawyers for the plaintiff framed the damage issue in its present form because their complaint specifies with care and particularizes the elements of damage, and each item thereof, and they constitute special damages only peculiar to this plaintiff within every known and accepted definition of that term. *Pedrick v. Railroad, supra*; *Mfg. Co. v. Railroad, supra*. It is universally held in this country that, where damages are specified in the complaint, the plaintiff can recover for no other; and all damages must be specially pleaded where, as in this case, they do not necessarily flow to the plaintiff from the wrong complained of. 5 Enc. Pl. & Pr. 733, and cases cited. In support of his averment that he is peculiarly injured by the nuisance the plaintiff alleges and testifies that he owns property near the rock quarry complained of; that his house was injured by explosions from blasting; that his property was made uninhabitable from nauseous smells, causing sickness to his tenants and himself; that the rental value of his property was reduced; and that, besides a good dwelling house, the plaintiff has on said lot a small dwelling house, and several other buildings for business purposes, and on account of the nuisance allowed and permitted by the defendant on said adjoining lot, as above set out, this plaintiff has been unable to rent or get any substantial income from some of these buildings. These are the only injuries plaintiff sustained, and they not only come within the definition of special damage peculiar to him but the plaintiff classifies them as such, for he sums up his catalogue of grievances in these words: "That the defendant is guilty of a wrongful and unlawful act in maintaining, permitting, and allowing said nuisance, above set out, to exist on its lot or tract of land, on account of which this plaintiff has suffered, and continues to suffer, 'special and peculiar damages,' being an adjoining lot owner, and not only has he been damaged in his health, but he has been, and is, greatly damaged in his property rights and interests, in that the market value of his said property, and the income therefrom, has been greatly decreased and diminished on account of the maintenance of said nuisance—all to his great damage in the sum of \$2,000." This court has repeatedly held that it will not interfere with the discretion of the trial judge

in shaping and submitting issues if opportunity is given to present evidence upon the issues raised by the pleadings. *Clark's Code*, § 396, and cases cited. Opportunity was not only given, but both plaintiff and defendant did introduce evidence under the issues submitted bearing upon each allegation of the complaint. In fact if my brethren will read the evidence, they will find that the whole of it is strictly pertinent to the issues submitted, and that there is none of it applicable to any other issue that could be logically framed as arising upon the pleadings. As no evidence was excluded by the court, we must assume that the plaintiff introduced all he had, and all that he could produce on another trial. We are not to assume that the judge erred in charging the jury as to what constitutes special damages, for there is no exception to the charge. Both sides seem contented with it and it is not before us.

The case of *Bryant v. Ins. Co.*, quoted in the opinion, is no authority here, for in that case no issue at all was submitted covering a material matter in dispute necessary to a decision of the controversy. Here the issue covering the question of damages framed by plaintiff has been submitted, which issue is peculiarly responsive to the allegations of the complaint, and the character of the evidence offered fits it exactly, and would fit no other issue.

The learned judge below and the 12 jurors had better opportunity to judge of the value of plaintiff's evidence than we have, and if the "12" erred in finding the second issue, the plaintiff seeks not to correct it by excepting and appealing, and why should this court undertake to do so? In no event, I submit, is the court justified in setting aside the findings already made and ordering a new trial. They should be permitted to stand, as no error has been assigned by either side affecting them.

If other additional issues are deemed essential and necessary to be determined before any judgment can be rendered for either party, then the court shall follow established precedents. In *McDonald v. Carson*, 95 N. C. 378, Chief Justice Smith says: "Where in the opinion of the court additional findings are necessary in order to do justice between parties, the case may be sent back for trial of additional issues." But in as much as every allegation of the pleadings and every word of the evidence are directly pertinent to the issues submitted, I fall to see the necessity for any further findings. To my mind it is plain that the jury have already passed upon the entire case, and under such circumstances for the court of its own motion to order a new trial appears to me, with entire deference for my Brethren to be at variance with the practice of the court.

(150 N. C. 628)

THRASH et al. v. COMMISSIONERS OF TRANSYLVANIA COUNTY.

(Supreme Court of North Carolina. May 21, 1909.)

EVIDENCE (§ 83*)—PRESUMPTIONS—REGULARITY OF ACTS OF PUBLIC OFFICERS—COUNTY COMMISSIONERS—COUNTY BOARD OF EDUCATION.

The presumption of law is in favor of the regularity of the act of a county board of education, approving a petition of freeholders for an election for the levy of a special tax in a special school district, and of the acts of the county commissioners in ordering the election and confirming the report of the judges of election; and the burden is upon one claiming the contrary to prove it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

Appeal from Superior Court, Transylvania County; Ward, Judge.

Action by J. M. Thrash and others against Commissioners of Transylvania County. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

W. B. Duckworth and George A. Shuford, for appellants. Shepherd & Shepherd and W. W. Zachery, for appellee.

CLARK, C. J. This was an action to impeach the validity of a local election for the levy of a special tax in a special school district, held under the provisions of Revisal 1905, § 4115, and the amendment thereto in 1907 (Pub. Laws 1907, p. 119, c. 835). The petition of the freeholders approved by the county board of education was regularly filed before county commissioners who ordered the election. The report of the judges of election was confirmed by the county commissioners. At the close of the evidence, his honor intimating that he would instruct the jury that, if they believed the evidence, the plaintiffs had not made out a case, they thereupon took a nonsuit and appealed.

The presumption of law is in favor of the regularity of the conduct of the authorities, and the burden was upon the plaintiff to show the contrary. *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797. A careful examination of the testimony causes us to concur with the judge below. There being no legal proposition involved, but merely an examination of the evidence, it can serve no purpose to recapitulate it.

No error.

(150 N. C. 736)

FREE v. CHAMPION FIBRE CO.

(Supreme Court of North Carolina. May 21, 1909.)

APPEAL AND ERROR (§ 999*)—REVIEW—VERDICT.

Where the jury under a correct charge accepted plaintiff's version of the facts, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.*]

Appeal from Superior Court, Haywood County; Gulon, Judge.

Action by J. Dan Free against the Champion Fibre Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

On issues submitted the jury rendered the following verdict:

"(1) Was plaintiff injured by the negligence of the defendant? Answer: 'Yes.'"

"(2) Did plaintiff by his own negligence contribute to his injury? Answer: 'No.'"

"(3) Did plaintiff voluntarily assume the risk? Answer: 'No.'"

"(4) What damages, if any, is plaintiff entitled to recover? Answer: '\$300.00.'"

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Smathers & Morgan, for appellant. W. B. Ferguson, J. W. Ferguson, and Frank Carter, for appellee.

PER CURIAM. In this case there was plenary evidence, on the part of plaintiff, tending to show that he was an employé of defendant company, engaged at the time in the proper performance of his duties, and was injured by reason of a defective equipment or appliance, disclosing a breach of duty on the part of defendant company, and that plaintiff himself was free from blame in the matter. The jury, under a correct charge, have accepted the plaintiff's version of the occurrence, and, under numerous decisions of this court, plaintiff's right of action is established. *Fearington v. Tobacco Co.*, 141 N. C. 80, 53 S. E. 662; *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69. The case, in many respects, is not unlike the one last cited, *Pressly's Case*, supra. It would serve no good purpose to write a minute and extended description of the machine and the defective appliance which caused plaintiff's injury, and we think it sufficient to say that we have carefully examined and considered the facts appearing in the record, and are of opinion that no error in the trial to defendant's prejudice was committed.

The judgment below is therefore affirmed. No error.

(150 N. C. 726)

STATE CO. et al. v. FINLEY.

(Supreme Court of North Carolina. May 21, 1909.)

1. DEDICATION (§ 63*)—ABANDONMENT—VALUATION.

Where streets and alleys in an incorporated town were mapped and laid out by a land company, but were never graded, and no lots facing upon them were sold, and the land company subsequently conveyed the lots to defendant by the acre for farming purposes and quitclaimed the streets and alleys to him, and the town commissioners passed an ordinance va-

cating such streets and alleys, and the town conveyed to defendant its interest therein, owners of lots in other parts of the town could not compel defendant to open up such streets and alleys.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

2. DEDICATION (§ 39*) — ACTION TO OPEN STREETS—DEFENSES—LACHES.

Defendant, having purchased in 1893, fenced the land and used it as a farm, and, the conveyance by the town having been made in February, 1897, the action to compel the opening brought in April, 1907, was barred by laches.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 77; Dec. Dig. § 39.*]

3. DEDICATION (§ 39*)—ESTOPPEL TO ASSERT.

Lot owners, seeking to compel defendant to open up streets and alleys conveyed to him by a land company in connection with the lots bordering such streets and alleys, are estopped to assert any right in such streets and alleys, where they either acquired their lots after the conveyance to defendant, or were officers and stockholders in the land company and parties to the conveyance to defendant.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 77; Dec. Dig. § 39.*]

Appeal from Superior Court, Wilkes County; Justice, Judge.

Action by the State Company and others against A. A. Finley to compel the opening up of abandoned streets and alleys. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

In 1890, upon completion of the railroad to a point opposite Wilkesboro, the Winston Land Company purchased the land around the new station and laid it off into lots, streets, and alleys, for a town. They made a map of the new town, which they procured to be incorporated as North Wilkesboro. The streets designated by the letters of the alphabet run east and west; B, C, and D running westwardly to Reddie's river. The streets named by number—1, 2, 3, and so on—run north and south. The town is laid off in the northeast angle formed by the junction of Reddie's river with the Yadkin. Lying between the town and these rivers, on the south and west of the town, is low bottom land suitable for farming and subject to overflow. No lots were ever laid off in this bottom land, save between B, C, and D streets, and no lots were sold west of an alley which was laid off 170 feet west of Tenth street. In 1893 the Winston Land Company laid off an alley 30 feet wide running from A to D streets 170 feet west of and parallel with Tenth street. It laid off the lots on this 170-foot strip lying between Tenth street and this 30-foot alley, facing these lots westwardly on Tenth street. All the land west of this 30-foot alley north of B street the land company sold to the defendant, by the acre, for farming purposes and quitclaimed the streets and alleys which had been laid out thereon. In February, 1897, the town commissioners passed an ordinance vacating the streets and alleys which had been laid

out by the land company on the land sold as above to the defendant, and in addition thereto the town executed a deed conveying to the defendant, whatever rights the town had in said discontinued streets and alleys. Upon these discontinued streets, lots, and alleys dwellings and manufacturing plants have since been erected. The streets, lots, and alleys, thus discontinued, had been surveyed, and laid down on the map; but the streets and alleys were never graded, and no lots facing upon them were sold. Upon the conveyance to the defendant in 1893 he fenced off his purchase. The plaintiffs are owners of lots in the other parts of the town, but all these lots except one were acquired by them after the sale to the defendant, and the owners of that lot are the heirs of W. M. Absher, who was a large stockholder and director in the Winston Land Company and in his official capacity party to the deed to the defendant. The only other plaintiffs are the State Company and the Deposit Bank, of both of which W. F. Trogden is president and owner of a majority of the stock. He was secretary, treasurer, and managing agent of the Winston Land Company, and as such was a party to the deed to the defendant. The summons herein issued April 30, 1907. On motion the action was dismissed as on nonsuit.

W. W. Barber, Louis M. Swink, F. D. Hackett, and C. G. Gilreath, for appellants. Manly & Hendren and Finley & Hendren, for appellee.

CLARK, C. J. This action is to compel the defendant to open the streets and alleys on the land sold to him, and is governed by *Church v. Dula*, 148 N. C. 262, 61 S. E. 639. This section of the proposed town was, it is true, laid off on the map; but it was cut off, conveyed to defendant, and fenced out before any of the streets and alleys were ever used, and no lot was ever sold in this abandoned section. The land company conveyed this section, including the proposed streets and alleys, to the defendant in 1893, and in February, 1897, the town authorities quitclaimed to the defendant any rights it might have to the streets and alleys in this abandoned and discarded "cut-off." This action began more than 10 years thereafter, April 30, 1907. The plaintiffs have slept on their rights, if any they had. *Staton v. Railroad*, 147 N. C. 428, 61 S. E. 455, 17 L. R. A. (N. S.) 949. Besides, the plaintiffs are in no situation to assert any equitable rights. All the lots they hold were acquired after the land company had conveyed this "cut-off" to the defendant, except one held by the heirs of W. M. Absher, who was a party, as an officer of the land company, to the deed to the defendant, and the other plaintiffs are two corporations, the president and owner of the majority of the stock in both of which companies (W. F. Trogden) was likewise an of-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ficer of the land company and a party to the conveyance to the defendant.

The judgment dismissing the action as of nonsuit is affirmed.

(150 N. C. 722)

BARKER v. DENTON et al.

(Supreme Court of North Carolina. May 21, 1909.)

PUBLIC LANDS (§ 164*)—DISPOSAL OF STATE LANDS—NORTH CAROLINA—TIME FOR PAYMENT.

Under Code, § 2766, providing that entries of land made in any one year shall be paid for on or before the 31st day of December in the second year thereafter, and all entries not thus paid for shall become void, the entry of land on November 16, 1904, does not lapse if payment is made on December 31, 1906, as the period for payment is computed from the year of the entry.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 164.*]

Appeal from Superior Court, Graham County; Ward, Judge.

Action by J. A. Barker against J. L. and C. T. Denton. Judgment for plaintiff, and defendants appeal. Affirmed.

A. S. Barnard, for appellants. Dillard & Bell, for appellee.

WALKER, J. The plaintiff, J. A. Barker, entered the land in controversy on November 16, 1904, and caused a survey thereof to be made, but did not pay the purchase money to the state until December 31, 1906, when a grant was issued to him. The defendants C. T. Denton and J. L. Denton entered the same land on December 7, 1906, and on January 5, 1907, the plaintiff, J. A. Barker, filed a protest against the issuing of a warrant of survey thereon as allowed by the statute. The court sustained the protest, and defendants appealed.

The question presented for our consideration is whether the entry of the plaintiff had lapsed when the defendants laid their entry. In other words, whether the plaintiff had until December 31, 1905, or until December 31, 1906, to pay the purchase money, and this depends upon the meaning of section 2766 of the Code, which is as follows: "All entries of land, made in the course of any one year, shall, in every event, be paid for, on or before the thirty-first day of December, which shall happen, in the second year thereafter; and all entries of land, not thus paid for, shall become null and void, and (the land) may be entered by any other person." The question was decided against the present contention of the defendants in the case of *Harris v. Ewing*, 21 N. C. 369. The court in that case construed the act of 1808 (*Haywood's Manual*, p. 200) which was substantially like section 2766 of the Code, the only difference being that, by the act of 1808, the purchase money was required to be paid

on or before the 15th day of December, while by section 2766 of the Code it is required to be paid on or before the 31st day of December. In other respects the two statutes are identical. In *Harris v. Ewing*, supra, the court, by Ruffin, C. J., said: "The act of 1808 (Rev. c. 759) enacts: 'As the standing law in the future, that entries made in the course of any one year shall be paid for on or before the 15th day of December in the (second) year thereafter.' Upon these words the period is not to be computed from the day of the entry, so as to make the price payable in the second December that may succeed the making of the entry. If that had been meant, it would have been easy to express it much more explicitly than it is. We think the year of the entry, and not the day, is the epoch from which the computation of the act begins. The 15th of December of the second year after the expiration of the year of entry is the time, as seems almost necessarily inferable from the words, 'made in the course of any one year,' which make 'thereafter' referable to that whole year, and not the particular day of that year. This construction is so obvious that its correctness was taken for granted by this court in *Nunn v. Mulholland*, 17 N. C. 381. If it were doubtful, the court would not be at liberty now to depart from it, as we learn upon inquiry at the executive offices that a similar one was adopted there upon the passage of Acts 1804, c. 653, and has been acted on ever since. A very clear wording could alone authorize a construction in opposition to one so long settled by the officers to whom the execution of the act is immediately confided, and under the annual practical sanction of the members of the Legislature, through whose hands, it is well known, their constituents remit a large portion of the purchase money due on entries. Our opinion, therefore, is that the plaintiff's payment was made in due time." This ruling was afterwards expressly approved in *Bryson v. Dobson*, 38 N. C. 138, and *Horton v. Cooke*, 54 N. C. 270, and has been understood to be the settled construction of this law. It is true that in several more recent cases there are some expressions indicating that the payment of the purchase money was required to be made under the Code on or before December 31st of the second year after the entry was made, but it is evident that the court or the judge speaking for it was not advertent to the phraseology of the statute, nor to the previous decisions of this court, in which it has been construed. The case upon which the defendants chiefly rely is *Wilson v. Land Co.*, 77 N. C. 445. It will be observed upon reading that case that the court cites *Plemmons v. Fore*, 37 N. C. 312, for the statement, which appears to be a dictum, that the money should have been paid by G. N. Folk,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the enterer, on or before December 31st of the second year after the entry was laid. Referring to *Plemmons v. Fore*, we find that the question was not presented in the case. The opinion in the latter case was written by Chief Justice Ruffin, who also wrote the opinion in *Harris v. Ewing*, which is cited by the learned Chief Justice in *Plemmons v. Fore* as the leading authority for determining the time within which the purchase money should be paid under the act of 1808. In the other two cases cited by the defendants—*Gilchrist v. Middleton*, 108 N. C. 705, 13 S. E. 227, and *Kimsey v. Munday*, 112 N. C. 816, 17 S. E. 583—the expressions upon which they rely were dicta contained in a casual reference to the statute without paying any special regard to its wording. We must adhere to the ruling of the court made in cases where the very question was presented and decided, and this requires us to affirm the judgment of the court below by which the protest of the plaintiff was sustained upon the facts as found by the judge.

Affirmed.

(150 N. C. 387)

STATE v. BROWN et al.

(Supreme Court of North Carolina. May 21, 1909.)

CRIMINAL LAW (§ 88*)—JURISDICTION—STATUTES.

Acts Gen. Assem. 1907, p. 856, c. 573, creating a recorder's court for the city of Winston, limits its jurisdiction to offenses committed within the city limits. The maximum term of imprisonment for larceny from the person is fixed by Revisal 1905, §§ 3500, 3506, at 10 years. *Held*, that the superior court, and not the recorder's court, has jurisdiction of a prosecution for larceny from the person, not shown to have been committed within the city limits.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 88.*]

Appeal from Superior Court, Forsyth County; Webb, Judge.

Ed. Brown and another were convicted of larceny from the person, and appeal. **Affirmed.**

Indictment for larceny from the person, of a pocketbook of the value of \$1. The defendants were convicted and moved in arrest of judgment upon the ground that the recorder's court of Winston had exclusive original jurisdiction of the offense charged in the bill. Motion overruled. Defendants appealed. This constitutes the only assignment of error.

J. S. Grogan, for appellants. The Attorney General, for the State.

PER CURIAM. The motion was properly overruled.

1. Acts Gen. Assem. 1907, p. 856, c. 573, creating a recorder's court for the city of Winston, limits the jurisdiction of that

court to offenses committed within the corporate limits of said city, and there is nothing appearing upon the face of this record showing that the offense was committed within those limits.

2. Larceny from the person, regardless of the value of the property, is neither a petty misdemeanor nor a felony the punishment for which cannot exceed one year under section 3506 of the Revisal of 1905. The punishment for such offense, under sections 3500 and 3506, may be as much as 10 years in the state's prison. Of this offense the superior court has exclusive jurisdiction.

Affirmed.

(150 N. C. 710)

LOVIN et al. v. CARVER et al.

(Supreme Court of North Carolina. May 21, 1909.)

1. PUBLIC LANDS (§ 164*) — DISPOSAL OF STATE LANDS—NORTH CAROLINA—EFFECT OF ENTRY.

Where a valid entry is followed by a survey and grant, a prior grantee, claiming under subsequent entry, will be declared to hold the legal title in trust for the subsequent grantee claiming under the first entry; but, if the entry is void for uncertainty, and is made definite by a subsequent survey, a grant based upon it will be valid as between the state and the grantee, but if the original entry is so vague that it does not give notice of the boundaries of the land, a survey without marking the lines or fixing the monuments could not afford such a notice.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 469, 470; Dec. Dig. § 164.*]

2. PUBLIC LANDS (§ 164*)—DISPOSAL OF STATE LANDS—NORTH CAROLINA—"FLOATING ENTRY."

An entry of lands in the office of the entry taker of a county, made in the following form: "A. L. Adams enters and locates 300 acres of land in said county and state in district ten, on waters of Little Santeetla creek, beginning on a chestnut tree and runs various courses for complements"—is a "floating entry," being vague and indefinite.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 470; Dec. Dig. § 164.*]

Appeal from Superior Court, Graham County; Ward, Judge.

Action by Will Lovin and others against R. Carver and others. Judgment for plaintiffs, and defendants appeal. **Affirmed.**

The facts, as stated in the record, are: One A. L. Adams, under whom plaintiffs claim, on February 6, 1901, laid the following entry in the office of the entry taker of Graham county: "A. L. Adams enters and locates three hundred acres of land in said county and state in district ten, on waters of Little Santeetla creek, beginning on a chestnut tree and runs various courses for complements." A warrant of survey was issued June 29, 1903, and the survey made September 12, 1903. A grant issued October 13, 1903. On February 16, 1903, one Jenkins, under whom the defendants claim, laid an entry No. 1,948, and on March 6, 1903,

another entry on land in said county. Both of these entries were surveyed, and land located June 23, 1903, and grants issued June 20, 1904. These entries were also vague and indefinite. It was admitted that the Jenkins' entries covered the land described in the Adams' grant. Plaintiffs had no notice of defendants' survey. Defendants claimed that plaintiffs held the legal title to the land in trust for them. An issue directed to this inquiry was submitted to the jury, and, under instruction of the court, answered in the negative. Judgment was rendered declaring plaintiffs to be the owners of the locus in quo, and removing the cloud from their title, etc. Defendants excepted; assigned as error his honor's instruction. Appeal.

A. S. Barnard and A. D. Raby, for appellants. John H. Dillard, for appellees.

CONNOR, J. It is well settled that, when a valid entry is laid, followed by a survey and grant, a prior grantee, claiming under subsequent entry, will be declared to hold the legal title in trust for the subsequent grantee claiming under the first entry. The decisions in our reports in which this doctrine is held are based upon the well-settled principle that one who lays an entry acquires an equity, or, as sometimes called, a right of pre-emption which, when followed by a survey and grant, ripens into the legal title. If, during the time intervening between the entry and grant, another lay an entry, and acquire a grant prior in date to the grant of the first entry, he shall hold the legal title as trustee for him. This is founded on the well-understood equitable doctrine that he who takes the legal title with notice of an equity takes subject to such equity. In *Plemmons v. Fore*, 37 N. C. 312, Ruffin, C. J., says: "An entry creates an equity which, upon the payment of the purchase money to the state in due season, entitles the party to a grant, and consequently to a conveyance from another person, who obtained a prior grant under a subsequent entry, with knowledge of the first entry." It is conceded that both entries were vague and indefinite, coming within the definition of a "floating entry." *Johnson v. Shelton*, 39 N. C. 85; *Munroe v. McCormick*, 41 N. C. 85; *Currie v. Gibson*, 57 N. C. 28; *Fisher v. Owens*, 144 N. C. 649, 57 S. E. 393; *Call v. Robinett*, 147 N. C. 616, 61 S. E. 578. It is also well settled that an entry, void for uncertainty, may be made certain and definite by a subsequent survey, and that a grant based upon it will be valid. *Harrison v. Ewing*, 21 N. C. 369; *Grayson v. English*, 115 N. C. 358, 20 S. E. 478. While this is true as between the state and the grantee, the question still remains open whether a survey of a "floating entry" will put a subsequent enterer and prior grantee upon notice. If the original entry was so vague and uncertain as to fail to give notice of the boundaries of the

land intended to be entered, we are unable to perceive how a mere survey, without marking lines or fixing monuments, afford any such notice. The statute did not, at the date of these entries or surveys, require that the survey should be recorded in the office of the entry taker. Merely running the lines, and making a map which the enterer could keep in his possession until he took his grant, certainly could not afford notice of boundaries of the land to be surveyed. The warrant to the county surveyor was no more definite, in its description, than the original entry—it could not be so. If by reason of the vagueness of the first entry no notice is given to a second enterer, who, in ignorance of such entry, proceeded to survey the land, pay his money, and takes a grant from the state, no equity can be invoked against him. He holds the legal title free from any claims of the first enterer. We, therefore, concur with his honor's instruction to the jury. By virtue of Acts 1905, p. 275, c. 242 (Revisal 1905, § 1722), a record of the survey is required to be made and kept in the office of the entry taker. This will give notice of all surveys, and the difficulty experienced by the defendants will not hereafter arise.

Upon a careful examination of the record we find no error.

(150 N. C. 631)

THORNTON v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 19, 1909.)

1. ADVERSE POSSESSION (§ 114*)—POSSESSION OF PLAINTIFF—EVIDENCE.

Testimony in an action for the burning over of land that R. was in possession of it for 50 years, and since then plaintiff, his widow, by tenants, and that L. occupies it as her tenant, is some evidence of possession, though subject to cross-examination as to what constitutes possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 114.*]

2. ADVERSE POSSESSION (§ 114*)—EVIDENCE.

There being abundant evidence that, at the time of the burning over of land for which plaintiff sues, she had actual possession of the land, and claimed it as her own, defects in her paper title do not necessarily bar recovery of damages.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 114.*]

Appeal from Superior Court, Burke County; Ferguson, Judge.

Action by E. C. Thornton, who was the widow of John Rutherford, against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The following issues were submitted:

"Were the woods, lands, timbered trees of the plaintiff, E. C. Thornton, set fire and burned over by the negligence and carelessness of the defendant, the Southern Railway Company, as alleged in the complaint? Answer: Yes.

"If so, what damage has the plaintiff sustained? Answer: \$900."

S. J. Ervin, for appellant. M. H. Yount and John T. Perkins, for appellee.

BROWN, J. There appears to be abundant evidence in the record to warrant the conclusion that the fire originated on the right of way of defendant, and was caused by sparks from its engine. There is also evidence that the right of way where the fire started was in a foul condition.

The assignments of error all relate to the title to the land which had been burned, and more particularly to the ruling of the court admitting in evidence the will of John Rutherford and the McPheeters grant. In the view we take of the case it is unnecessary to discuss those assignments.

There is ample evidence in the record tending to prove that at the time of the fire the land burned over was not only claimed by the plaintiff, but that she and her representatives were in the actual possession thereof. As a sample of the evidence, one witness testifies: "I have heard the description contained in the deeds and grants. I know the boundaries. I have known the land for 50 years. John Rutherford been in possession until he died, then his widow, Mrs. Thornton, ever since." Grant for 100 acres read. "I know where that land lies. John in possession of it all the time, and his widow, Mrs. Thornton, since, for fifty years. The McPheeters grant covers the home place—the residence of John Rutherford located on this tract. John Rutherford has lived on the place 50 years in my recollection. Since death Mrs. Thornton has had tenants on it. Walker Lyerly occupies it as tenant of Mrs. Thornton, and cultivates all that is fit for cultivation." That such testimony is some evidence of possession, although subject to cross-examination as to what constitutes possession, is held in *Bryan v. Spivey*, 109 N. C. 68, 13 S. E. 766, where the use and meaning of the terms are learnedly discussed by Mr. Justice Shepherd. There being abundant evidence to go to the jury that at the time of the fire plaintiff had actual possession of the land burned and claimed it as her own the alleged defective links in her paper title would not necessarily bar a recovery. As is said by Chief Justice Smith in the oft-cited case of *Aycock v. Railroad*, 89 N. C. 324: "But no harm has come to the defendant by the reception of the copies of the grants, since under the deed from Leak the plaintiff was in law in possession through his tenant of all the land described therein up to the boundaries, and, in the absence of other evidences, prima facie the owner, and he may recover for all the damage done to his possessory and proprietary rights." See, also, *Jackson v. Com-*

missioners, 18 N. C. 177; *Ruffin v. Overby*, 88 N. C. 369; *Osborne v. Ballew*, 34 N. C. 373; *Lamb v. Swain*, 48 N. C. 370.

Upon an examination of the record we find no reversible error.

No error.

(150 N. C. 678)

WHITE v. HANS REES' SONS.

(Supreme Court of North Carolina. May 19, 1909.)

JUDGMENT (§ 143*) — DEFAULT JUDGMENT — SETTING ASIDE—GROUNDS.

On a motion under Revisal 1905, § 513, to set aside a judgment for excusable neglect, it appeared that the case was called for trial on a designated date, and that the defendant failed to appear. Defendant and his counsel, a firm of three members, were notified by telegram that the case would be called on the next day. The partner having special charge of the case was too sick to attend, and defendant, having sufficient time to consult his counsel and attend court and at least move for a continuance, failed to attend. Held to justify a denial of the motion.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 143.*]

Appeal from Superior Court, Madison County; Ward, Judge.

Action by J. H. White against Hans Rees' Sons. From a judgment denying a motion to set aside a default judgment, defendants appeal. Affirmed.

Davidson, Bourne & Parker, for appellants. Gudger & McElroy, for appellee.

WALKER, J. This is a motion to set aside a judgment upon the ground of excusable neglect under Revisal 1905, § 513. It appears that the case was called for trial on Monday of October term, 1907, and the defendants failed to appear in person or by counsel. The defendants and their counsel, a firm composed of three members, who resided in Asheville, were notified by telegram that the case would be called at all events on the next day, Tuesday. The member of the law firm, who had special charge of the case, was too sick to attend; but no sufficient excuse is shown for the failure of the other two members of the firm to attend, nor does it appear why the defendants did not attend the court. On Tuesday the case was called and tried. Judgment was rendered for the plaintiff. The defendants at the same time moved to set aside the judgment, upon the very grounds now assigned, but did not prosecute their motion. There was an appeal at that time from the judgment, upon the merits of the case, to this court, which was dismissed here under rule 17 (39 S. E. vi). No further action was taken in the matter until August term, 1907, nearly a year after the judgment was rendered. The court overruled the motion of the defendants to set aside the judgment, and the latter excepted and appealed.

In no view of this case was there any excusable neglect. The attorney having special charge of the case was too ill to look after his clients' interests, but the defendants were in fault. They did not attend the court on Monday and received special notice that their case would be tried on Tuesday. Why did they not consult with their counsel and attend that session of the court and at least ask for a continuance of the case? They had sufficient time to do so. "The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business." Per Rodman, J., in *Sluder v. Rollins*, 76 N. C. 271. To the same effect are the cases of *Waddell v. Wood*, 64 N. C. 624; *Kerchner v. Baker*, 82 N. C. 169. As said by Dillard, J., in *Kerchner v. Baker*, supra: "The course of the defendant was not the care of an ordinarily prudent man in reference to his own personal interests, nor was it consistent with the proper deference and attention due from the defendant and every suitor to the known and orderly course and practice of the courts in the administration of the law." The defendants have lost their rights, if they had any to protect, by their own inattention and inexcusable neglect.

We have not deemed it necessary to set out all the findings of fact made by the judge, which would perhaps present the case more strongly against the defendants than those we have briefly stated. It is sufficient to say that the judge, upon his findings, committed no error in law in adjudging that the defendants' neglect was inexcusable.

No error.

(150 N. C. 866)

STATE v. BLACK.

(Supreme Court of North Carolina. May 21, 1909.)

1. CRIMINAL LAW (§ 1189*)—APPEAL—DISPOSITION OF CAUSE.

Where an excessive term of imprisonment was imposed on accused, he was not entitled on reversal to a new trial, but to be remanded for a legal sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3226; Dec. Dig. § 1189.*]

2. CRIMINAL LAW (§ 7*)—POWER TO DEFINE CRIME—ORDINANCES—CONFLICT WITH STATE LAWS.

A city ordinance, making an act a misdemeanor and imposing a punishment where the same act is a misdemeanor at common law and punishable under the criminal laws of the state, is void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 4; Dec. Dig. § 7.*]

Appeal from Superior Court, Buncombe County; Ward, Judge.

W. P. Black was convicted of keeping a disorderly house, and he appeals. Affirmed.

W. P. Brown, Thos. Settle, and Davidson, Bourne & Parker, for appellant. The Attorney General, for the State.

CLARK, C. J. The defendant, convicted in the police court of Asheville for keeping a disorderly house, appealed to the superior court. Upon a trial *de novo* he was found guilty by a jury and sentenced to 22 months' imprisonment. He presses but one ground of appeal in his brief, which is that by the charter of Asheville (Priv. Laws 1901, p. 268, c. 100, § 77) keeping a disorderly house in that city is a misdemeanor punishable by a fine not exceeding \$50 or imprisonment not exceeding 30 days.

If this exception were well taken, the defendant would not be entitled to a new trial, but to be remanded for resentence in conformity to law. *State v. Lawrence*, 81 N. C. 522; *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502; *State v. Austin*, 121 N. C. 622, 28 S. E. 861. If this had been an ordinance of the city, it would be void because it covers the same acts as are a misdemeanor at common law and punishable under the criminal law of the state. *State v. McCoy* (from Asheville) 116 N. C. 1059, 21 S. E. 690, and cases there cited. The offense for which the defendant was tried is an offense at common law and has not been repealed. Charter of Asheville, § 77 (chapter 100, p. 268, Priv. Laws 1901), does not purport to repeal it. Its object was evidently to make it an offense against the city in addition to being an offense against the general law of the state. Doubtless the idea was that it might thus be dealt with more promptly and efficiently than in the superior court, where the jurisdiction then lay; but there are no words in said section 77, indicating an intention to repeal it as a common-law offense within the limits of Asheville. It remained as before a common-law offense throughout the state. The defendant was tried and convicted under the common law. The above section 77 (if valid) was not pleaded below nor relied on either by the state or the defendant, and its validity is not presented.

No error.

(150 N. C. 668)

SUTTLE v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 19, 1909.)

1. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A passenger on a freight train, to which a passenger coach is attached, is entitled to the highest degree of care of which such trains are susceptible, and while the difference in the character and purpose of the trains should be given due consideration, in reference to their proper management, there is no relaxation as to the degree of care required towards a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1067; Dec. Dig. § 280.*]

2. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—NEGLIGENCE.

In an action for injuries to a passenger on a mixed train caused by giving the passenger coach a sudden and unusual jolt, evidence held to show the carrier's actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1307; Dec. Dig. § 318.*]

3. CARRIERS (§ 325*)—PASSENGERS—CARE REQUIRED OF PASSENGERS.

A passenger on a mixed train must exercise care commensurate with the increased dangers ordinarily incident to the management of such trains, but he is entitled to have his conduct determined in reference to such trains when properly managed, and he is not required to anticipate extraordinary dangers incident to the carrier's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1348; Dec. Dig. § 325.*]

4. CARRIERS (§ 347*)—PASSENGERS—CARE REQUIRED OF PASSENGERS.

A passenger on a mixed train who leaves his seat in the passenger coach to get a drink of water while the coach is standing still and cars are being shifted is not negligent as matter of law, but his negligence is ordinarily for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1402; Dec. Dig. § 347.*]

5. CARRIERS (§ 332*)—PASSENGERS—CARE REQUIRED OF PASSENGERS.

Where a passenger on a mixed train left his seat in the coach to get a drink of water while the coach was standing still, and while cars were being shifted, and at a time when there was no reason to expect that any harm would ensue, and no harm would have ensued if the trainmen had properly managed the train, the passenger was not guilty of contributory negligence precluding a recovery for injuries received by the coach receiving an unusual and sudden jolt by shifting cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1383-1384; Dec. Dig. § 332.*]

Appeal from Superior Court, Buncombe County; Ward, Judge.

Action by D. D. Suttle against the Southern Railway Company. From a judgment for plaintiff; defendant appeals. Affirmed.

The evidence tended to show that on or about October 8, 1905, plaintiff was a passenger on a mixed train of defendant company, a freight train having a passenger coach attached, from Shelby to Asheville, N. C., and while in the coach he was knocked down and seriously injured by a sudden and unusual jolt given by defendant's employes in shifting other cars of the train which had been detached. Speaking of the occurrence, the plaintiff testified, in part, as follows: "Q. Did you get hurt at any time while on that trip? A. Yes; we run out six miles to a little station called Washburn, and they stopped, and, after stopping, they cut the coach that I was in loose from the freight—it was a mixed train—and they were shifting some cars out, and, while my coach was standing there, I went to the water-closet to get some water, and just as I was in the act of getting hold of the dipper the freight struck the front end of the coach, and I was standing in about four feet of the corner post of the

water-closet, and that post struck me on the side of the head here, and the blood ran down, and there was the back of a seat right to my left and that was shelving towards me, and, when I fell, it bent my back over that, and from there I rolled over into the aisle, and I laid there about a minute and a half, and while I was down I could not move or speak. And there was one of the train hands in there working on his books, and, after I had laid there some time, he asked me if I was hurt, and I did not answer him—I could not answer—and, after I revived a little, I made an effort to raise my right arm up and could not move it, and then I took hold with my left hand and got hold of this seat in front of me and failed to do it, and then I asked him if he would help me up, and he came and helped me up, and as I went back to my seat I noticed most of the cushions off of the seats on the floor, and my seat was that way. The lick was so heavy that it had driven the seats from under the cushions, and many of the cushions were on the floor. After I got in my seat, I was sitting holding to the seat in front of me and they slashed into it again, and I hollered, and the flagman, or whoever it was that was in there with me, jumped up and ran out, and from that on there was no further trouble with the train. Q. You say they 'slashed' into it? A. I mean that the freight cars that were shifting, the cars that were making some change, and while I was standing— Q. You say that they 'slashed' into you. The jury don't know what that means. A. They backed into it with such force. Q. With how much force did they come back the second time? A. Equally as much as the first time or more." At the close of plaintiff's testimony defendant moved to nonsuit plaintiff, motion denied, and defendant excepted. Under a proper charge the question of defendant's responsibility was submitted on the three ordinary issues in actions of negligence: "(1) As to negligence of defendant causing the injury. (2) Contributory negligence on part of plaintiff. (3) Damages." There was verdict in favor of plaintiff, and, from judgment on the verdict, defendant excepted and appealed.

Moore & Rollins, for appellant. Adams & Adams, Frank Carter, and H. C. Chedester, for appellee.

HOKE, J. (after stating the facts as above). There has been no error committed in the trial of this case which gives the defendant any just ground of complaint.

Where a person has been received as a passenger on one of these mixed trains, whether in a passenger coach or caboose or a car temporarily fitted for the purpose, he is entitled to the highest degree of "care and diligence of which such trains are susceptible." While the difference in the character

and purposes of the trains may, and should, be given due consideration in reference to their proper management and control, there is no relaxation as to the degree of care required towards a passenger on the part of the company's employes, and for a breach of duty of the kind indicated the company may be held responsible. *Miller v. Railroad*, 144 N. C. 545, 57 S. E. 345; *Railroad v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Sprague v. Railway*, 92 Fed. 59, 34 C. C. A. 207; *Railroad v. Holcomb*, 44 Kan. 336, 24 Pac. 467. In *Sprague v. Railway*, supra, Goff, Circuit Judge, for the court, quotes with approval from *Railroad v. Horst*, supra, and in reference to this matter said: "The court below seems to have founded its conclusion on the fact that the plaintiffs were traveling in a caboose car, and not on a regular passenger train. But we are of opinion that as the defendant sold tickets to the plaintiffs to be used in said car, which was provided for the accommodation of passengers in general, the plaintiffs were entitled to demand and have of and from the defendant the highest possible degree of care and diligence, regardless of the kind of train they were on. A railroad company is liable for the negligence of its servants, resulting injuriously to its passengers, whether they are traveling in the luxurious cars of the modern train or in the uncomfortable caboose of the local freight; for in all such cases the law requires that the highest degree of care that is practicable be exercised. The reasons for this rule are well known, and are based upon wise public policy and the plainest principles of justice. The Supreme Court of the United States, in alluding to this matter (*Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898), said: 'Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains. The same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason in the nature of things why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. * * * The rule is beneficial to both parties. It tends to give protection to the traveler, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen. *Dunn v. Railway Co.*, 58 Me. 187, 4 Am. Rep. 267; *Tuller v. Talbot*, 23 Ill. 357,

76 Am. Dec. 695; *Railway Co. v. Thompson*, 56 Ill. 138.'"

This being the correct principle, a mere statement of the testimony above set out affords convincing evidence of negligence on the part of the defendant company causing the injury, and justifies the finding of the jury on the first issue. The defendant did not seriously contend that there was error in this respect, but it was earnestly urged that upon the entire testimony the court should have held as a matter of law that the defendant was guilty of contributory negligence barring recovery, and this on the evidence above stated, and the additional questions and answers appearing in the course of a long cross-examination, as follows: "Q. You know that the jolting and jars on a freight train are rougher than they are on a passenger train, don't you? A. I don't know about the couplings. Q. Did you ever see them handling the trains, the starting and the coupling? A. Yes; I know they are rough. Q. I ask you if you were not simply standing in that car, paying no attention when the coupling was made, and you fell over on the side? A. Of course, I was paying no attention, my coach being standing still, and I was struck and knocked down." There is doubt if this answer should be given any special significance on the subject, coming as it did in the midst of a prolonged examination in which the witness had placed the entire facts before the jury. Clearly the witness did not mean to say that he was at the time entirely unobservant of care for his own safety, but, in reference to the question and by fair intendment, he should be understood to mean that he was not noticing the coupling at the time, nor expecting to be knocked down by any such severe and unusual shock. Certainly he had done nothing to indicate any lack of care, for he had only gotten up to get a drink of water, and the jolt came just as he was getting hold of the dipper. In any event, the authorities are to the effect that getting up for this purpose in the usual way, and on a train of this character, does not import negligence as a matter of law. While a passenger on these mixed trains is held to a degree of care commensurate with the increased dangers which are ordinarily incident to their management, he is entitled to have his conduct weighed and his rights determined in reference to such trains when carefully and properly managed, and he is not required to anticipate such extraordinary and unusual dangers as are incident to the company's negligence. This is the rule as stated by Associate Justice Walker for the court in the case of *Marble v. Railroad*, 142 N. C. 557, 55 S. E. 355, in which it was held that: "(4) In taking passage on a freight train, a passenger assumes the usual risks incident to traveling on such trains when managed by prudent and competent men in a careful manner." And,

in reference to the question directly presented here, it is very generally accepted that standing up, under certain circumstances, or getting up from one's seat for a natural purpose, or going for a drink of water and the like, is not negligence per se, but the question should as a rule be referred to the jury under a proper charge. *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Burr v. Railroad*, 64 N. J. Law, 30, 44 Atl. 845; *Railroad v. Masterson*, 16 Ind. App. 323, 44 N. E. 1004; *Hutchinson on Carriers* (3d Ed.) § 1217. In *Tillett's Case* it was held: "(7) A passenger has a right to presume that the servants of the carrier will properly discharge their duties. Consequently one who enters a railroad passenger car is not guilty of contributory negligence because he fails to rush into the first seat he reaches, although he knows the train is about to be coupled." The case to which we were referred by counsel for the defendant (*Smith v. R. R. Co.*, 99 N. C. 241, 5 S. E. 896) does not conflict with the positions sustained by these authorities. In that case the plaintiff was held guilty of contributory negligence because from his own testimony it appeared that he had taken a position on the arm of the car seat, thus inviting the injury from which he had suffered. Whether in the present and improved methods of control and management of these trains this ruling would now obtain, a question to which we were invited by the argument of plaintiff's counsel, it is not necessary to determine, for in the case before us no such fact appears; the evidence showing that plaintiff, a passenger on defendant's train, got up in a natural way and went for a drink of water at a time when his car was at a standstill, and when there was not reason to expect that any harm would ensue, and when none would have ensued if defendant's train had been carefully and properly managed.

There is no error, and the judgment below is affirmed.

No error.

(150 N. C. 707)

MCCOLMAN v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. May 21, 1909.)

APPEAL AND ERROR (§ 1062*)—SUBMISSION OF ISSUES—HARMLESS ERROR.

Where, in an action against a carrier for damages from vexatious delay, the court submitted the issue of defendant's negligence and the issue of wanton and willful negligence and the single issue of damages, and the jury in answer to the first issue found that defendant was not negligent, plaintiff could not complain that the court erred in not submitting issues framed by him involving the issue of punitive damages.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

Appeal from Superior Court, Scotland County; Long, Judge.

Action by J. A. McColman against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The record discloses the following case: Plaintiff on July 5, 1904, entered into a contract with defendant company as "charterer" of an excursion train, consisting of one baggage car and not less than five passenger coaches, to be run from Gibson, N. C., to Wilmington, N. C., and return. The schedule was set out in the contract "subject to such changes as may be made necessary for the safe operation of the train by other train schedules of the company, and such unavoidable delays as may be occasioned by damages to the equipment of the company." The other provisions of the contract are not material to the decision of this appeal. The train was furnished in accordance with the contract and the excursion run on July 27, 1904. It seems that, by reason of the weight of the rails on the portion of the road from the main line to Gibson, it was necessary to use a light engine which was exchanged at Fayetteville for another of heavier weight. On the return trip, when the train reached Fayetteville, some difficulty was experienced in making the exchange and a delay occurred of some five hours from 11 o'clock p. m. until some time the following morning. The plaintiff alleged that the engine was defective and of insufficient capacity, that the cars were not supplied with water, and that in this and other respects the defendant company was guilty of reckless, wanton, and willful negligence, whereby he sustained large damages, etc.

The plaintiff in apt time requested the court to submit the following issues to the jury:

"(1) Did the defendant wrongfully fail to transport the plaintiff as alleged in the complaint?"

"(2) Was the failure to transport the plaintiff willful and wanton?"

"(3) What compensatory damages, if any, is the plaintiff entitled to recover?"

"(4) What exemplary damages, if any, is the plaintiff entitled to recover?"

The court declined to submit the issues, and the plaintiff excepted. The following issues were submitted to the jury:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?"

"(2) Was the plaintiff injured by the wanton and willful negligence of the defendant as alleged in the complaint?"

"(3) What damages, if any, has plaintiff sustained?" Plaintiff excepts. The jury responded to the first issue "No," and did not answer the second and third. Judgment

was rendered upon the verdict for defendant, and plaintiff excepted and appealed. The exceptions are discussed in the opinion.

Gibson & Russell, for appellant. McLean, McLean & Snow, for appellee.

CONNOR, J. The plaintiff noted a number of exceptions to the ruling of his honor upon the competency of testimony. They were not pressed on the argument, and we find no merit in them. It was conceded that plaintiff did not sustain any substantial damage other than inconvenience and discomfort. The portion of the charge to which exception was taken and pressed upon our attention is as follows: "The plaintiff must also show that he received injuries as the direct and proximate cause of the alleged negligence by the defendant. Has the plaintiff satisfied you, by the greater weight of evidence, that the defendant was negligent, and has he also satisfied you by the greater weight of evidence that as the result and proximate result of that negligence that he himself suffered the injuries of which he complains? If so, your answer to this issue would be 'Yes.' But, if he failed to so satisfy you by the greater weight of evidence, your answer to the first issue would be 'No.'" The learned counsel earnestly contends that if his honor had submitted the issues tendered by him, and the jury had found that defendant was guilty of a breach of the duty which it owed him as a passenger, he would have been entitled to nominal damages which would have entitled him to ask for punitive damages upon the theory that the negligence was willful and wanton. The difficulty which he encounters is found in the fact that upon a properly framed issue the jury acquit the defendant of any breach of duty or negligence. It is difficult to see how the question of punitive damages can arise when no cause of action is established. The plaintiff's rights and the defendant's duty are fixed by the terms of the contract, and this the jury finds has not been broken. This put an end to the action.

We have examined the record, and find no error.

(150 N. C. 689)

RIDDLE v. BRIDGEWATER MILLING CO.

(Supreme Court of North Carolina. May 19, 1909.)

1. JUSTICES OF THE PEACE (§ 44*)—JURISDICTION—AMOUNT DEMANDED—INTEREST.

Under Revisal 1905, § 1419, limiting the jurisdiction of a justice to a case in which the sum demanded, "exclusive of interest," does not exceed \$200, he has not jurisdiction where the demand is for \$200 and interest on a greater sum.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 166; Dec. Dig. § 44.*]

2. PAYMENT (§ 42*)—APPLICATION.

A payment must always be applied first to extinguish the interest, and then on the principal.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 121; Dec. Dig. § 42.*]

3. JUSTICES OF THE PEACE (§ 44*)—JURISDICTION—"DEMAND."

The "demand," what plaintiff could recover on the face of the summons, in the absence of defense, determines the jurisdiction under Revisal 1905, § 1419, limiting the jurisdiction of a justice to a case wherein the sum demanded does not exceed a certain amount, so that such demand being for a greater amount, and there being no remitter of the excess before the justice, he has no jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 157-172; Dec. Dig. § 44.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1973-1976; vol. 8, p. 7633.]

Appeal from Superior Court, Burke County; Ferguson, Judge.

Action by J. B. Riddle against the Bridgewater Milling Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Riddle & Huffman and J. T. Perkins, for appellant. Avery & Ervin, for appellee.

CLARK, C. J. This was a civil action, begun before a justice of the peace and dismissed on appeal in the superior court, upon the motion of the defendant for want of jurisdiction in the justice's court.

The complaint of the plaintiff as set out in the summons was "for the nonpayment of the sum of \$200, with interest on \$938.18 from 22d day of February, 1907, due by promissory note, being the balance unpaid, and demanded by said plaintiff." The demand for interest on a greater sum than \$200 defeats the jurisdiction of the justice. In *Hedgecock v. Davis*, 64 N. C. 650, where the interest is held to be "a mere legal incident," it is evident that interest on the jurisdictional amount of \$200, or less, is meant, and not on any sum in excess of \$200, and therefore that case has no application where interest on a larger sum is claimed. The constitutional limit of the jurisdiction of a justice of the peace in civil action founded on contract is "wherein the sum demanded shall not exceed \$200." Const. art. 4, § 27, and Revisal 1905, § 1419 (1) limits such jurisdiction in such cases "wherein the sum demanded, exclusive of interest," does not exceed \$200. This does not include interest on a larger sum. The note here was \$938.18. As the payment amounts to \$738.38, the interest should have been calculated and added to the principal, and the payment deducted, leaving the difference as a new principal. As this new principal was much in excess of \$200, it was necessary to remit such excess if the plaintiff desired to bring action before a justice of the peace. The plaintiff conceived the idea that he could avoid that re-

quishment by applying all the payment to the principal, leaving the balance due on principal \$199.80. He therefore sued for \$200 principal and interest on \$918.33." This was beyond the jurisdiction of a justice of the peace, who cannot adjudge recovery of interest on a sum greater than \$200. Besides, a payment must always be applied first to extinguish the interest, and the remainder only upon the principal. It is the "demand," i. e., what the plaintiff could recover on the face of the summons if there is no defense, which determines the jurisdiction. *Knight v. Taylor*, 131 N. C. 85, 42 S. E. 537; *Noville v. Dew*, 94 N. C. 45; *Allen v. Jackson*, 86 N. C. 321. There being no remitter of the excess before the justice, he had no jurisdiction, and the action was properly dismissed on appeal.

Affirmed.

(150 N. C. 674)

GARRISON et al. v. WILLIAMS et al.

(Supreme Court of North Carolina. May 19, 1909.)

1. PLEADING (§ 408*)—COMPLAINT—WAIVER OF DEFECT BY ANSWER.

Where a complaint states no cause of action, the defect is not waived by answering; but defendant may demur ore tenus, or the Supreme Court may take notice on its own motion of the insufficiency.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1366; Dec. Dig. § 408.*]

2. PUBLIC LANDS (§ 164*)—ENTRY—PROTEST—CONSTRUCTION OF STATUTE.

Code, § 2766, provided that entries of land made in the course of any year should be paid for on or before December 31st, which should happen in the second year thereafter, and all entries of land not thus paid for should be void and might be entered by any other person. Under section 2765, if the land was not subject to entry, any person claiming an interest therein could file a protest with the entry taker against the issuing of a warrant of survey thereon, and the entry taker thereupon certified the entry and protest to the superior court for trial of the issue of validity of the entry, but the protest was required to be filed within 10 days after the posting of notice of entry by the entry taker. *Held*, that the statute contemplated that the posting of notice of entry should be made, not by the enterer, but by the entry taker, and that the protest should be filed within the 10 days during which the notice of entry was posted; the provision for filing the protest being mandatory, and a condition annexed to the right of protest, not a statute of limitation.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 164.*]

3. PLEADING (§ 406*)—DEFECTIVE STATEMENT OF CAUSE—WAIVER.

In an action by a person who had entered public land against others alleged to hold under a subsequent wrongful entry to have them declared trustees thereof for plaintiff, a complaint alleged that on August 14, 1900, plaintiff duly entered the land in the entry taker's office, that on December 22, 1902, nine days before the time limited for plaintiff to take out her grant, defendants protested her entries, and thereby prevented her from having a grant issued during pendency of the proceedings to determine the validity of the protest, and that defendants ob-

tained the grants while the proceedings were pending. *Held*, that if it was necessary for plaintiff to allege that the notice of plaintiff's entry had not been seasonably given by the entry taker, so that the protest was filed in time, and she thereby prevented from obtaining her grants, her failure to do so would constitute only a defective statement of her cause of action, and, defendants having answered instead of demurred, they waived the defect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1374; Dec. Dig. § 406.*]

4. PLEADING (§ 211*)—DEMURRER ORE TENUS—NATURE.

The omitted allegation, if a defect, could not be availed of by a demurrer ore tenus, since such a pleading is only equivalent to a motion to dismiss after answering.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 472, 481; Dec. Dig. § 211.*]

Appeal from Superior Court, Burke County; Ferguson, Judge.

Action by Ida E. Garrison and others against Richard Williams and others. A demurrer to the complaint was sustained, and plaintiffs appeal. Reversed.

J. M. Mull and S. J. Ervin, for appellants. Avery & Ervin and Avery & Avery, for appellees.

WALKER, J. This action was brought by the plaintiffs for the purpose of having the defendants declared trustees for the feme plaintiff, Ida E. Garrison, of certain tracts of land described in the amended complaint, containing about 1,500 acres. She alleged: That on August 14, 1900, she duly entered said land in the office of the entry taker of Burke county; that in the year 1902 the defendant Richard Williams entered the same land, and his rights under said entry, if any, have passed to his codefendants with notice of the prior entry of the feme plaintiff; that on December 22, 1902, just nine days before the time limited for the feme plaintiff to take out her grant, the defendants protested her entries, and thereby prevented her from having a grant issued during the pendency of the proceedings to determine the validity of the protest; that while said proceeding was pending, and during the year 1904, the defendants caused grants to be issued upon the entry laid by the said Richard Williams and thereby acquired, though unlawfully, wrongfully, and fraudulently, the legal title to the premises; that the protest of the defendants was at August term, 1905, of the superior court decided against them, and the feme plaintiff thereupon, and within nine days after the rendition of the judgment of the court in the said proceeding, obtained warrants of survey and received grants from the state for the said lands. Answers were filed by the defendants denying the fraud alleged in the complaint and asserting title to the land in dispute. When the case was called for trial, the defendants demurred ore tenus to the complaint upon the ground that it does not state facts sufficient

to constitute a cause of action. The demurrer was sustained. The plaintiffs excepted and assigned the following errors: "(1) That the court permitted the defendants, who had filed an answer, to demur ore tenus to the amended complaint, when the cause was upon the calendar for trial and had been reached and called for trial. (2) That the court refused to tax the defendants with the cost of the witnesses subpoenaed and in attendance upon the court for the trial of the cause; the same being upon the calendar and having been reached and called for trial upon the pleadings. (3) That the court sustained the defendant's demurrer ore tenus and ruled that the amended complaint failed to state a cause of action. (4) That the judgment rendered was erroneous."

Disposing of the question of procedure in limine, we have repeatedly held that, where a complaint states no cause of action, such a defect is not waived by answering. The defendant may demur ore tenus, and furthermore this court may take notice, ex mero motu, of the insufficiency of the complaint in this respect. If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for, if he proves everything that he alleges, he must eventually fail in the action? *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874; *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621. Our decisions upon this matter are in strict accordance with the very letter and spirit of the law. Revisal 1905, § 478.

The real question in the case is whether the feme plaintiff was, in contemplation of the law, prevented by the action or conduct of the defendants, or any one of them, from obtaining grants, upon her entries, from the state. It was provided by Code, § 2766, which was in force when the entries of Mrs. Garrison were made, that "all entries of land, made in the course of any one year, shall, in every event, be paid for, on or before the thirty-first day of December, which shall happen, in the second year thereafter; and all entries of land, not thus paid for, shall become null and void, and may be entered by any other person." Revisal 1905, § 1731, makes a different provision and requires that all entries of land shall be paid for within one year from the date of entry, unless a protest be filed to the entry, in which event the payment shall be made within 12 months after final judgment on the protest, and, if the payment is not made within the said time, the entry shall be null and void and the land may be

entered by any other person. This case, of course, is governed by the law as contained in the Code. If the land was not subject to entry, any person claiming title to or an interest in the same, or any part thereof, was authorized to file a protest with the entry taker against the issuing of a warrant of survey thereon, and the entry taker thereupon certified the entry and protest to the superior court, where the issue as to the validity of the entry was tried, but the protest was required to be filed within 10 days after the posting of the notice of entry by the entry taker. Code, § 2765. It was evidently contemplated by the Legislature that the posting of the notice of entry should be made, not by the enterer, but by one of its officers, namely, the entry taker, and that the protest should be filed within the 10 days during which the notice of the entry was posted. This provision of the law we regard as mandatory. The protest must be filed within the time fixed by the statute. It is a condition annexed to the right of protest, and not a statute of limitation. The time for paying the purchase price and taking out a grant had not expired when the protest was filed. It does not appear by any allegation in the pleadings whether the entry taker ever posted notice of the plaintiff's entries. If it was necessary for the plaintiff to have alleged that the notice had not been seasonably given by the entry taker, so that the protest was filed in time, and she was thereby prevented from obtaining her warrant of survey and her grants, her failure to do so would constitute only a defective statement of her cause of action, and the defendants, having answered, instead of demurring, waived any such defect. They cannot avail themselves of the omitted allegation, if it is a defect, by demurring ore tenus, which is equivalent, to a motion to dismiss after they have answered. *Masten v. Marlow*, 65 N. C. 695; *Halstead v. Mullen*, 93 N. C. 252.

We need not now consider the question argued by counsel whether, in law, the protest delayed action on her part in perfecting her entry and procuring her grants, so as to entitle her to the relief she demands. We will decide that question when the facts of the case are before us. The complaint sufficiently alleges a cause of action, even if it is defectively stated, and is good as against a demurrer ore tenus or motion to dismiss under the circumstances of this case. The court erred in sustaining the demurrer.

Error.

(132 Ga. 672)

DARIEN & W. R. CO. v. MCKAY.

(Supreme Court of Georgia. May 15, 1909.)

1. EMINENT DOMAIN (§ 239*)—PROCEEDINGS TO TAKE PROPERTY—RELIEF AWARDED.

The jury, in the case of an appeal from the award of assessors in a statutory condemnation proceeding, have no authority to give compensation in anything but money. A verdict which awards the landowner a sum of money, and also reserves to him the privilege of moving improvements from the right of way sought to be condemned, is erroneous.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 239.*]

2. EMINENT DOMAIN (§ 239*)—PROCEEDINGS TO TAKE PROPERTY—VERDICT.

On appeal from the award of assessors in a statutory condemnation proceeding, the verdict should be for a given sum.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 239.*]

3. EMINENT DOMAIN (§ 239*)—PROCEEDINGS TO TAKE PROPERTY—EVIDENCE—ADMISSIBILITY.

The particular proposals and declinations of the respective parties in their unsuccessful negotiation to agree upon the amount of damages prior to the condemnation proceeding are irrelevant on the trial of an appeal from the award of the assessors.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 618; Dec. Dig. § 239.*]

4. TRIAL (§ 193*)—INSTRUCTIONS—INTIMATION OF OPINION.

A charge which intimates an opinion as to the amount of recovery, where the evidence is conflicting, is erroneous.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 193.*]

(Syllabus by the Court.)

Error from Superior Court, Liberty County; Paul E. Seabrook, Judge.

Condemnation proceedings by the Darien & Western Railroad Company against H. F. McKay. From the award of the assessors, McKay appealed to the superior court. From the judgment there rendered for McKay, the railroad company brings error. Reversed.

Hitch & Denmark, for plaintiff in error. Garrard & Muldrim, for defendant in error.

EVANS, P. J. Under the statutory proceeding to condemn a right of way for railroad purposes the assessors awarded the landowner, H. F. McKay, \$300 damages and the right to remove the house off the land condemned within four months. From this award McKay appealed to the superior court. The jury, on the trial of the appeal, returned the following verdict: "We, the jury, find for H. F. McKay the sum of \$700, with the right to move all his improvements off the right of way." The railroad company moved in arrest of judgment on the ground that the verdict was illegal and unauthorized by the pleadings, and also moved for a new trial. Both motions were denied, and exceptions taken.

1. The attack on the validity of the verdict is made both in the motion in arrest of judgment and in the motion for a new trial. At common law the usual mode of attack on an illegal verdict was by a motion for a venire de novo. Under our practice, a verdict of a jury which is illegal and void, and cannot be enforced, is a ground for granting a new trial. *Mitchell v. Printup*, 27 Ga. 469. So we will consider the legality of the verdict along with the other grounds of the motion for new trial.

One of the reasons assigned for its invalidity is that the verdict is not responsive to the issues, nor authorized by the pleadings. The notice of condemnation specified that the railroad company sought to condemn for railroad purposes a specifically described strip of land 150 feet in width. It appeared from the evidence that the improvement referred to in the verdict was a dwelling house which rests in part upon the land sought to be condemned as a right of way. The statute prescribes that the issue to be made and tried by a jury on appeal is "the value of the property taken or the amount of damage done." Civ. Code 1895, § 4678. The law contemplates that the verdict shall be for a definite sum, and the jury have no authority to annex any condition. See 2 *Lewis on Eminent Domain*, § 506. The notice of condemnation does not ask that the condemnor be permitted to pay the compensation to be awarded in any other way than in money. As soon as the assessors make their award, the railroad company, upon paying or tendering the amount awarded, may immediately proceed to use the property for railroad purposes; and this is so, even though an appeal be taken. Civ. Code 1895, § 4679; *Oliver v. Union Point, etc., R. Co.*, 83 Ga. 257, 9 S. E. 1086. If the landowner may be given by the verdict the right to remove his house, this would mean that he could move it in a reasonable time; and this privilege would be inconsistent with the condemnor's right to immediate possession. We think the verdict was void.

2. On the appeal from the award of the assessors the form of the verdict intended by the statute is the recovery of a gross sum, the amount of which is to be arrived at by a consideration of the various elements enumerated in Civ. Code 1895, § 4675. *Atlantic Coast Line R. Co. v. Postal Tel. Co.*, 120 Ga. 268, 48 S. E. 15.

3. The landowner was allowed to testify, over objection, that the testimony was irrelevant, that he tried to get the railroad company to remove the house, and it refused. The testimony was irrelevant. The issue to be submitted to the jury, in a case like the present one, is the value of the property taken and the consequential damages sustained; and proposals of the parties, and their declination, pending a prior unsuccessful negotia-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of settlement of the damages, are immaterial.

4. The court charged: "In order that there may not be any confusion, you can let your verdict state the full amount that you find, and the \$300 already paid can be deducted from the amount that you find." This charge is open to the criticism made that it was an intimation of opinion that the amount of recovery should exceed the amount awarded by the assessors and paid by the railroad company. There was evidence from which the jury could find a less amount, and the charge was therefore harmful.

Judgment reversed. All the Justices concur.

(132 Ga. 621)

CLARKE BROS. v. STOWE.

(Supreme Court of Georgia. May 13, 1909.)

1. REPLEVIN (§ 96*)—VERDICT—VALIDITY.

Suit was brought for the recovery of personality, which was alleged to be of the value of \$577.30, and the amount of hire claimed was \$100, with no other allegation of damages. The undisputed evidence showed that the value of the property at the time of the conversion was \$577.30. The pleadings of the plaintiff showed that at the time when the suit was brought the property was of the same value. Bail process was sued out in connection with filing the suit, and on failure of the defendant to give bond the plaintiff did so and received possession of the property. It did not appear that the plaintiff elected to take a money verdict alone. *Held*, that a verdict "for plaintiff for 125 with 7% interest," if construed as a verdict in favor of the plaintiff for the property and also for \$125 and interest, was not supported by the evidence, and in any event such verdict did not accord with the evidence, and in view of the pleadings and evidence was vague and uncertain.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 96.*]

2. TRIAL (§ 252*)—REQUESTED CHARGE NOT APPLICABLE.

Under the pleadings and evidence, the judge did not err in refusing to charge, on request, that "the plaintiff must clearly prove his title to the property in dispute, and if he cannot do this, whether such inability arise from mingling of the goods or any other cause, the verdict must be for the defendant."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

3. LOGS AND LOGGING (§ 3*)—LEASE—DESCRIPTION—SUFFICIENCY.

A timber lease, which authorized the cutting and manufacture of lumber and shingles for one year, but which contained no other description of the timber or land included in the lease, except "all that tract or parcel of land known as lot 162½ acres of lot 169 in the 6th district of Montgomery county, Ga.," was too vague and indefinite in point of description to be admissible in evidence as a muniment of title.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

4. NEW TRIAL (§ 132*)—BRIEF OF EVIDENCE—AMENDMENT.

Where a motion for a new trial was made, and thereupon an order was taken setting it for a hearing and allowing the movants 60 days

within which to file a brief of the evidence, "which may be approved at the hearing," and granting leave to amend the motion and brief of evidence up to the time of the hearing, which might be had in term or vacation, and where the movants within 60 days made a bona fide effort to comply with such order and filed a brief of the evidence, though it was not complete and perfect, on the hearing of the motion there was no error in allowing such brief to be amended and perfected; and if in the opinion of the presiding judge this could better be done by substituting for the brief which had been filed another which covered the same ground, with additions and alterations necessary to make it a complete brief, he could permit this to be done, without specifically referring in his order of approval to the brief which had first been filed, or requiring it to be incorporated or referred to in the substituted brief.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 132.*]

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; Paul E. Seabrook, Judge.

Trover by J. A. Stowe against Clarke Bros. Judgment for plaintiff, and defendants bring error, and plaintiff assigns cross-error. Reversed on main bill of exceptions, and affirmed on cross-bill.

W. L. Clay, for plaintiffs in error. Harry E. Dunwoody, for defendant in error.

ATKINSON, J. On the 6th day of November, 1906, J. A. Stowe brought an action of trover against Clarke Bros., to recover certain described pieces of sawn pine timber or lumber. The petition alleged that "the present value of said personality is five hundred and seventy-seven dollars and thirty cents (\$577.30)." On the 5th of November he had made an affidavit to obtain bail process. He stated that "the value of said property [is] five hundred and seventy-seven dollars and thirty cents (\$577.30), and the amount of hire claimed is one hundred dollars (\$100)." The defendants did not make bond, but delivered the property to the officer. On November 9th the plaintiff executed a bond in terms of the statute and received possession of the property. On the trial a verdict was rendered in the following words: "We, the jury, find for the plaintiff 125 with 7% interest, May 23, 1907." A motion was made for a new trial, which was overruled, and the defendants excepted.

1. The verdict which was found by the jury cannot be sustained. Counsel for the plaintiff contended that the evidence showed that at the time of the conversion in June the property was worth \$577.30; that testimony was admitted without objection that between the date of conversion and the time when the plaintiff obtained possession under the bail proceeding there had been a depreciation in value to the extent of \$125, and therefore that the verdict, in the light of the evidence, construed as finding for the plain-

tiff the property and in addition the sum of \$125 as damages on account of the depreciation, could be sustained. The plaintiff testified: "When they received it on the boom, it was worth \$577. When I gave bond and got it back, it was worth \$125 less. The market was down. It fell between the time they got it in August, and I did not get it till November." There was no evidence of a depreciation to the extent named between the beginning of the suit and the giving of the bond and obtaining possession by the plaintiff. The affidavit which he made in order to obtain bail was dated November 5th, and stated the value of the property to be \$577.30; and the petition which he filed (apparently on November 6th, as the process bears that date), stated that the "present value of said personalty is" \$577.30. He is bound by the admission in his pleadings, and cannot recover on the basis of a depreciation in value prior to and existing at the time of the commencement of the suit, in the face of his allegation showing that there was none. After the making of the affidavit to obtain bail the defendant did not give bond, and the plaintiff did so, and took possession of the property. See *Moomaugh v. Everett*, 88 Ga. 67, 13 S. E. 837. In the briefs of counsel for both parties the verdict was discussed as being a verdict in favor of the plaintiff for the property and also for \$125 and interest. So considered, we have shown that it could not be sustained. This is probably what the jury intended to find, as the undisputed evidence was that the value of the property was \$577.30, and no evidence refers to the sum of \$125 as being the entire value of the lumber, but only as the amount of depreciation in value, and also in view of the fact that the plaintiff had obtained possession of the property itself by giving bond. In view of these facts it is hardly probable that the jury intended to find 125 (dollars [?]) and interest as the entire value of the property which the plaintiff could recover. At any rate, the verdict is not adjusted to the evidence and in view of the pleadings and evidence it is vague and uncertain. It does not appear that the plaintiff elected to take a money verdict alone. What is here said in no way conflicts with the ruling in *Central of Ga. Ry. Co. v. Mote*, 131 Ga. 166, 62 S. E. 164, where, in a suit for personal injuries, the damages were laid at \$20,000, the evidence was sufficient to authorize a verdict for \$10,000, and the jury found for the plaintiff "the sum of ten thousand (10,000.00) and costs of suit," which was sustained as being a verdict for \$10,000.

2. One ground of the motion for a new trial complained that the court refused a request to charge the following: "The plaintiff must clearly prove his title to the particular property in dispute; and if he cannot do this, whether such inability arise from a mingling of the goods or any other cause, the

verdict should be for the defendant." The plaintiff carries the burden of making out his case by a preponderance of evidence; but it is stating the proposition rather strongly to inform the jury that he must "clearly prove his title." It was also not applicable to the facts of this case to instruct the jury in regard to the effect of mingling goods as stated in the request. Under the evidence there was no error in refusing to give this request in charge.

3. The defendants offered in evidence certain instruments for the purpose of proving title to the lumber in themselves. The first of these was executed by J. E. McAlum as party of the first part and Pitman, Claxton & Co. as party of the second part. It stated that the party of the first part, in consideration of certain rents to be paid and covenants to be performed by the other party, had "demised, leased, and to farm let, and by these presents does demise, lease, and to farm let, unto the said parties of the second part, to their heirs and assigns, all that tract or parcel of land known as lot 162½ acres of lot number 169 in the 6th district of Montgomery county, Ga.," with right of ingress and egress, to be used, worked, and operated for the purpose of manufacturing lumber and shingles for one year. The other papers were offered to show a chain of transfers carrying the rights covered by this lease down to the defendants. These instruments were excluded from evidence. The grounds of objection are not stated. One which might have been very properly made, and sustained, is that the description was too vague and indefinite to identify any particular property. Merely to mention 162½ acres of lot No. 169 does not indicate any particular part of that lot, or give any indicia by which the tract to which reference was intended to be made could be located. It does not appear whether McAlum only owned 162½ acres of the land lot, or that the tract sought to be conveyed was known by any particular name, or that there was any other circumstance or fact by which it could be located. *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691; *Tippen v. Phillips*, 123 Ga. 415, 51 S. E. 410. There may have been other good reasons for the rejection of this instrument; but this one appears to be sufficient. If this conveyance was inadmissible, the other writings, which were offered as transfers under it, were inadmissible for the same reason. Some of them were also objectionable for other reasons.

4. On the hearing of the motion for a new trial the respondent made a motion to dismiss it on several grounds. They all involve the proposition that, when the motion for a new trial was made, it was ordered that the defendants should have 60 days within which to file a brief of evidence, "which may be approved at the hearing," and that they should have leave to amend their motion and brief

of evidence up to the time of said hearing, "which may be had in term or vacation"; that within the 60 days thus allowed the movant had filed what purported to be a brief of evidence, but it was not approved by the presiding judge; and the respondent contended that it was not in fact a brief of evidence in compliance with the order, but was a mere skeleton brief. At the hearing a complete brief was tendered, and approved by the judge, and ordered to be filed as a part of the record, and he thereupon overruled the motion to dismiss the motion for a new trial. Complaint is made of this ruling by a cross-bill of exceptions. The first brief of evidence was filed within the time limited by the order, the terms of which did not require that it should be presented for approval or be approved within that time; on the contrary, an opportunity was allowed to amend the brief of evidence up to the time of the hearing. The presiding judge evidently thought that there had been a bona fide effort to comply with his order, and that the paper filed was not a mere skeleton or mockery of a brief, but was sufficient to be perfected by amendment. We cannot say that he erred in this. It was contended, however, that the brief originally filed was not perfected by additions and alterations, and then approved, but that a new and complete brief was substituted in lieu of it. If there was not a mere trifling with the order of the court, but such a brief was filed as authorized amendment and perfection, we perceive no reason why this result could not be reached by substituting a complete brief for an imperfect one, instead of erasing, altering, interlining, and adding to that which was originally filed. If, in the opinion of the presiding judge, a clearer and more consistent result could be reached than by using the original brief as a basis or as a part of a new brief, together with such additions or alterations as were necessary, no sound objection is presented against such a course. The point is covered by the decision in *Co-operative Mfg. Co. v. Andrews*, 105 Ga. 506, 31 S. E. 40 (2).

Judgment reversed on main bill, and affirmed on cross bill, of exceptions. All the Justices concur.

(132 Ga. 601)

DICKS v. ANDREWS.

(Supreme Court of Georgia. May 13, 1909.)

1. BANKRUPTCY (§ 434*) — PROMISE TO PAY DEBT—DISCHARGE—EFFECT.

A promise to pay a pre-existing debt, made by a bankrupt after his adjudication as such, but before his discharge, will not be impaired by a subsequent discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 861; Dec. Dig. § 434.*]

2. BILLS AND NOTES (§ 92*)—CONSIDERATION.

If a note was made and delivered to an attorney for his client, and delivered by him to

the client, being payable on its face to the attorney or bearer, the absence of a consideration between the attorney personally and the maker of the note would not affect its status, but the question would turn upon whether there was a valid consideration as between the client and the maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 167; Dec. Dig. § 92.*]

3. COMPOSITIONS WITH CREDITORS (§ 13*)—VALIDITY AND ENFORCEMENT OF AGREEMENTS FOR PREFERENCE.

If a bankrupt gave to one of his creditors a note for the balance of the debt due such creditor in excess of the amount which was to be accepted by creditors in a composition, in consideration that such creditor would join in the composition and not oppose it or its confirmation, and the transaction was withheld from the knowledge of the other creditors, such consideration would be illegal, and the creditor receiving the note could not enforce its payment by suit.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. § 26; Dec. Dig. § 13.*]

4. COMPOSITIONS WITH CREDITORS (§ 13*)—VALIDITY AND ENFORCEMENT OF AGREEMENTS FOR PREFERENCES.

If such an agreement for a secret preference was made, and a note was given in consideration and consummation thereof, it was not rendered valid by being signed before the composition, but dated in advance and left with another person to be delivered after the composition was completed, and so delivered.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. § 26; Dec. Dig. § 13.*]

5. TRIAL (§ 250*) — INSTRUCTIONS — APPLICATION TO CASE.

Under the facts disclosed by the evidence, it was error to charge that, if the jury believed that the debt of the creditor to whom the note was given was bona fide claimed to be a fiduciary debt—that is, one against which a discharge in bankruptcy would not be a protection—and that the attorneys of the bankrupt, in view of that contention, advised him to pay the debt as a fiduciary one, and that thereupon he signed the note, and the fiduciary character of the debt was the moving consideration, then the note was not illegal, but was valid.

(a) There was no evidence on which to base a hypothesis that the debt was in fact of a fiduciary character.

(b) The charge made the validity of the note depend upon whether there was a bona fide contention that the original debt was fiduciary in character, and whether this was the moving consideration for giving the note, and neither here nor elsewhere in the charge was the question submitted to the jury as to whether the note was given in consummation of an agreement for a secret preference to one creditor of the bankrupt, in consideration that he would join in a composition and not oppose its making or confirmation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Julia Andrews, administratrix, against J. J. Dicks. Judgment for plaintiff, and defendant brings error. Reversed.

B. B. McCowen, for plaintiff in error. Wm. H. Fleming, for defendant in error.

LUMPKIN, J. A suit was brought on a promissory note. The presiding judge held that the defendant's answer raised no issuable defense, and entered judgment against him. This judgment was reversed. 129 Ga. 756, 59 S. E. 782. On the second trial, the defendant amended his answer and set up several pleas. A verdict was rendered against him, a new trial was refused, and the case is again here for review.

1, 2. The ruling made in the first headnote is controlled by the decision in *Moore v. Trounstone*, 126 Ga. 116, 54 S. E. 810, where the case of *Thornton v. Nichols*, 119 Ga. 50, 45 S. E. 785, is considered and explained. The second headnote requires no elaboration.

3. The controlling question in the case is whether the consideration of the note was illegal, and therefore the note was uncollectible. The presiding judge charged the jury as follows: "I charge you that if you believe from the evidence that the debt due Andrews was bona fide claimed to be a fiduciary debt—that is to say, one against which a discharge in bankruptcy would not be a protection—and that the attorney of Dicks & Bro., in view of that contention, advised Dicks to pay the debt as a fiduciary one, and that thereupon Dicks signed the note sued on, and that the fiduciary character of the debt was the moving consideration, then the note in this case is not illegal, but is valid." Nowhere in his charge did he submit to the jury the question whether the note was given in consideration of an agreement under which Andrews was to receive a secret preference or advantage over other creditors who were parties to the composition in bankruptcy, or was delivered in consummation of such an agreement, although that question was raised by the pleadings and evidence. He made the entire case turn on whether there was a bona fide claim that the debt due to Andrews was of a fiduciary character, and whether, in view of that contention, Dicks was advised to give the note, and did so. There was no evidence whatever that the debt due by Dicks & Bro. to Andrews was in fact of a fiduciary character, within the meaning of the bankrupt law. Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428); *Bump on Bankruptcy* (11th Ed.) 71; *Id.* 691, 693. See, also, *Collier on Bankruptcy*, p. 229, § 17, par. 4; *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565. If the expression employed by the judge, "and that the fiduciary character of the debt was the moving consideration," referred to an actual fiduciary character, it was without evidence to support it. If it meant that a mere claim that the debt was of a fiduciary character, whether it was so or not, would render the note valid, without regard to whether the giving of a secret preference to one creditor over others, in order to carry through a composition, entered into the consideration, it was not a correct statement

of the law. Mere claims of a creditor, whether bona fide or not, that a debt is fiduciary in character, do not make it so. The charge left out of view a vital question in the case, and it was nowhere else submitted to the jury.

Section 12, par. "b," of the bankrupt act of 1898 provides that "an application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge." Paragraph "d" provides that "the judge shall confirm a composition if satisfied that * * * the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden." See, also, section 29. This contemplates the payment of debts which have priority, and the payment to creditors not having priority of the amount agreed upon in writing to be accepted by the creditors and approved by the court. Creditors claiming to have securities or priorities can only prove such debts and have them allowed, for the purpose of receiving dividends, for such sums as may seem to the court to be owing over and above the value of their securities or priorities. Bankr. Act July 1, 1898, c. 541, § 57e, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). The fiduciary character of a debt does not ipso facto create a lien. Fiduciary debts are not discharged in bankruptcy. But this is not a suit brought upon the original debt as being of a fiduciary character, and hence not discharged. It is a suit on a note, given for the balance of the creditor's claim in excess of the amount received by him under the composition. The debt appears to have been proved in bankruptcy as an ordinary debt, and the statement of "the consideration thereof" in making proof of the claim does not seem to have made reference to anything which would indicate that the debt was of a fiduciary character. Bankr. Act 1898, § 57.

In *Austin v. Markham*, 44 Ga. 161, it was held that "a promise to pay a debt due by an applicant to be declared a bankrupt, in consideration that the payee will withdraw his objections in the bankruptcy court to the discharge of the bankrupt, is illegal and void, and no action can be sustained on such promise." See, also, *Burgess v. Simpson Grocery Co.*, 128 Ga. 423, 57 S. E. 717; *Brown & Franklin v. Everett-Ridley-Kagan Co.*, 111 Ga. 404, 36 S. E. 813. In *Breck v. Cole*, 4 Sandf. (N. Y.) 79, a promissory note secretly given to the plaintiff, in addition to the composition notes, as an inducement to sign, was held void. In *Morrison v. Schlesinger*, 10

Ind. App. 635, 38 N. E. 493, an assignment was made by a debtor for the benefit of creditors, and a composition with the creditors arranged. One creditor, without the knowledge of the others who were unsecured, procured, in consideration that he should sign the composition, a guaranty securing his existing claim and providing for future credit. It was held that such a guaranty was unenforceable, both as to existing and subsequent indebtedness, and that the debtor himself might set up this as a defense to an action brought thereon. In *Willis v. Morris*, 63 Tex. 458, 51 Am. Rep. 635, it was held that, where a debtor had procured a composition from all his creditors, a note secretly given by him to one of them, for the balance of his debt, to induce him to join, was void and could not be enforced. In *Russell v. Rogers*, 10 Wend. (N. Y.) 479, 25 Am. Dec. 574, Nelson, J., said that "any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative." See, also, note to *Bank of Commerce v. Hoeber*, 88 Mo. 37, 57 Am. St. Rep. 359; In re *Chaplin* (D. C.) 8 Am. Bankr. Rep. 121, 115 Fed. 162; *Batchelder & Lincoln Co. v. Whitmore*, 122 Fed. 355, 58 C. C. A. 517; 6 Am. & Eng. Enc. Law (2d Ed.) 395.

"If the consideration be good in part and void in part, the promise will be sustained, or not, according as it is entire or severable, as hereinafter prescribed. But if the consideration be illegal in whole or in part, the whole promise fails." Civ. Code 1895, § 3662. If the consideration of the note was illegal, dating it as of a later date, or leaving it with an agreed person, to be held and delivered after the composition and consequent discharge, would not change the result. It is therefore unnecessary to discuss the question of the time when a promissory note takes effect—whether from the date of its signing or from the date of its delivery, or whether the doctrine of delivery in escrow and treating the final delivery as relating back to the date of the deposit applies to a note. Nor, in view of the facts of this case, is a question involved as to whether the doctrine of a bona fide purchaser of a negotiable note before due and without notice could have any application, under the stringent terms of the bankrupt act of 1898.

It was earnestly urged by counsel for defendant in error that courts are not inclined to aid one who sets up illegality in his own conduct. But, where a suit is brought, the law allows the defendant to set up such defense as is here made, and, if it is sustained by the evidence, to prevent a recovery, not as a matter of aiding him, but as a matter of upholding the mandates of the law. It may be doubted whether, under the evidence as it appears in this record, a recovery by

the plaintiff could be allowed to stand, had the case been submitted without error in the charge. But, as it was made practically to turn on a single question, and the important issue above discussed was not submitted to the jury, or passed upon by them, we deem it best to remand the case for a new trial, without ruling distinctly upon the evidence.

Judgment reversed. All the Justices concur.

(132 Ga. 630)

DIX v. DIX.

(Supreme Court of Georgia. May 13, 1909.)

1. JUDGMENT (§ 956*)—PAROL EVIDENCE AFFECTING WRITINGS—JUDGMENTS.

Where a year's support was set apart to a widow, and the judgment of the ordinary recited the return of the appraisers, the issuance of citation, and that "objections in the nature of a claim" were filed by a named person, and ordered that the objections be "disallowed" and the return of the appraisers be affirmed, in a subsequent suit by the widow against the person thus mentioned in the judgment of the ordinary, to recover personal property included in the year's support thus set apart, it was error to reject testimony that the ordinary did not in fact hear evidence on the subject of title, or pass upon that question, but refused to do so, because of lack of jurisdiction to adjudicate the question as a court and an unwillingness to act as an arbitrator, and that the property in fact belonged to the defendant, and not to the decedent before his death, or to his widow by virtue of the setting apart of the year's support out of her deceased husband's estate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1824, 1824½; Dec. Dig. § 956.*]

2. EXECUTORS AND ADMINISTRATORS (§ 194*)—COURT OF ORDINARY JURISDICTION IN PROCEEDINGS FOR WIDOW'S ALLOWANCE—TITLE TO PROPERTY.

A court of ordinary has no jurisdiction to try and determine conflicting claims of ownership of property, arising between a widow applying for the setting apart of a year's support and a person asserting title adversely to the estate of her deceased husband.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 714; Dec. Dig. § 194.*]

3. JUDGMENT (§ 660½*) — CONCLUSIVENESS—JURISDICTION.

If a court is wholly without jurisdiction of a given subject-matter, or power to pass upon issues in respect thereto, an attempted decision of issues on that subject is invalid, and will not operate as res adjudicata in a subsequent suit concerning the subject-matter in a court of competent jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660½.*]

4. ARBITRATION AND AWARD (§ 1*)—INVOKING DECISION OF COURT BEYOND JURISDICTION—EFFECT.

If, upon an application by a widow to have a year's support set apart to her, another person, who claims title to the property adversely to the estate of the decedent, files objections to the grant of the year's support, and mistakenly invokes a decision of the court of ordinary as to matters which it is without jurisdiction to hear and determine, this will not, by legal construction, be treated as the submission of the issue by consent to the ordinary as an arbitrator; and if the court of ordinary undertakes to decide an

issue as to which it has no jurisdiction, such decision will not be considered as the award of the ordinary acting as an arbitrator, merely because a question beyond the jurisdiction of the court to determine was raised and no objection was urged thereto by the other party.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 2; Dec. Dig. § 1.*]
(Syllabus by the Court.)

5. WORDS AND PHRASES—"DISALLOW."

The word "disallow" is defined by Webster's Dictionary to mean "to refuse to allow; to deny the force or validity of; to disown, or reject."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2082.]

Error from Superior Court, Liberty County; Paul E. Seabrook, Judge.

Suit by Mary E. Dix against Charles Dix. Judgment for plaintiff, and defendant brings error. Reversed.

Mary E. Dix brought suit against Charles Dix to recover certain personal property, which had been set apart to her as a year's support from the estate of her deceased husband. The defendant was a son of the deceased by a former wife. On the trial the plaintiff introduced in evidence the proceedings of the court of ordinary setting apart the property in dispute as a year's support for her. The pleadings are not set out in the bill of exceptions in the present case; but the judgment, which is copied in full, recites the return of the appraisers, the issuance of citation, and that, "objections in the nature of a claim being filed by Charles Dix, it is ordered that said objections be disallowed, and the return of the appraisers is hereby affirmed." The defendant offered evidence tending to show that the property in dispute formerly belonged to his mother, the first wife of the decedent, and was given to him, by her, and also that, on the hearing of the application for the year's support, when Dix filed objections in the nature of a claim, the ordinary refused to act as arbitrator, to hear evidence of title, or to pass upon the question of title, and that in fact he did not pass upon the question of title in that proceeding. The court rejected this evidence, held that the judgment of the court of ordinary, setting apart the year's support, was an estoppel, and directed a verdict for the plaintiff. The defendant excepted.

Donald Fraser, for plaintiff in error. Edwin A. Cohen and Shelby Myrick, for defendant in error.

LUMPKIN, J. The court of ordinary had no jurisdiction to pass upon a question of conflicting claims of titles on the hearing of the application for a year's support. His judgment does not show that he did so, but recites that, objections having been filed by Dix "in the nature of a claim," it was ordered that they be "disallowed." This was not a statement that the ordinary heard evidence

and passed upon the question of title. The word "disallow" is defined to mean "to refuse to allow; to deny the force or validity of; to disown or reject." Webster's Dictionary. It is often applied to a refusal to allow an amendment to pleadings, as indicating a holding, as matter of law, that such offered amendment is improper, and not that the judge heard evidence in regard to the allegations and passed upon the merits of them. Civ. Code, 1895, § 3743, provides that "parol evidence is admissible to show that a matter apparently governed by the judgment was really not passed upon by the court." We do not know of any case where this section could be more aptly applied than one where the court had no right to pass upon the question, ought not to have done it, and used language in his judgment which does not necessarily imply that he did so. The presiding judge erred in rejecting the evidence offered by the defendant.

The cases relied on by counsel for defendant in error, and those on which they are based, furnish a striking illustration of how an obiter dictum or inadvertent expression may sometimes acquire strength by repetition until it may be in danger of developing into a formal erroneous ruling. It is rudimentary law that parties cannot, by consent express or implied, give jurisdiction to a court; that as to the subject-matter the court is limited by the powers conferred upon it by law, and cannot be given additional power or jurisdiction by consent of the parties or by waiver; but that as to the jurisdiction of the person the point may generally be waived, so far as the rights of the parties are concerned, but not so as to prejudice the rights of third persons. Civ. Code, 1895, §§ 5079, 5080. The language in the latter part of section 5079 does not mean that parties can confer upon a court, by agreement or waiver, jurisdiction as to a subject-matter. That section was a codification of the pre-existing law, and it has been declared that it was the same in effect after the adoption of the Code as before that time. *Suydam v. Palmer*, 63 Ga. 546, 548. In *Towns v. Springer*, 9 Ga. 130, it was held that "a judgment rendered by a court without jurisdiction is a mere nullity, and may be so held wherever and whenever and in whatever way it is sought to be used as a valid judgment." In that case a rule against the sheriff was issued by the superior court, based on an execution which was returnable to the inferior court, and it was held that the superior court had no jurisdiction of the subject-matter. In *Central Bank of Georgia v. Gibson*, 11 Ga. 453, it was held that "when the court has jurisdiction of the person and subject-matter, and the defendant has some privilege which exempts him from the jurisdiction, he may waive the privilege, and in so doing will be bound by the judgment." In *Raney*

v. McRae, 14 Ga. 589, 60 Am. Dec. 660, it was said: "Parties, by consent, express or implied, cannot give jurisdiction to the court, as to the persons or the subject-matter. It may be waived, however, as to the person, so far as the rights of the parties themselves are concerned, but not so as to prejudice third persons." See, also, *Bostwick v. Perkins, Hopkins & White*, 4 Ga. 47; *Adams v. Lamar*, 8 Ga. 83 (3).

These cases were all decided before the adoption of the original Code, and show how the law was construed at that time. They are in substantial accord with the rulings in other jurisdictions. 11 Cyc. 673, 676; 17 Am. & Eng. Enc. Law (2d Ed.) 1057, 1060, 1061. Since the adoption of the Code the distinction between a privilege or right which a person may waive as against himself, though not against third parties, and an inability to confer jurisdiction over subject-matter upon a court by consent or waiver, has been generally recognized and applied. In *Smith v. Ferrario*, 105 Ga. 51, 53, 31 S. E. 38, *Simmons, C. J.*, said: "Consent of parties, however, cannot give a court jurisdiction of a subject-matter when it has none by law, and when this court discovers from the record that a judgment has been rendered by a court having no jurisdiction of the subject-matter, and the case is brought here for review upon writ of error, this court will of its own motion reverse the judgment." See, also, *Cutts v. Scandrett*, 108 Ga. 620, 34 S. E. 186. "A suit in a court having no jurisdiction of the subject-matter, resulting in a judgment for the defendant, is a nullity." *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396, 8 L. R. A. 189 (2). This has been the general trend of decisions in this state.

The case of *Wells v. Hawkins*, 130 Ga. 524, 61 S. E. 121, may apparently conflict with these rulings, in view of the fact that decisions which will presently be mentioned were there cited. But the conflict is apparent rather than real. There a statutory proceeding to foreclose a mortgage on realty was brought, and the mortgagor in his answer to the rule nisi set up, as cause why the rule absolute should not be granted, that a homestead had been set apart to him, as the head of a family, in the mortgaged premises, and the issue thus raised was tried and found against him. It was held that he could not subsequently prevent the sale of the land under the levy of the execution issued upon the judgment rendered in the foreclosure proceeding by an affidavit of illegality in which the sole ground alleged the setting apart of such a homestead in the land. The superior court is a court of general jurisdiction. It has jurisdiction of the subject-matter of foreclosing mortgages, and also that of determining whether a homestead is subject to a mortgage. Possessing power to deal with and decide both these questions, and thus having jurisdiction of both the parties and the subject-matter, though the more orderly

procedure might be to determine the matters separately, yet if a party by pleadings and evidence invokes and obtains, without objection, a ruling on both issues at once, he cannot afterward set up the same ground by affidavit of illegality. There is a wide difference between mere irregularity of procedure before a court of competent jurisdiction, and entire absence of jurisdiction. Moreover, the statutory proceeding to foreclose a mortgage by rule nisi and rule absolute may ordinarily be used instead of a proceeding by equitable petition to foreclose. Even before the Code it was held that when there was jurisdiction of the person and subject-matter in the court in which the suit was brought, and where suit was brought at law for a matter more properly cognizable in equity, and the defendant acquiesced in the proceeding on the law side of the court, without appealing to its equitable jurisdiction (the superior court having both jurisdictions), a judgment confessed by him would not be set aside after the lapse of five years. *Bostwick v. Perkins, Hopkins & White*, 4 Ga. 47. *supra*.

The court of ordinary is a court of general jurisdiction with respect to particular subject-matters; but it is not so in the sense of having jurisdiction generally over every possible subject-matter, question, or issue. Thus the Constitution provides that "the superior court shall have exclusive jurisdiction in cases of divorce; in criminal cases where the offender is subjected to loss of life, or confinement in the penitentiary; in cases respecting titles to land, and equity cases." Civ. Code 1895, § 5842. The superior court has concurrent jurisdiction of other subject-matters; and other courts have jurisdiction of particular subjects. Where the court of ordinary is without jurisdiction to deal with a particular subject-matter, or to make a decision in regard to it, an effort to do so is ineffectual; and this is true, whether want of jurisdiction of the subject-matter is urged before that court or not. *Craddock v. Kelly*, 129 Ga. 818, 825, 60 S. E. 193. In order for a year's support to be set apart to a widow, it should appear *prima facie* that the money or property sought to be set apart forms a part of the estate of the applicant's deceased husband. If, by way of illustration, a widow should state in her application for a year's support that the property sought to be set apart was never owned or claimed by her husband, and formed no part of his estate, that he had no interest in it, the application would be denied. But, where a *prima facie* showing is made by an applicant to have a year's support set apart to her from property forming part of the estate of her deceased husband, there is no provision of law by which third parties can file claims, or objections to the grant of a year's support in the nature of claims, and thus form an issue as to title, to be tried by the court of ordinary. That court is without jurisdiction to try or pass upon

such an issue. Suppose the property sought to be set aside for a year's support were real estate, under the constitutional provision above quoted how could the ordinary adjudicate the question of title between the estate of the decedent and a third party? If it were sought to have notes or choses in action set apart, to permit the apparent debtors to file objections on the ground that they did not owe the debts, and thus try the issue between the debtor and creditor, would be to give to the court of ordinary jurisdiction by consent or waiver which has not been conferred upon it by law. When property is set apart to a widow as a year's support, she receives just such title as her deceased husband had, and acquires no greater title by reason of the setting apart of the property to her.

The confusion which has grown up on this subject originated in regard to cases of setting apart homesteads. As far back as *Chambliss v. Phelps*, 39 Ga. 386, it was held that "a creditor, though his claim may be one of the exceptions provided for in the homestead act, cannot set it up to prevent the laying off of the homestead. Other conditions having been fulfilled, the homestead ought to be set off, leaving to the creditor his right to go on under the exceptions at his discretion." In *Harris v. Colquit & Baggs*, 44 Ga. 663, in which two judges presided, factors, who made advances to a person for the purpose of making a crop and took a lien thereon, foreclosed it, and the execution was levied upon a part of the property. The wife of the debtor applied to the ordinary and obtained an exemption of certain property, including that on which the levy was made. She interposed a claim. It appeared that the factors were represented by counsel before the ordinary, and no appeal was taken from his judgment setting apart the homestead. What questions were made before the ordinary did not appear. Under these facts it was submitted to the decision of the judge whether the property was subject to the execution. He held that it was, and this was assigned as error. The judgment was affirmed. It was held that "parties who appear before the ordinary to contest the granting of a homestead are concluded by the judgment upon all questions which it is necessary for the applicant to prove, and upon all questions which the statute provides the creditors may make; but they are not concluded upon questions over which the ordinary has no jurisdiction, unless it appears that they actually made such questions, and that they were in fact decided." The last clause was unnecessary to the decision of the case, and it was an obiter dictum to state what might have been the law on a different case from that before the court. In the opinion of McCay, J., he made use of a similar statement, saying: "The judgment concludes on all the facts necessary to appear before the court can give a judgment. But the title to the land, and whether, notwithstanding the judgment setting aside the homestead,

the debt of the objector may not still levy on it, is not an issue in the case, unless the parties actually make it and it is decided. In that case the parties have by mutual consent waived the objection to the jurisdiction, and a judgment binds them."

As it has already been held by this court that the question of whether a homestead, when granted, would be subject to a particular lien, was not only not a proper question for determination on the application for a homestead, but could not be made, and, if made, could not prevent the grant, clearly that portion of what Judge McCay said was obiter. Nevertheless, in *Patterson v. Wallace*, 47 Ga. 452, 455, a similar view was taken, and *Montgomery, J.*, said: "If the ordinary granted the homestead on demurrer, as it were, to the proof showing that the plaintiff's debt was created for the purchase money, thus declining to take jurisdiction of that issue, then the principle laid down in *Chambliss v. Phelps*, 39 Ga. 386, would seem to warrant the plaintiff in proceeding with his execution so far as the homestead may present an obstacle; but, if the ordinary decided that the debt was not created for the land, it would be *res adjudicata*." Inasmuch as it made no difference at all whether the debt was created for the purchase money of the land, and such fact formed no legal ground of objection, but the homestead would be granted, regardless of how that question might be decided, leaving the matter of subjecting the property for future determination by a court of competent jurisdiction, the statement that a decision of the question would be *res adjudicata* is not convincing. In *Gunn v. Petty-grew*, 93 Ga. 327, 20 S. E. 323, the only question made which was dealt with in the fourth headnote was as to the form of the verdict.

In *Smith v. Smith*, 101 Ga. 296, 28 S. E. 665, a year's support was granted to a widow, being set apart to her in a city lot. No objection was filed to the return of the appraisers, and it was duly recorded. After this three persons, who alleged themselves to be the children and heirs at law of the decedent, and to be in possession of the lot, entered what purported to be an appeal to the superior court. The widow filed an equitable petition praying for the appointment of a receiver. The judge of the superior court appointed a receiver *ad interim*. Before the trial the defendants dismissed their appeal from the judgment setting apart the year's support. The widow moved for a decree that the receiver deliver to her the house and lot and the accrued rentals, less the cost of the proceedings, as her year's support under the judgment of the ordinary, and that the petition abate and be dismissed. The court granted such a decree. That judgment was reversed. The decision necessarily rested upon this statement in the opinion: "Upon the plaintiff's voluntarily dismissing the petition in this case, the court should have passed an order restoring the status as it existed at

the time the court first sanctioned the application for a receiver. This would have placed the defendants in possession, would have turned over to them the rents which had been collected pending the case, and would have left the parties to their remedies at law to determine the question of title." It was, however, also said that "a judgment of the ordinary approving a return made by appraisers setting apart specified realty as a year's support did not, as against third persons claiming title to the property, but who had not filed with the ordinary any objection to the allowance of such return, adjudicate that the title was in the estate of the applicant's deceased husband." In the opinion Mr. Justice Cobb substantially reiterated the obiter dictum of Judge McCay, saying that "it seems that" a person filing an objection raising the question of title, and having it passed on would be concluded. He cited the case of *Harris v. Colquit & Baggs*, supra, and also *Newton v. Summey*, 59 Ga. 397, and *Robson v. Harris*, 82 Ga. 153, 7 S. E. 926. In neither of the last two cases was any question made as to the jurisdiction of the ordinary in regard to such issue. In fact, in none of the cases up to this point does the question of ability to confer jurisdiction by agreement appear to have been considered.

In *Durham v. Durham*, 107 Ga. 285, 33 S. E. 76, appraisers set apart to a widow and her minor children a year's support, consisting of an article of personalty, an account against a named person, and a one-half interest in described realty. The alleged debtor filed a caveat on the ground that the deceased did not own the property and the caveator did not owe the debt. A demurrer to the caveat, on the ground that it was in effect a claim to the property, and that the ordinary had no jurisdiction to pass upon the question of title thus attempted to be raised, was sustained by the judge, and the judgment was affirmed. It was said that the issues thus tendered, even treating the caveat as a claim to the realty and personalty set apart, were such as should have been determined elsewhere. Mr. Justice Cobb, who wrote the opinion, declared that the court of ordinary was without jurisdiction to try the question of title, and that therefore the demurrer to objections seeking to raise that question was properly sustained. It was unnecessary to go further, and discuss what might have been the result if no objection had been raised by demurrer, and what was said on that subject was obiter dictum. Nevertheless, the learned justice who prepared the opinion saw the anomalous situation arising from what had previously been said in some of the opinions, indicating that, although the court of ordinary had no jurisdiction of the subject-matter, it might be conferred by agreement or waiver, and endeavored to reconcile those statements with the law. He said: "Neither the ordinary nor the court of ordinary has, under

the law of this state, jurisdiction to try cases involving the title to property either real or personal, or to decide questions arising between the representatives of estates of decedents and persons who may be indebted to the same. Civ. Code 1895, §§ 4232, 4951, 5870. Parties may by consent submit such questions to the decision of the ordinary; but when this is done the decision made is not a judgment of the court of ordinary, but simply an award by the individual who is ordinary, as an arbitrator between the parties." And again, after referring to language used in some of the cases, which he stated was probably not entirely accurate, he said that the conclusion reached by this court in the case under consideration was not in conflict with those decisions. "That conclusion is that the court of ordinary has no jurisdiction to try questions of title to property; but if those questions are presented to the presiding officer of that court, and are passed upon without objection from either party, the decision rendered is binding upon the parties submitting the question to his judgment; not, however, because it is a judgment of the court of ordinary, but because he has a right as an individual, when parties consent thereto, to determine, if he sees proper, any question submitted to him."

As already stated, this was not essential to the decision of the case then under discussion. The language of the previous cases did not indicate any idea of the submission of the question to arbitration, but treated the matter as a waiver of objection to jurisdiction, apparently overlooking the inability to confer jurisdiction as to subject-matter on a court by consent or waiver. If the court had jurisdiction to try and determine the subject-matter, the judgment was binding. If it had not, the judgment was invalid, and had no binding force. Undoubtedly parties may submit questions to arbitration, and if they select an ordinary as an arbitrator, and he consents to act as such, there would seem to be no reason why an award by him would not stand like an award by any other arbitrator. But we cannot assent to the proposition that where the proceeding is one before a court of ordinary, and an effort is made to invoke a judgment of that court on a subject-matter over which it has no jurisdiction, the judgment rendered is to be treated as a void judgment for want of jurisdiction, but as a valid and binding award by an arbitrator. Arbitration is a matter depending upon consent and agreement to arbitrate, not upon merely proceeding to litigate before a court.

We have gone at some length into a review of the cases, because much reliance was placed upon the decision in *Durham v. Durham*, supra. A judgment granting an injunction against a claim for a year's support and dower, based on adverse title, has been reversed. *Burks v. Beall*, 77 Ga. 271, 3 S. E. 155. Whether an effort to prevent a cloud

from being placed on a title, without any justification therefor, would authorize equitable interference was not discussed.

Judgment reversed. All the Justices concur.

(132 Ga. 610)

CLARKE BROS. v. McNATT.

(Supreme Court of Georgia. May 13, 1909.)

1. SALES (§ 462*)—CONTRACTS (§ 35*)—CONDITIONAL SALE—SIGNING BY SELLER—SIGNING BY BOTH PARTIES.

Where a vendor of personal property delivers possession of it to the vendee, but receives from the latter a promise to pay a stipulated amount therefor and an agreement that the title shall remain in the vendor until payment has been made, it is not generally necessary to the validity of such a contract, as against the vendee or one purchasing under him, that it should be signed by the vendor.

(a) Where a contract on its face provides or shows that the parties intended for both to sign before it takes effect, it is not complete until both do so.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1350; Dec. Dig. § 462.* Contracts, Cent. Dig. § 177; Dec. Dig. § 35.*]

2. SALES (§ 472*)—CONDITIONAL SALES—PURCHASERS FROM BUYER—CHANGE IN TERMS.

Where a contract of sale of personal property, with the title retained in the vendor till payment of the purchase price, provided that the vendee might sell such property to a purchaser or purchasers, who should make the check or checks payable to the vendor, and that the latter should apply one-half to his vendee to pay for the expense of preparing and marketing the product, and such contract was recorded, if a purchaser from a vendee was affected with notice of such terms, as against him they could not be varied by the subsequent parol agreement between the original vendor and vendee under which one-half of the amounts received from sales of the lumber was not applied to the purchase price, but to another indebtedness of the vendee to a firm of which the vendor was a member for supplies furnished to the vendee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1371; Dec. Dig. § 472.*]

3. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—SALE OF PERSONALTY OR REALTY.

A contract of sale in regard to timber which is attached to the soil, but which is presently to be severed therefrom and converted into personalty before the title is to pass to the purchaser, is an executory sale of personalty, and not of an interest in land.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6, 7; Dec. Dig. § 3.*]

4. SALES (§ 473*)—CONDITIONAL SALE—CONDITIONS—PURCHASERS FROM BUYER.

If a vendor of personal property retains title under a written and recorded contract until payment of the purchase money, but it is also provided in such contract that the vendee may sell the property, consisting of lumber to be cut and carried to market, the vendor cannot impose on a bona fide purchaser or purchasers from his vendee, without notice of such limitations, other than the mere recording of the contract, the duty of seeing that he receives the proceeds of the sale or sales; nor, as against such a bona fide purchaser without notice, can he accomplish such result by stating in the con-

tract that the sales shall be made to a purchaser who will make the checks payable to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1384; Dec. Dig. § 473.*]

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; P. E. Seabrook, Judge.

Bail trover by James McNatt against Clarke Bros. Judgment for plaintiff, and defendants bring error. Reversed.

James McNatt brought an action of bail trover against Clarke Bros., seeking to recover two rafts of timber. The defendants denied the plaintiff's title to the property, and contended that it belonged to them. McNatt was the owner of certain timbered lands. T. P. McBride and W. D. Petersen executed and delivered to him the following written contract, which was recorded:

"State of Georgia, Montgomery County. This indenture and contract of lease, made and entered into this the 22d day of January, 1903, between James McNatt, of the first part, and T. P. McBride and W. D. Petersen, of the second part, all the parties of the county and state aforesaid, witnesseth: That for and in consideration of the sum of two thousand and thirty-six and $\frac{42}{100}$ dollars, to be paid as hereinafter provided, as the purchase price of all the sawmill timber on the following tract of land [describing it]. The aforesaid condition [consideration?] of two thousand and thirty-six dollars and $\frac{42}{100}$ is to bear interest at the rate of 8 per cent. per annum for the above date, and is to be paid as follows: The said parties of the second part hereby agree, in order to pay the aforesaid sum of two thousand and thirty-six and $\frac{42}{100}$ dollars and all interest that may accrue thereon at the said rate of 8% per annum, to cut, haul, and saw square all the sawmill timber on the land aforesaid, and when the same is ready for the Darien market then the same is to be sold to a buyer who will make the check payable to the said James McNatt, who hereby agrees to return to the said party of the second part one-half of the proceeds of said check, in order that the said parties may defray the expenses incurred by reason of preparing the said timber for market. It is further agreed by the parties to this contract that the said James McNatt reserves the title to the aforesaid sawmill timber and control and sale thereof until the purchase price aforesaid is paid. In order to further secure the aforesaid sum of two thousand and thirty-six and $\frac{42}{100}$ dollars we hereby mortgage and create a lien on the following personal property to wit: [Describing it.] It is further agreed that the above sum of two thousand and thirty-six and $\frac{42}{100}$ dollars, to become due and collectible in six months from the above date; and should we fail to pay the aforesaid sum

of two thousand and thirty-six and ⁴²/₁₀₀ dollars, we hereby constitute the said James McNatt our lawful authorized agent to sell said mules heretofore described and to execute titles thereto in our names after having advertised the same for ten days at the courthouse in Montgomery county, Ga., said county, and appropriate the proceeds to the payment of the aforesaid sum and all interest and costs that may accrue thereto. And we hereby waive and renounce for ourselves and families all the rights to the homestead or exemption laws which we may have under or by virtue of the Constitution or laws of the state of Georgia or of the United States, as against this note or any renewal thereof. In witness whereof we have hereunto set our hands and seals the day and year first above written. T. P. McBride. [L. S.] W. D. Petersen. [L. S.]

"Signed, sealed, and delivered in presence of W. L. Wilson, Com. N. P. M. Co., Ga.

"Recorded January 28, 1903. D. B. Graham, Clerk."

On this were entered four credits, of \$90.82, \$462.97, \$440.64, and \$366.67, respectively. McBride and Petersen cut timber from the property and caused it to be sold. Some of the drafts or checks given in payment were made payable to McNatt, and some to the order of McBride and Petersen. In order to carry on the business, McBride and Petersen purchased supplies from merchants, a large part of them from E. T. McBride & Co., which firm was composed of E. T. McBride and the plaintiff, McNatt. The plaintiff testified that that firm would not furnish McBride and Petersen with supplies until he agreed that the indebtedness due them should first be paid from the proceeds of the timber as cut and sold, and then the balance should be paid to him on account of the purchase price; he saying: "If anybody loses, let it be me." He admitted that \$2,037.42 had been by consent delivered to E. T. McBride & Co., and said that, after settling the account of that firm, he received certain payments for which he gave credit on the contract with McBride and Petersen. He testified that these applications of payments were made by agreement between himself, E. T. McBride & Co., and McBride and Petersen. He indorsed drafts which were payable to him. Finally Clarke Bros. bought the timber now in controversy from McBride and Petersen, and gave drafts which were not payable to McNatt. These drafts did not come into the hands of the plaintiff, and he sought to recover the timber. There was also testimony tending to show notice to Clarke Bros. of a claim to the property by the plaintiff. On behalf of the defendants there was testimony that the consideration for the entire timber had been paid to McNatt, and that nothing was due him on account of it when the sale was made to Clarke Bros. There was also evidence

conflicting in some respects with that of the plaintiff as to any agreed application of the proceeds of timber first to the account of E. T. McBride & Co. There was much other evidence which it is unnecessary to set out. The jury found for the plaintiff. The defendants moved for a new trial, which was refused, and they excepted.

W. L. Clay, for plaintiffs in error. E. J. Giles, Chas. M. Tyson, and Hines & Jordan, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1. Objection was made to the admission of the contract in evidence, on the ground that it was not signed by McNatt. Section 2776 of the Civil Code of 1895, on the subject of conditional sales, declares that "every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property." It is not required that the vendor as well as the vendee shall sign the written instrument. *Smith v. De Vaughn*, 82 Ga. 574, 9 S. E. 425. If the personal property is delivered into the possession of the vendee, the object is to provide a method of putting third parties on notice that the apparent title thus evidenced by possession is not in fact such, but that the title rests in the vendor until the condition of the sale shall be fulfilled. As against creditors or persons claiming under the vendee it does not require the signature of the vendor. The contract is in some degree analogized in the section of the Code to a mortgage. An instrument of the latter kind is signed by the mortgagor, and a bill of sale to secure a debt is signed by the debtor. If the property should remain in the possession of the vendor, and it were sought to set up notice as against his creditors or persons holding under him, a different question might be presented.

The instrument in the present case contains some indication that the vendor should have signed it, as agreements by him are stated in it; but in the latter part it apparently contemplates only the signature of the vendees. If a contract is intended to be signed by both parties, and so appears on its face, it is not complete until thus signed. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 126 Ga. 388, 55 S. E. 330, and citations. But as it is not clear that both vendor and vendees intended to sign the contract before it should become effective, and as both have acted under the instrument, and the lumber has been cut and sold by the latter, a failure of the vendor to sign will not be held to operate so as to convey complete title to the vendees, who did sign the instrument, which was duly attested and recorded.

2. The court charged the jury as follows: "If, however, notwithstanding the original agreement between McNatt and McBride and Petersen, [another was made] by the terms of which the original agreement in that respect was varied, and that McNatt should take the money, and did take the money received from timber sold by McBride and Petersen, and by their direction or consent applied it first to the extinguishment or partial payment of any debt due to McBride & Co., why McNatt would have the right to so apply it, if it was with the consent and direction of McBride and Petersen, and if he did so apply it, whatever portion was left after being so applied to the indebtedness of McBride & Co., the rest would be applied to the payment of the lien. You will ascertain how much has gone to the payment of the original price of the timber. If sufficient to discharge it, why, as I say, the plaintiff cannot recover. If not sufficient to discharge it, provided that you find that the subsequent contract has been satisfactorily proven, why then the plaintiff should recover, because his lien would still be in existence. He would have a right ahead of the rights of Clarke Bros., or any other purchaser of timber."

This charge was erroneous. If the reservation of title was good as against purchasers of the timber from McBride and Petersen, and if they were charged with notice of the contents of the contract, and the conditions and agreements contained therein, to allow those conditions and agreements to be varied as against them by a parol agreement between McNatt and McBride and Petersen would be substantially to allow a parol reservation of title instead of a written one. The nature of this contract of conditional sale will be considered later; but for the present it is enough to say that, if McNatt could rely on the written contract as affecting the rights of purchasers from McBride and Petersen, he could not also injuriously affect those rights by means of a subsequent parol agreement or understanding with his immediate vendee. Suppose that Clarke Bros. had bought enough of the timber to have paid the entire purchase price to McNatt after deducting what should go to the payment of expenses, and had made a check payable to McNatt in strict accordance with the terms of the written agreement between him and McBride and Petersen. McNatt could not, with the assent or agreement of McBride and Petersen, have applied such a payment to other indebtedness than the purchase money of the timber, and still have recovered the timber from Clarke Bros. Under the charge of the court above quoted, this would have been possible. That payments by purchasers from McBride and Petersen were made at different times, or that McNatt treated checks not made to his order as sufficient by accepting and applying them, would not

authorize him to insist on the terms of the written instrument as against purchasers from McBride and Petersen, even though bona fide and without notice other than such as the record of the paper might carry, and at the same time vary the terms of such instrument by parol agreement with McBride and Petersen, and set up the variance also as against the rights of such purchasers, who were not shown to have had any knowledge thereof or to have acquiesced therein.

The error contained in the charge above set out entered into several other portions of the charge which were made grounds of the motion for a new trial. It was not an ordinary question of application of payments between debtor and creditor, which could be controlled by agreement, or where in the absence of agreement the creditor could make the application, or in the absence of this the law would make it for the parties. Civ. Code 1895, § 3722. It was an effort to set up the strict terms of a written contract between the vendor and vendee, with reservation of title in the former, against third persons, but to bind such persons also by a departure from the contract. If McNatt received enough from sales of timber by McBride and Petersen to pay the purchase money in full in accordance with the terms of the written agreement, he could not set up as against third parties an agreed diversion of such purchase money to the payment of other indebtedness of McBride and Petersen to him or to the firm of which he was a member.

3, 4. It was urged that the verdict was contrary to law and evidence, because, under the undisputed evidence and under the written instrument which was introduced, McNatt was not authorized to recover. In *Jordan v. Jones*, 110 Ga. 47, 35 S. E. 151, where a landowner agreed with a laborer to allow the latter to cut timber from the land and transport and deliver the logs to a second person, who, by agreement, was to reserve from their sale a certain amount per thousand feet for the landowner, the contract was sustained, and it was held that the title to the logs did not pass to the laborer, and that when he abandoned the contract, and left on the land certain logs which had been cut by him, they were not subject to levy as his property. It was said that the contract was a peculiar one, and that the relation between the landowner and the laborer had some of the elements of an executory agreement, some of a partnership, some of a conditional sale, and some of a bailment. A contract of sale of growing trees concerns an interest in realty. *Corbin v. Durden*, 126 Ga. 429, 55 S. E. 30. An agreement for the sale of property attached to the soil, but which is to be severed therefrom and converted into personalty before the title to the property is to pass to the purchaser, is an

executory sale of personal property, and not of an interest in land. *Graham v. West*, 126 Ga. 624, 55 S. E. 931. Under these rulings, the contract now before us should be treated as dealing with personal property rather than with realty, at least as to the timber which was to be cut and sold. It was not a bailment, but a sale. It was not a method of paying persons, who should cut the timber and prepare it for market, for their services, as in *Jordan's Case*, supra.

Aside from legislative acts regulating conditional sales and their record, such sales have been productive of much litigation. Starting with the maxim that no one can convey a title which he does not own, a variety of modifications and limitations of its application have resulted from the conduct of the parties. It was at one time a subject of controversy as to whether an owner of personal property, who placed it in possession of another under a contract of conditional sale, and thus invested the purchaser with prima facie evidence of ownership, could assert his title as against a bona fide purchaser without notice from such person, or against a creditor of the person so intrusted. As to bailments, it was clear that the bailor could not be held to have lost his property by merely intrusting it to the bailee for a specific purpose. As to conditional sales, the view generally prevailed that, while possession of personalty was prima facie evidence of ownership, it was only prima facie so, and was subject to be rebutted by proving the actual title, and that therefore, where a conditional sale was made with reservation of title in the vendor until the condition should be performed, such as the payment of purchase money, the mere delivery of possession to the vendee, without more, did not destroy the right of the vendor to assert his title, even as against bona fide purchaser without notice from the vendee. But if the vendor went further, and conferred upon the vendee the actual or apparent right of sale, the right of a bona fide purchaser without notice would prevail. Thus in *Leigh v. Mobile & Ohio R. Co.*, 58 Ala. 165, *Brickell, C. J.*, said: "Another class of cases forming an exception to the general rule is when the owner, by his own act or consent, has given another such evidence of the right to sell or otherwise dispose of his goods as, according to the customs of trade or the common understanding of the world, usually accompanied the authority of sale, or of disposition. Then, if the person intrusted with the possession of the goods, and with the indicia of ownership, or of authority to sell or otherwise dispose of them, in violation of his duty to the owner, sells to an innocent purchaser, the sale will prevail against the right of the owner. He ought to bear the loss which may follow from his misplaced confidence,

rather than the bona fide purchaser, who relied on the evidence of property or of authority with which he clothed the possessor."

In 1 *Mechem on Sales*, § 601, it is said: "But the rule permitting the conditional vendor to retake his goods in case of default, even from a bona fide purchaser from his conditional vendee, very obviously should not, and does not, apply in those cases in which the goods have been delivered to the conditional vendee for the very purpose of being resold to such a purchaser, as where a retail dealer obtains goods from a wholesale dealer upon the agreement that the title to the goods as a bulk shall remain in the latter, but the retail dealer is impliedly, if not expressly, permitted to sell from the bulk in the usual course of trade. A sale of the goods in bulk might be deemed unauthorized and pass no title; but the retail purchaser in the usual course of business would, where such resales were expressly or impliedly authorized, obtain a good title, though the retail dealer might fail in paying for the goods." See, also, on the general subject, *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382 (a case involving a conditional sale of a car load of 20 wagons by a manufacturer to a dealer); *Columbus Buggy Co. v. Turley & Parker*, 73 Miss. 529, 19 South. 232, 32 L. R. A. 260, 55 Am. St. Rep. 550; *Fitzgerald v. Fuller*, 19 Hun (N. Y.) 189; *Ludden v. Hazen*, 31 Barb. (N. Y.) 650; *Wildner v. Wilson*, 16 Lea (Tenn.) 548; *Rogers v. Whitehouse*, 71 Me. 222; *Devlin v. O'Neil*, 6 Daly (N. Y. Com. Pl.) 305; *Brinton v. Gerry*, 7 Ill. App. 238; *McCombs v. Guild, Church & Co.*, 9 Lea (Tenn.) 81; *Pickering v. Busk*, 15 East, 38 (a case which has been thought to go quite far as to what would constitute an implied authority to sell); *Loving Pub. Co. v. Johnson*, 68 Tex. 273, 4 S. W. 532. Some of these authorities apply the rule in favor of creditors as well as bona fide purchasers.

Under our present law in regard to the execution of contracts of conditional sale (codified in section 2776 of the Civil Code), it is provided as follows: "Whenever personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid, and may be enforced, whether evidenced in writing or not." By section 2777 conditional bills

of sale are required to be recorded within 30 days from their date. This law provides for the making of a sale with reservation of title in the vendor until the purchase money shall have been paid, and that such contracts may be good, not only between the parties, but also against third parties, even innocent purchasers without actual notice, if they are executed and recorded in accordance with the statute. It does not provide generally for affecting the world with notice of all contracts of bailment, agency or partnership. A contract for the retention of title in a vendor until payment, though the possession of the chattel is delivered to the vendee, normally contemplates a lack of authority in the vendee to sell until payment, at least to sell more than such interest as he has. Authority to sell the entire title to a third party is inconsistent with its retention by the vendor. Where, therefore, a vendor, who reserves title until payment, confers upon his vendee the power to sell the chattel, he confers a power to destroy his retention of title.

Can a vendor of personalty, who retains title until payment of the purchase money, authorize the vendee to sell all or a part of the property, and impose upon the purchaser the duty of seeing that he is paid the proceeds of the sale? And will it bind a bona fide purchaser, without notice, from the original vendee, if such a provision is inserted in and recorded as a part of the contract of conditional sale? In *Guill v. Northern*, 67 Ga. 345, a deed conveyed land to the wife of the grantor for her use for life, together with her children, and provided that at her death it should be divided among the children. It contained a power in the wife "at any time in her discretion to sell and convey the said property by deed, provided the proceeds of such sale are invested in other real estate for the uses expressed." It was held that a bona fide purchaser from the wife acquired a good title, and was not bound to see to the application of the proceeds. In *Tucker v. Mann*, 124 Ga. 1003, 53 S. E. 504, one person executed to another a promissory note which contained a clause conveying to the payee the title to a certain mule as security. The payee had the note duly recorded. Before it was fully paid he authorized the debtor to sell the mule and turn the proceeds of the sale over to him. The debtor sold the mule, but failed to pay the proceeds to the creditor, and the latter brought an action of trover against the purchaser. The court charged that if the plaintiff gave the maker of the note permission to sell the mule, coupled with the condition that the maker was to pay him the money received from the sale, and the defendant bought the mule in good faith without knowledge of this condition, then the plaintiff could not recover, and that the defendant would not be required to see that the condition was complied with, and would get a good title to the mule regardless of it. This court held that the charge was not erroneous, and that,

the evidence showing the facts as stated, a verdict for the defendant was proper.

It will be seen that in the case of *Guill v. Northern*, supra, the recorded deed included the power of sale and conveyance, "provided" the proceeds should be reinvested. But this attempt to place the burden of seeing to the reinvestment upon the purchaser was held not to accomplish that result. In the case of *Tucker v. Mann*, supra, the recorded contract, in the nature of a bill of sale to secure payment of a debt, contained no power of sale at all. The debtor, therefore, had no authority to make any sale except such as was given him outside of the writing. The creditor undertook to make the authority to sell conditional upon his receiving the money. But this court held that, as against a bona fide purchaser without notice, he could not do so. In the case before us the effort was made to authorize the vendee in a conditional sale to prepare the lumber and carry it to a distant market and there sell it, but to impose on the purchaser substantially the duty of seeing that the original vendor received the proceeds. This was not stated in so many words, as in the two cases above cited; but the effort was made to accomplish the same result by saying that the vendees under the conditional sale might sell to a buyer who would make the check payable to the original vendor. The law does not contemplate that one who reserves title as security can authorize his vendee to sell the property, but charge a bona fide purchaser without notice with the duty of seeing that he received the proceeds; nor does the record of the contract of conditional sale convey notice to purchasers under the original vendee of any such duty or impose it upon them. If McNatt could, by inserting such a provision in his contract, make the validity of the title acquired by purchasers under McBride and Petersen depend on their making payment in the form of a check to him, there would seem to be no reason why he could not say that they would acquire title if they made payment in gold, or in bills of the denomination of \$100, or in any other form which he might think likely to reach him through the hands of the vendees whom he had authorized to make the sale.

It also appears from the evidence that McNatt did not require of McBride and Petersen a strict compliance with this portion of the agreement, even as between themselves, but recognized drafts or checks not payable to him as sufficient in sales of other portions of the lumber. It may be a question as to whether he did not waive a strict compliance, even as between him and his vendees. Whether Clarke Bros. were bona fide purchasers without notice, aside from the mere record of the contract, is a question of fact, and we deem it best to return the case for a trial upon the issues, under proper instructions from the court.

Judgment reversed. All the Justices concur.

192 Ga. 648)

HANSEN v. OWENS et al.

Supreme Court of Georgia. May 15, 1909.)

1. DEATH (§ 2*)—PRESUMPTIONS AS TO CONTINUANCE OF LIFE.

The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last heard of as living.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. DEATH (§ 2*)—EVIDENCE—SUFFICIENCY.

Where it is sought to raise a presumption of death by reason of the absence of a person from his known place of residence or domicile for seven years without being heard from, by the testimony of a witness who merely makes inquiry to lay the foundation for such proof, and who himself is not cognizant of any of the facts, the evidence must show that there has been an unsuccessful effort to find the absent person by search and diligent inquiry at his last known place of residence and among his relations or acquaintances, if any, and it must appear that the absent party has not been heard from for seven years or more by those who would be most likely to hear from him.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. § 2.*]

3. DEATH (§ 2*)—PRESUMPTION AS TO DEATH FROM ABSENCE.

Evidence of absence of a person from his original place of residence will not raise the presumption of death, where it appears that he has moved to another place and there located.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. § 2.*]

4. DEATH (§ 4*)—EVIDENCE.

Where a deed was executed by some of the children of a deceased person as his heirs at law, and it appears that there were other children and descendants of children, but it is sought to show that those who executed the deed inherited the entire estate by virtue of the death of the other descendants of the testator, presumed to arise from their absence unheard from for more than seven years, there must be some evidence as to their status when last heard from, in respect to their being married or having other heirs.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 5, 6; Dec. Dig. § 4.*]

5. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Although plaintiffs may claim the right to recover land by virtue of prescriptive title and prior possession, as well as on account of a paper chain of title, yet where it was necessary, in order to sustain such a chain, to show inheritance by certain persons from others, and the proof on that subject was inadequate at least as to some of them, a charge in reference to a presumption of death, which was not properly adjusted to the evidence and which was calculated to mislead the jury, was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

6. DEEDS (§§ 193, 199*) — SIGNATURE — PRESUMPTION OF GENUINENESS — EVIDENCE — ADMISSIBILITY — PRESUMPTION OF REQUEST TO SIGN.

If a deed purports to be executed in the presence of, and is attested by, an officer authorized to make such attestation and another witness, and is recorded, presumptively the signature is genuine; but this may be disproved, and the signature shown to be a forgery.

(a) Evidence that the person who purported to sign the deed could not write is admissible

for that purpose, and is for the consideration of the jury.

(b) In such a case, if the jury believed from the evidence that the person whose name appeared to be signed to the deed in writing could not write, and therefore did not in fact personally sign it, no presumption of law would arise that he had authorized some other person to sign it for him. One who sought to set up such fact would carry the burden of proving it. Atkinson, J., dissenting.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 562-573, 595-600; Dec. Dig. §§ 193, 199.*]

7. ADVERSE POSSESSION (§ 71*) — DEEDS (§ 111*)—COLOR OF TITLE—ESTATE CONVEYED — FRACTIONAL PART.

In order for a deed to convey perfect title, it must be signed by all the persons owning the land as tenants in common; but a deed which purports to convey the entire title may operate as color of title although it is not signed by all the owners, but as against the other owners it must be accompanied by adverse possession of such a character as would affect them.

(a) The deed from certain persons, purporting to convey as the heirs of Hiram Waller, deceased, did not on its face indicate a conveyance of a fractional part of the lot, or less than the whole.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71;* Deeds, Dec. Dig. § 111.*]

8. EXPENSES OF LITIGATION.

The evidence did not authorize a recovery in this action of expenses of litigation against the defendant.

(Syllabus by the Court.)

9. WORDS AND PHRASES—"SIGNATURE."

Ordinarily, to sign an instrument indicates the signing with one's own hand.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6508-6512.]

Error from Superior Court, Ben Hill County; U. V. Hill, Judge.

Action by John S. Owens and another against F. J. Hansen. Judgment for plaintiffs, and defendant brings error. Reversed.

Jay & Jay, Haygood & Cutts, and O. J. Wimberly, for plaintiff in error. E. W. Ryman and Edgar Latham, for defendants in error.

ATKINSON, J. John S. Owens and Edgar Latham brought an action against F. J. Hansen to recover certain land, together with mesne profits and expenses of litigation, including attorney's fees. They obtained a verdict for the land, and also for \$445 for expenses of litigation. The defendant moved for a new trial, which was overruled, and he excepted.

1-5. The plaintiffs relied on a paper chain of title coming down from the state to them, upon title by prescription, and upon prior possession. The state granted the land lot including the land sued for to Hiram Waller. One link in the chain of title set up by the plaintiffs was a deed from four persons, described as heirs at law of Hiram Waller, deceased, to E. H. Moore. In order to support the contention that their chain of title was

complete, it was necessary to show title from Hiram Waller. He did not make a conveyance to them; but they contended that he died intestate, and that they held a deed executed by all of the heirs of Hiram Waller. The date of his death does not appear; but there was testimony tending to show that he died in Bryan county, intestate, at the advanced age of 90 years, leaving surviving him three daughters and five sons, all of whom, at the time of the trial of the case, were claimed to be dead, except one son and one daughter. The dates of the death of those deceased nowhere appear. The deed relied upon by the plaintiffs as a conveyance by all of the heirs at law of Hiram Waller was executed in 1884, and was signed by only three of the sons and one daughter, who, it was contended, were the only sons and daughter of Hiram Waller then in life. The several sons and daughters who had died previously to that time had all been married and had had children; but the evidence does not disclose where they lived, or whether any of them survived their respective parents. Under these facts, it could not be said that the deed under which the plaintiffs claimed was the deed of all of the heirs of Hiram Waller. The evidence does not affirmatively show that the title of the deceased sons and daughters of Hiram Waller descended by inheritance to the surviving sons and daughters who executed the deed in 1884, or that the latter otherwise acquired the title of the said sons and daughters. See 14 Cyc. 100; *Skinner v. Fulton*, 39 Ill. 484.

In order to account for the descendants of Hiram Waller, other than those who signed the deed, and to raise a presumption of death of such descendants, one of the attorneys for the plaintiff testified that he went to Bryan county, and to Savannah, Chatham county, and undertook to locate all of the descendants of the children of Hiram Waller who had died before the deed was made by the four heirs to Moore in 1884; that he could not find anybody who had heard of them in years and years—he thought it was about 15 years since anybody had heard of where they were. A son and a daughter of Hiram Waller testified by interrogatories. The son testified that in 1884 two daughters and a son of Hiram Waller were dead, and that he thought another son, named James, was also dead, but did not know; that the deceased son first mentioned left three children living, whose names he gave; that one of the deceased daughters left four children, whose names he stated; that he thought that the other daughter had one or two children; that he did not know where any of these children "live now"—that is, at the time the testimony was delivered; and that James had no living children "in this country." The daughter of Hiram Waller, who was a witness, testified that in 1884 she and

three of her brothers were living; that "James went to California when he was 21, and has since been reported dead"; that one of her deceased brothers and two sisters had living children at the time of their death. Neither of these witnesses was asked as to the residence of the descendants of Hiram Waller when last heard from, nor did they testify that they had not heard from them within several years, or that they did not know what had become of them, except that the son stated that he did not know where they lived at the time of the trial. Neither was it shown that any inquiry had been made of these two witnesses, or of any particular person, or of what person or persons, to ascertain where these descendants lived, or what was their last known place of residence. In general terms, one of the attorneys for the plaintiffs, as above recited, stated that he had made inquiry in Bryan county, and in Savannah, and could not find anybody that had heard of them in about 15 years. Why the inquiry was made in Chatham county is not apparent; nor in Bryan county, except that Hiram Waller and some of his children seemed to have lived there. Whether those who had died leaving descendants continued to live there until their death, or whether their descendants ever lived there, was not proved.

The presiding judge on this subject gave the following charge: "I charge you, in connection therewith, that the death of a party is presumed by the law when he has been absent seven years without being heard from—absents himself. The absence means from the locality where such party has lived before, and is away from, and not being heard from means not heard from in the locality which had been his home and where he had lived; and wherever, under such circumstances, a party has not been heard from in seven years since last heard from, the law presumes him to be dead." As to James, it is not very clear whether he went to California and located there at some particular point as his home, or whether he merely went away. There was some evidence that it had been reported that he had died, and perhaps the testimony of his brother and sister might have authorized a finding as matter of fact that he was dead; or if he merely went abroad, and had not been heard from at his former home in more than seven years, this might raise a presumption that he was dead. But we are now dealing, not with the sufficiency of evidence to authorize a finding of the fact of death, but with the question of whether a presumption of death has arisen.

As to the other descendants of Hiram Waller there was no statement of reputed death in the family, but it was only as above set out. Under this testimony we think that the charge quoted was calculated to mislead the jury, and to lead them to infer that they might find that a presumption of death as to

all of the descendants of Hiram Waller, except those who signed the deed, had been raised. A presumption of death may arise where a person has been absent from his known place of residence or domicile for seven years without being heard from. In order to show that he has not been heard from by a witness who merely makes inquiry for the purpose of making proof which will raise a presumption of death, and who himself is not cognizant of any of the facts, the evidence must show that there has been an unsuccessful effort to find the absent person by search and diligent inquiry at his latest known place of residence and among his relations or acquaintances, if any; and it must appear that the absent party has not been heard from within seven years by those who would be most likely to hear from him. Mere absence is not sufficient to raise the presumption. A person may be absent from his home or from his last place of residence in this state for many years on business or for other sufficient reason, but he may have been heard of by his family or friends; or a person may move from one locality and establish a residence or domicile in another. Evidence of absence from his original place of residence will not raise the presumption of death, where it appears that he has moved to another place. *Gray v. McDowell*, 6 Bush (Ky.) 475; *Keller v. Stuck*, 4 Redf. Sur. (N. Y.) 204. See, on the general subject, *Cofer v. Flanagan*, 1 Ga. 538; *Adams v. Jones*, 39 Ga. 479; *Watson v. Adams*, 103 Ga. 786, 30 S. E. 577; 13 Cyc. 301.

Furthermore, the object of evidence introduced for the purpose of raising a presumption of death as to the descendants of Hiram Waller must have been to show that those of his sons and daughters who executed the deed to Moore acquired by inheritance a complete title to the land. In order to show this, it would be necessary for the evidence to indicate that they died under such circumstances as would make the four signers of the deed their sole heirs; they having died after Hiram Waller's death. If the descendants thus sought to be accounted for married or left children or other heirs, the four signers of the deed would not be the owners of the entire title by inheritance. There was no evidence at all as to whether the descendants referred to were married, or single, or childless when last heard from, or whether they still lived.

It was contended on behalf of the defendants in error that the evidence authorized a recovery of the land by them on the grounds of prescription and of prior possession; but, as above stated, they did not rely on those grounds exclusively. They also relied on the existence of a chain of title coming down to them under Hiram Waller through persons claiming to have inherited the entire land. As to this contention it was necessary that there should be some proper evidence and a proper submission of the question to the jury

so far as the evidence authorized. We cannot tell how far the jury may have been influenced in finding their verdict by the theory that the four persons who signed the deed as heirs of Hiram Waller thereby conveyed the entire title which he had acquired by grant from the state. The charge on this subject, which the court gave broadly, as above stated, was not warranted by or appropriate to the evidence in the case, and, under all the evidence, the error was substantial and harmful.

6. One ground of the motion for a new trial complains of the following charge: "I also charge you in that connection that wherever such an issue is made, and the jury should believe from the testimony, under the rules as I have given them, that if a particular grantor of the defendant could not write at the time the deed was made—is alleged to have been made—and the jury should further find from the evidence that the deed so attacked as having been alleged to have been made by him is in fact signed in writing, that fact of itself would be a circumstance that the jury would be authorized to consider, along with all the other evidence in the case upon that point, in determining what is the truth of that issue. And wherever the jury believe from the evidence that a grantor could not write, and a deed is introduced, and after being introduced is attacked, where it is signed by him in writing, then there is no presumption of law that such deed was signed by some party authorized by said grantor; but the burden would be upon the party offering the deed to show that such was the case, if the case all of which is to be passed upon by the jury." As to the correctness of this charge the court is not unanimous in opinion, though they are in accord as to all other points involved in the case. In regard to the question involved in this charge, the opinion of the majority of the court, as prepared on their behalf by Justice LUMPKIN, is as follows:

An affidavit of forgery may be filed and a special issue made on a recorded deed, and, if found against the deed, such deed cannot be admitted in evidence; or if no affidavit is made, and the deed is apparently regular and properly attested and recorded, it may be put in evidence. Nevertheless the adverse party may then attack it by evidence as a forgery. The exact question is this: If the deed appears to be regularly signed by the purported grantor, and is introduced in evidence, but under the evidence introduced the jury should find that the purported grantor could not, and therefore did not sign his name to the deed, will it be presumed, because of the "attestation" of a notary public, that the purported grantor authorized some other person to sign for him, or is that a matter for determination under the evidence, rather than as a matter of presumption?

As the term is ordinarily understood, to sign an instrument indicates the signing with one's own hand. Among the definitions of the word "sign," given in Webster's Dictionary, are "to affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting." And among the definitions of the word "signature" are the following: "A sign, stamp, or mark impressed, as by a seal, especially the name of any person written with his own hand, employed to signify that the writing which precedes accords with his wishes or intention; a sign manual; an autograph." In Pol. Code 1895, § 5, it is said that "signature, or subscription, includes the mark of an illiterate or infirm person." If a witness should testify on the stand that he saw a grantor sign a deed, in the common use of language every man would understand him to mean that he saw the grantor himself subscribe his name or make his mark. From this statement no one would understand the witness to mean that he saw the grantor call in some third person and authorize such person to write the name of the grantor or make a mark for him in his presence. Whether a signature made by another in the grantor's presence and at his request or with his authority would be sufficient to bind him, if proved, has caused some discussion. The case of *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740, is the leading case holding that it would be so, and it has been followed by the current of authority, though not without criticism. See *Browne*, Stat. Frauds (5th Ed.) §§ 10-12b; *Wallace v. McCollough*, 1 Rich. Eq. (S. C.) 426. It has been so held in Georgia (*Ellis v. Francis*, 9 Ga. 325), where a constable who wrote a poor hand requested a justice of the peace, in his presence, to make an entry of "No property" on two justice court executions; the constable knowing the return to be true of his own knowledge. In *Merchants' & Farmers' Bank v. Johnston*, 130 Ga. 661, 61 S. E. 543, 17 L. R. A. (N. S.) 969, where an agent, at the instance and in the presence of a member of a partnership, signed the firm name to a promissory note, it was held binding.

We are not contesting, therefore, the fact that a signature, if proved to have been thus made, would be binding; but we deny that the existence of such a state of facts can be assumed as a presumption of law. The leading case of *Gardner v. Gardner*, supra, furnishes an apt illustration. The signature to the deed there under consideration was "Polly Gwinn, by Mary Gardner." The attesting witnesses testified that, when it was time for the grantor to sign, her daughter, Mary G. Gardner, offered to sign for her, and did so in her presence and with her assent, expressed by a nod of the head. This was held sufficient to bind the grantor; but certainly these facts would not have been presumed without evidence, nor in this state would such a signature, though attested by a nota-

ry public, be presumed to have been authorized by being done in the presence of the grantor or by reason of an unproduced power of attorney. In the two cases in this state above cited, if nothing more had been proved than that the name of the officer in the one case, or that of the firm in the other, was not in the handwriting of the officer or a partner, the law would not have presumed other affirmative facts which would have made the signature binding, because of the general legal presumption that all men perform their legal and social duties. The existence of such facts is matter of proof, not of presumption.

So far as our examination of authorities has gone, wherever it has been held that the signing of the grantor's name in his presence and at his request by another would suffice, the facts have been proved, not presumed. The only case which has come to our notice in which the word "presumption" is used at all in that connection is *Hogans v. Carruth*, 19 Fla. 84. In that case an ancient deed was offered in evidence, and objection was made to its admission. It was shown that the deed came from the proper custody, that some of the parties could not write, and that their names were signed in the handwriting of a person present at the time, and not a party in interest. It was held to be admissible in evidence, and it was said that under these facts, and there being "neither charge nor evidence of fraud," the presumption was that the signatures were made at the request of the purported makers. Strictly this was inferable, rather than a presumption, and only arose after evidence of the facts. In 2 Jones on Real Property, § 1014, it is said: "The fact of the execution of the deed by the hand of another, under the immediate direction of the grantor and in his presence, must be affirmatively shown by the party relying upon the deed. The proper execution of the deed cannot be left to inference." In *Videau v. Griffin*, 21 Cal. 389, it was held that "the fact that the execution was in the presence of the principal must be affirmatively established by the party who relies upon it as an excuse for the absence of a power in writing and it is not to be inferred from any coincidence between the date of the deed and an acknowledgment of the principal that it was executed by his attorney." In that case the deed was signed by "John A. Clark, by his Attorney, Henry Sparks," and on the same day a notary public made a certificate, "Personally appeared before me John A. Clark, to me known, and who executed the within deed and acknowledged the same to be his free act and deed, by his attorney, Henry Sparks," which was signed by the notary, but not by the grantor.

A signature actually made by a grantor himself is good. If shown to have been made by another in his presence and at his request, it will bind him, especially when he delivers

the deed as his own. Although a signature may not be made in either of these modes, but the grantor's name may have been signed by another not in his presence, he may adopt such signature as his own, and may acknowledge it as his signature before a proper officer, or he may estop himself from denying it by allowing others to act on it. 1 Devlin on Deeds (2d Ed.) § 235; Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; Vickers v. Hawkins, 128 Ga. 794, 58 S. E. 44; McCalla v. American Freehold, etc., Co., 90 Ga. 113, 15 S. E. 687. Again, where a deed is executed by an agent, the advisable and most correct mode for the agent to adopt is to sign the principal's name by himself as attorney in fact. In some of the earlier cases it was held that this must be done; but in a number of later cases the disposition has been towards relaxing this rule, and holding that, if the attorney has due authority as such to execute a deed in the name of his principal, "it cannot be said that it is indispensable to the valid execution of his power that he should add his own name to the instrument which he executes for his principal," and that his signing of the principal's name alone, though not desirable, is not invalid. 1 Devlin on Deeds, §§ 377-380. Thus, although the grantor may not sign his own name to a deed, there are several circumstances which will render the signing of his name by another as valid and binding upon him as if signed by his own hand.

If the contrary argument on this subject is sound, when a deed is attested by a notary public or other officer authorized so to do, and recorded, although it may be shown that the purported grantor did not in fact himself sign it, this would not suffice to rebut the general presumption in favor of official conduct, but the burden would rest upon the party denying the genuineness of the deed to go further and negative the possibility of the existence of any of the other circumstances to which reference has been made. Thus he must disprove the possibility that the grantor authorized another to sign in his presence; and, logically, he should also be required to show that the grantor never adopted the signature of another, or that he never estopped himself by allowing others to act upon the faith of the signature being genuine, or that the deed was not executed by an attorney in fact who held a power of attorney, but failed to note the existence of the agency. We do not see how the argument adverse to the position here taken can logically stop short of requiring disproof of all these possible modes by which a signature written by the hand of another than the grantor might be binding on him. We think that where a recorded deed has been introduced in evidence, and where the signature purports to have been written by a certain person, and the jury are satisfied from the evidence that it could not have been, and therefore was not, so written, then, if it is nevertheless claimed

to be binding for any of the reasons which might legally make it so, aside from the manual execution by the grantor himself, and which would be held in law to be equivalent thereto, this would be a matter of proof, not presumption. Any other rule would in many instances place upon a person attacking a recorded deed, after its introduction in evidence, practically an impossible burden to negative conjectural occurrences.

The entire argument to support a different ruling rests upon the presumption in favor of a proper discharge by an officer of his official duty. This is a branch of, or closely allied to, the broader presumption that every man obeys the mandates of the law and performs all of his official and social duties. 4 Wig. Ev. § 2534; Doe ex dem. Truluck v. Peeples, 1 Ga. 5, *infra*. But that presumption, as to nonofficial persons, has never been carried to the extent of taking the place of necessary evidence of matters in pais. As to officers, the presumption is somewhat stronger, partly, no doubt, because more specific duties are imposed upon them by law, and partly because they are sworn and commissioned to discharge such duties. The law authorizing the recording of deeds in this state is somewhat different from that in force in many other states. It declares that, "in order to authorize the record of a deed to realty or personalty, if executed in this state, it must be attested by a judge of a court of record of this state, or a justice of the peace, or notary public, or clerk of the superior court, in the county in which the three last-mentioned officers respectively hold their appointments; or if subsequent to its execution the deed is acknowledged in the presence of either of the named officers, that fact, certified on the deed by such officer, shall entitle it to be recorded." Civ. Code 1895, § 3620. This section of the Code provides two modes under which a deed may be recorded: First, if it be "attested" by any of the officers named; second, if it be acknowledged in the presence of such an officer. Section 3623 provides that, "if a deed is neither attested by, nor acknowledged before, either of the officers aforesaid, it may be admitted to record upon the affidavit of a subscribing witness, before either of the above named officers, testifying to the execution of the deed and its attestation according to law." The rule in many other states is to require an acknowledgment before a designated officer, and not merely that the instrument be "attested."

If there were an acknowledgment of a signature as genuine, a different question would be presented. Of course, the presumption is that such certificate of acknowledgment is true. When, likewise, the officer signs a statement that he saw the grantor sign, seal, and deliver a deed, the presumption is that that is true, unless the contrary appears. But if it be established by the evidence to the satisfaction of the jury that in fact the grantor did not sign the deed personally, the

presumption of the discharge of official duty by the attesting officer will not suffice to prove that the grantor authorized some other person to sign the deed for him either in his presence or in his absence. That is an affirmative fact to be established by proof, not a matter in which a presumption of discharge of duty by an officer can take the place of evidence. None of the authorities cited in support of that position go to such an extent, and we have found none which do so. In *Doe ex dem. Truluck v. Peeples*, 1 Ga. 3, a deed had the attesting clause, "Signed, sealed, and delivered in presence of," and was signed by the grantor, with his mark, and by two attesting witnesses. Immediately under these signatures were the words, "Acknowledged in the presence of me," followed by the signature of a justice of the peace. It was held that, in the absence of all proof to the contrary, the presumption was that the acknowledgment before the magistrate was made where the deed itself purported to have been executed. In *Rushin v. Shields & Ball*, 11 Ga. 636, 56 Am. Dec. 436, a deed was probated for record by a subscribing witness, who made affidavit that he saw the grantor sign and seal that deed for the purposes therein named, and that he saw also the other subscribing witnesses sign. It was held that this was not a sufficient proof of delivery and execution to authorize the deed to be recorded. And see *Stanley v. Suggs*, 23 Ga. 137.

In *Dinkins v. Moore*, 17 Ga. 62, a deed concluded with the statement that the grantor had thereto set his hand and seal, and had delivered the property by the symbolic tradition of a penknife. Below this were the words, "In the presence of," followed by the signature of two witnesses, one of whom was a justice of the peace. It was held that the deed was sufficiently attested to admit it to record, "and the conclusion of law, from this general form of attestation, is that the subscribing witnesses saw the grantor sign, seal, and deliver the deed, for the purposes therein mentioned." In the opinion the case was distinguished from that of *Rushin v. Shields & Ball*, supra, by saying: "To make the cases parallel, the form of attestation in the deed before us should have been signed and sealed in our presence, or in the presence of, etc. The inference would then have been that the subscribing witnesses did not see the deed delivered." The opinion concluded with the following general statements: "Our opinion is that, under such an attestation clause, if neither of the witnesses be an officer, any one of them may prove its execution by making the usual oath; and, if one of them be a magistrate, the officer appointed by law to perform this duty, the conclusion of law is that he saw the instrument legally executed—that is, signed, sealed, and delivered." Considering this in the light of the facts, it was equivalent to saying that a certificate which in effect stated that the mag-

istrate saw the grantor set his hand and seal to the paper and deliver it was presumptively true. In *Highfield v. Phelps*, 53 Ga. 59, it was held by two judges that, if one of the attesting witnesses to a deed be a magistrate, the presumption of law is that he saw the instrument legally executed—that is, signed, sealed, and delivered—so as to authorize the same to be admitted to record. *Warner, C. J.*, cited *Dinkins v. Moore*, supra, as authority for this position, though in the case then being considered there was no statement of delivery.

Perhaps, on the theory that a complete execution includes delivery, the attestation by a proper officer of "the execution" of a deed may include its delivery. The writer, however, would suggest that it may be doubted whether there is any law which imposes upon the officer the duty of seeing that a deed which he attests is actually delivered to the grantor; and it is common knowledge that a very large part of the instruments which are signed before and attested by an officer are not in fact then delivered to the other party, and some of them are never delivered. Due attestation by an authorized officer and another witness will suffice to admit a deed to record, and by that decision this is true, even without the use of the word "delivered." The record itself is evidence of delivery. *Stallings v. Newton*, 110 Ga. 875, 36 S. E. 227. But the decision in *Highfield's Case* does not extend to presuming any such state of facts as is now sought to be covered by a presumption. In *Granniss v. Irvin*, 39 Ga. 22, a deed appeared on its face to be regularly attested; one of the witnesses being a justice of the peace. The ink used in writing his name was different from that used in writing other parts of the paper, and on the back of the deed were the words of an affidavit for probating it, but not executed. The deed was recorded. When offered in evidence, objection was made on the ground that the circumstances mentioned indicated that the justice had signed the deed at a time different from that of its original execution. This court held that it was admissible. *McCay, J.*, said: "The presumption of law is that the magistrate signed it in the county and at the time appearing on the face of the deed. Prima facie, also, the signatures are genuine. The deed appearing to be properly attested and admitted to record, the presumptions are in its favor." None of these cases deal with any presumption of a signing for the grantor by another in his presence and at his request.

In *Walker v. Logan*, 75 Ga. 759, an affidavit of forgery was made, and the issue tried separately. The jury found the deed to be a forgery, and this verdict was sustained. The only facts mentioned by *Jackson, C. J.*, who delivered the opinion, were that the deed was executed in 1835, and not recorded till 1883, which he said was a very strong evidence or circumstance of want of genuineness, "and the fact that the grantor could not write his

name, which is in writing on the deed, is stronger—I had almost said conclusive—evidence of forgery, and the additional evidence that he swears by interrogatories, signed only by his cross-mark, that he did not sign or make any such deed, would seem to clinch the truth of the verdict which pronounced it a forgery. On the other side, to overcome this overwhelming evidence is testimony that the witnesses delivering it on the stand believe that the handwriting of the two dead witnesses to the deed is genuine. It is a feather weighing in scales against a ton of iron." In the present case there was no affidavit of forgery; but to rule otherwise than we do would result in holding that absolute proof, satisfactory to the jury, that the grantor could not sign his name, and therefore did not do so, would not at all suffice to rebut a mere presumption arising from the attestation of a notary public. This would seem to reverse the idea of Chief Justice Jackson, and hold that proof that the grantor could not write was a feather of evidence weighing in the scales against a ton of presumption.

The trial judge charged, in effect, that if the jury believed that the purported grantor could not, and therefore did not, write his name, whether or not he authorized some other person to do so was not a matter of presumption. We think he charged correctly. The views of Justice ATKINSON in regard to the charge quoted above are as follows:

The charge has reference to a deed conveying land with the name of the grantor signed thereto and attested by two witnesses (one of whom was an officer authorized by law to attest deeds), and duly recorded. No affidavit of forgery was made under Civ. Code 1895, § 3628, so as to cast the burden of proving the genuineness of the deed upon the party relying on it. Such a deed was admissible in evidence without further proof of its execution, and all presumptions were in favor of its genuineness. *Grannis v. Irvin*, 39 Ga. 22, 24. The attesting clause recited, "Signed, sealed, and delivered in the presence of" the witnesses. If the grantor did not sign with his own hand, but stood by and directed another to sign for him, and it was signed in his presence, such act of signing would not in law be the act of an agent, but would be signing by the grantor. *Ellis v. Francis*, 9 Ga. 325; *Vickers v. Hawkins*, 128 Ga. 794, 799, 58 S. E. 44. In dealing with this rule the Supreme Court of Massachusetts at an early date, in the case of *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 484, 52 Am. Dec. 740, Chief Justice Shaw, rendering the opinion, among other things said: "The name being written by another hand, in the presence of the grantor and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. * * * To hold

otherwise would be to decide that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing a letter of attorney under seal." See, also, *Devlin on Deeds*, §§ 232, 233; *Jones on Law of Real Property in Conveyancing*, §§ 1014, 1015. In the light of the rule above announced, the attesting certificate quoted from the deed now under consideration would not be inappropriate, although the deed was not signed by the grantor himself, but by another in his presence, at his request. The fact that the grantor could not write would not contradict the certificate; nor would it necessarily follow, merely because the grantor could not write, that the signature to the deed was placed there improperly, or was a forgery.

There was no attempt to show that the signature of the attesting officer was forged. It stands unchallenged and prima facie genuine. All the presumptions are in favor of his having done his duty. *Scott v. McDaniel*, 64 Ga. 780; *Wiggins v. Gillette*, 93 Ga. 22, 19 S. E. 86, 44 Am. St. Rep. 123; *Kirk v. State*, 73 Ga. 628; *City Council of Augusta v. Pearce*, 79 Ga. 100, 4 S. E. 104; *McRae v. Adams*, 36 Ga. 444; *Throop on Pub. Off.* § 558; *Ford v. Ford*, 27 App. D. C. 401, 6 L. R. A. (N. S.) 442, 7 Am. & Eng. Ann. Cas. 245, and notes at page 250. If he did his duty, he would not have placed his signature to the attestation of the deed, unless it had been executed by the grantor in such manner as to have made the act of signing the deed the act of the grantor himself. Conceding the genuineness of the signature of the attesting officer, to hold that he was derelict in duty in the manner contended for would in effect be to impeach his official act by a mere circumstance which did not necessarily conflict with what his signature purported to attest. The circumstance relied on to impeach the verity of the officer's certificate, namely, that the grantor could not write, is at most equivocal, and is consistent with either the theory that the instrument is a forgery or that it is genuine. To impeach the certificate of the officer there should be no equivocation, but the evidence should affirmatively and necessarily contradict it. All the presumptions being in favor of this duly recorded deed, there is a presumption that it was the genuine deed of the grantor, and it was inaccurate for the judge to instruct the jury as a matter of law that the presumption in favor of the genuineness of the deed was destroyed by mere proof of the fact that the grantor could not write. Such in effect was the charge of the court to which exception was taken.

In the case of *Walker v. Logan*, 75 Ga. 759, 760, Jackson, Chief Justice, said: "The verdict that the deed is a forgery, and not

the genuine deed of the grantor, is supported by the evidence. The fact that, though executed in 1835, it was not recorded until 1883—nearly a half century thereafter—is a very strong evidence or circumstance of want of genuineness; and the fact that the grantor could not write his name, which is in writing on the deed, is stronger—I had almost said conclusive—evidence of the forgery." This language imports that the writer, though giving great weight to the circumstance, did not consider the fact of the grantor's inability to write sufficient to prove forgery "conclusively," so as to authorize the court to take the question from the jury and decide it as a matter of law. Moreover, in that case an affidavit of forgery was filed, under the provisions of Civ. Code, § 3628, which, under the ruling in *Holland v. Carter*, 79 Ga. 139, 3 S. E. 690, cast the onus upon the party relying on the deed to prove its genuineness.

The case of *Anderson v. Cuthbert*, 103 Ga. 767, 30 S. E. 244, referred to a paper (a certificate dated January 10, 1891), which was not the foundation of the action, and was not attested by an officer, and was not recorded or entitled to record, so as to authorize its introduction in evidence without proof of execution. Dealing with the question of forgery relative to that paper, it was said by Little, J. (page 773 of 103 Ga., page 246 of 30 S. E.): "The law presumes nothing whatever until the signature to the instrument is proven genuine. This being done, the law then presumes that the instrument in all its parts is genuine also, when there are no indications to be found upon it to rebut such a presumption." As the paper there under consideration was not recorded or attested by an officer authorized by law to attest deeds, there was no question before the court which authorized a ruling relative to presumptions in favor of the acts of public officers or presumptions relative to the genuineness of duly recorded deeds attested by an officer authorized by law to witness deeds. The language of the court in dealing with the law of presumptions is somewhat equivocal; but, as it was obiter, its construction is not of supreme importance in the present case.

7. The defendant requested the court to give in charge certain instructions. The substance of all of them was that if Hiram Waller had several heirs or descendants, and if only four of his sons and daughters joined in an effort to convey his title as being his heirs, and under this deed a chain of conveyances came down to the plaintiffs, they acquired no more than the interest which the four heirs of Waller could convey, and in no event could recover more than that. There was no error in refusing these requests. The plaintiffs relied, not merely

upon a paper chain of title, but also upon prescriptive title and prior possession. In so far as their claim of title rested upon a paper chain, they could only recover what that chain conveyed to them; but, in so far as it rested upon prescription or prior possession, it was possible for them to recover, although they might not have had a perfect title by the chain of conveyances to the entire estate. Where prescriptive title is claimed under possession and color of title, the color does not have to be perfect title in order to ripen by prescription. The instrument on which the prescription is based must purport to convey the title prescribed for; but, if it were essential that it should actually convey a good title, the difference between perfect title by chain and title by prescription would practically be valueless, and title and color of title would become synonymous. *Street v. Collier*, 118 Ga. 470, 45 S. E. 294. This is not a contest with the other descendants of Hiram Waller, or persons claiming under them; and hence no question of ouster or notice of adverse holding arises. Some of the requests to charge seem to proceed on the theory that the deed from Waller's heirs purported to convey a fractional part of the lot. But such was not the case.

8. One ground of the motion for new trial was that the verdict was contrary to law and evidence. As the case must be returned for a new trial, we deem it best not to discuss the evidence further than to say that a careful examination of it as contained in the record falls to show sufficient facts to authorize a finding of \$445 for expenses of litigation. See Civ. Code 1895, § 3796. Whether or not some of the deeds in the chain of title under which he claimed were forgeries, the evidence did not make such a case against Hansen as authorized a recovery for expenses of litigation. It was urged that, if the verdict for attorney's fees and expenses was not authorized, this portion of the finding was not specially signaled out and complained of. But we cannot say that a verdict is sustained in whole by the evidence if some part of it is not so sustained.

Judgment reversed. All the Justices concur.

(5 Ga. App. 750)

WRIGHT v. MAYOR, ETC., OF CITY OF MACON. (No. 1,282.)

(Court of Appeals of Georgia. May 18, 1909.)

1. COURTS (§ 217*)—JURISDICTION—COURT OF APPEALS — CONSTITUTIONALITY OF ORDINANCE.

The Court of Appeals has full power and authority to determine whether municipal ordinances are unconstitutional.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 217.*]

2. INTOXICATING LIQUORS (§ 11*)—POWER TO CONTROL—CONFLICTING REGULATIONS BY STATE AND MUNICIPALITY.

The General Assembly having by the general tax act expressed and established the general policy of the state with reference to the existence of "locker clubs," a municipal ordinance, inconsistent with the general policy of the state as declared by the Legislature, is void. Unless it is shown that intoxicating liquors are sold by the club or its employes, the mere assembling of liquors in a bona fide private club (whose membership is not open to the public at large) cannot be controlled by municipal regulation, if the tax imposed by the state has been paid.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 13; Dec. Dig. § 11.*]

(Syllabus by the Court.)

3. CLUBS (§ 1*)—NATURE AND STATUS.

A club is defined to be an association of individuals for pleasure or profit.

[Ed. Note.—For other cases, see *Clubs*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1235.]

4. WORDS AND PHRASES—"LAW."

The word "law" does not ordinarily include a municipal ordinance.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 5, p. 4020; vol. 8, p. 7701.]

Error from Superior Court, Bibb County; E. J. Reagan, Judge.

C. R. Wright was convicted in the recorder's court of the city of Macon for violation of the "locker ordinance" of that city. He excepted by certiorari to the superior court, and, the certiorari having been dismissed, brings error. Reversed.

B. C. Jones and John P. Ross, for plaintiff in error. C. H. Hall, Jr., and N. E. Harris, for defendant in error.

RUSSELL, J. The plaintiff in error was convicted in the recorder's court of the violation of what is called in the record the "locker ordinance." This ordinance is as follows:

"Be it ordained by the mayor and council of the city of Macon, and it is hereby ordained by the authority of same:

"Section 1. That it shall be unlawful for any club, corporation, or association of persons, or number of persons, in this city, whether incorporated or otherwise, to keep or to permit to be kept, in any room or place, or in any place connected therewith directly or indirectly, in which the members of such club, corporation, association of persons, or number of persons assemble or frequent, any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks which, if drunk to excess, will produce intoxication.

"Sec. 2. Be it further ordained by the authority aforesaid, that any person, member, officer, agent or servant of any such club, corporation, or association, or other number of persons violating the provisions of this ordinance, upon being arrested, tried, and convicted before the recorder, shall be pun-

ished as provided in the act creating the recorder's court of the city of Macon, and the amendments thereto; and that each day in which this ordinance shall be violated by any person or persons shall be held and deemed a separate offense."

The case was submitted to the recorder's court upon the following agreed statement of facts:

"The Benevolent and Protective Order of Elks of the United States of America was organized in the city of New York in May, 1868, and since its organization has been in continuous existence throughout the United States. Beginning as a voluntary fraternal association, lodges of the order were organized in various cities in various states of the Union, which lodges created and established, by mutual consent and voluntary allegiance, a supreme governing body of the order, known and designated as the Grand Lodge of the Benevolent and Protective Order of Elks of the United States of America, and as such fraternal order was incorporated by an act of the Senate and Assembly of the state of New York on March 10, 1871. On June 19, 1895, said order of Elks filed articles of incorporation in the District of Columbia, pursuant to the laws of the United States, providing for the filing of such articles of incorporation by fraternal associations. The objects of said order of Elks are, to inculcate the principles of charity, justice, brotherly love, and fidelity, to promote the welfare and enhance the happiness of its members, to quicken the spirit of American patriotism, to cultivate good fellowship, and to perpetuate itself as a fraternal organization. By its laws it is provided that a subordinate lodge of the order may establish and maintain a club for the social enjoyment of its members, bearing the name of the order, and subject to the limitations and restrictions provided by the laws of the order; and it is provided by its laws that the membership of such club shall be limited exclusively to members in good standing in the lodge establishing and maintaining such club, and that such club shall be managed and controlled by the officers or trustees of the lodge, or by a house committee appointed by the presiding officer of the lodge for that purpose, under such rules and regulations as may be adopted by the lodge and approved by the committee on judiciary of the Grand Lodge.

"Macon Lodge, No. 230, of the Benevolent and Protective Order of Elks of the United States of America was organized in the city of Macon, Ga., in March, 1892, by authority of and pursuant to the laws of said order of Elks, as adopted and promulgated by said Grand Lodge of said order, and since said date has maintained a continuous existence in said city by virtue of a charter granted to it by said Grand Lodge, and under and subject to the laws of said Benevolent and Pro-

tective Order of Elks of the United States of America. Pursuant to the laws of said fraternal order, the said Macon Lodge established, and for many years past has continuously maintained, a club in said city of Macon, which has been and now is known as the 'Elks' Club,' which club is maintained for the social enjoyment of the members of said Macon Lodge. The said Macon Lodge, for more than two years last past, has occupied and now occupies the entire seventh floor of what is known as the 'Grand Building,' on Mulberry street, in said city of Macon, the same being the topmost floor of said building, by absolute lease from the owner of said building, for its lodge room and club quarters, in which leased premises, to wit, the room on the seventh floor of said Grand Building, the members of said Macon Lodge assemble, frequenting at will the said lodge room and club quarters under the laws, rules, and regulations of said order of Elks and said Macon Lodge for the government of the same.

"No male persons are now or ever have been authorized or permitted to enter, assemble in, or frequent the rooms and premises of said Elks' Club, except members in good standing of said Macon Lodge, No. 230, and members in good standing in other subordinate lodges of said Benevolent and Protective Order of Elks of the United States of America (there being no other lodge of said order in Bibb county, except said Macon Lodge), and residents outside of the county of Bibb, who, by special invitation of some member of said Macon Lodge, may by such member be carried to said quarters of said Elks' Club and granted temporarily the social privileges thereof. No member of the lodge is permitted to invite or carry any male citizen of Bibb county to said lodge and club quarters not a member of the lodge. Any member of said Macon Lodge may invite or carry any lady relative or friend to the parlor and reading room of said club, and to the lodge room when the lodge is not in session. The employed servants of said Macon Lodge of Elks and its club are authorized and permitted to be and to serve in said Elks' Club quarters, but not to enjoy any of the privileges of said club, and said servants are subject to the control and discipline of the house committee of said club, under the rules and regulations governing the same.

"On the 4th day of February, 1908, the said Macon Lodge No. 230 of the Benevolent and Protective Order of Elks of the United States of America, having theretofore caused said Elks' Club to be registered with the ordinary of Bibb county, and paid to the tax collector of said Bibb county \$500 for special tax as required by the law of Georgia, did permit members of its said Elks' Club, which membership is limited exclusively to members in good standing in said lodge, to keep in a room and place forming a part of and connected directly with the aforesaid leased premises of said Macon Lodge and its club,

on the seventh floor of said Grand Building, in the city of Macon, in which the members of said lodge and club are accustomed to assemble, alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks which, if drunk to excess, will produce intoxication. And certain members of said lodge and club, pursuant to said permission, did, on the date aforesaid, keep such liquors, bitters, and drinks in the place aforesaid for their own private use and control. The defendant knew of, and, as a member of said lodge, took part in granting, and assented to the grant of, said permission, and has knowledge that some members availed themselves of said permission. Such liquors were the private, personal property of each member of said lodge and club who saw fit to keep them, by the permission aforesaid, in the premises leased, occupied, and controlled by said lodge and club as aforesaid, and were so kept as to be readily identified and distinguished as the individual property of the member placing same there. No such liquors or bitters were sold or permitted to be sold or kept for sale in or about said club and lodge quarters, either directly or indirectly by any persons to any person.

"On the date aforesaid, when said members were permitted to keep and did keep such liquors as their own private personal property and for their own private personal use in the premises as aforesaid, the said defendant, C. R. Wright, was a member and officer of said Macon Lodge No. 230 of the Benevolent and Protective Order of Elks of the United States of America, being secretary of said lodge, and was a member of said Elks' Club."

The recorder found the plaintiff in error guilty, and he excepted by certiorari to the superior court. Upon hearing the certiorari was dismissed. In the petition for certiorari error is assigned upon the ground that the ordinance passed by the mayor and council of the city of Macon, for the violation of which the plaintiff was convicted, is unconstitutional, illegal, and void:

(a) Because the mayor and council of the city of Macon had no corporate or charter right, power, or authority to pass said ordinance, and the state has not granted such power to said municipal corporation, nor is the power to pass said ordinance incident to any power which has been granted to said municipal corporation.

(b) Because said ordinance is contrary to the public policy of the state of Georgia, as shown by the laws of the state duly enacted, and seeks to take from the petitioner and his associates and fellow citizens a right expressly granted by the state in section 2, subd. 47, of the general tax act, approved August 22, 1907 (Acts 1907, p. 35).

(c) The ordinance seeks to take from the state the power to raise revenue.

(d) The state, by general law, has regulated places where and upon what conditions in

intoxicating liquors may be kept, and has levied and provided for the collection of a tax upon every club, corporation, or association of persons who shall keep or permit to be kept any intoxicating liquors in any place connected directly or indirectly with any room or place in which the members of such club, corporation, or association assemble or frequent. And the said municipal corporation has no power, right, or authority to prohibit the keeping of intoxicating liquors in conformity to the general law of the state, and has no power, right, or authority to amend or annul the said general law of the state.

(e) The ordinance is not a reasonable exercise of police power of said municipal corporation, and the right to pass the aforesaid ordinance is not within the police power granted to said municipal corporation by the state, and there is no evidence or facts in the record to indicate that said ordinance was or is necessary for the preservation of health, good order, and morals in said city of Macon.

(f) The ordinance is contrary to the Constitution of the state of Georgia, and to the preamble of said Constitution, which provides that said Constitution is ordained to perpetuate the principle of free government and transmit to posterity the enjoyment of liberty; whereas said ordinance violates the principles of free government and strikes down the liberty of American freemen.

(g) The ordinance is contrary to article 1, § 4, par. 1, of the Constitution of said state of Georgia, which provides that no special law shall be enacted in any case for which provision has been made by any existing general law. Petitioner shows that provision has been made by existing general law for the places where, and the conditions under which, intoxicating liquors may be kept in said city of Macon, and the said ordinance seeks to vary and annul said existing general law.

(h) The ordinance is contrary to the fourteenth amendment to the Constitution of the United States, which provides that no state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, and, a fortiori, that no municipal corporation shall make or enforce any such law. The petitioner further excepts to the judgment and sentence as contrary to the evidence and contrary to law, because the sentence is excessive and unjust, and violates article 1, § 1, par. 9, of the Constitution of the state of Georgia, and the eighth amendment to the Constitution of the United States.

1. It is unnecessary to certify to the Supreme Court any question involving the constitutionality of the ordinance under which Wright was convicted, because this court, by the terms of the constitutional amendment creating it, has full power to determine the constitutionality of any law or ordinance which does not involve "the construction of a

provision of the Constitution of this state or of the United States, or the Constitutionality of an act of the General Assembly." The constitutionality of municipal ordinances can be determined by this court as well as by the Supreme Court.

2. The general question raised in this case is whether a social club shall be permitted to keep intoxicating liquors, the private property of its members, for their own use, at a place which is neither a public house nor a place of business. We do not know that a club may not have a place of business. We do not pass upon this question, because it is not involved in the present case; for, if it is a public place of business, the state, and not the city of Macon, would have sole jurisdiction to deal with the offense, if any was committed. A club is defined to be an association of individuals for pleasure or profit. *Martin v. State*, 59 Ala. 34. In *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 69, 40 Am. Dec. 540, it was held that "a club is a definite association organized for indefinite existence; not an ephemeral meeting for a particular occasion, to be lost in a crowd at its dissolution." The rules applicable to such private clubs as keep on hand intoxicating liquors for the use of their membership have been discussed by the Supreme Court of Massachusetts in *Commonwealth v. Smith*, 102 Mass. 144, and *Commonwealth v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340.

In the latter case, Judge Field, delivering the opinion of the court, says: "The word 'club' has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for, upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy, and the sale of what might be called a temporary membership in the club, with a sale of the liquors, would not substantially change the character of the transaction. One inquiry always is whether the organization is bona fide a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the constitution and rules of the club, or whether either the form of a club has been adopted for other purposes, with the intention and un-

derstanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it."

In the Smith Case, *supra*, the Supreme Court of Massachusetts ruled that "if the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance, within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole keeping were a mere evasion, and the substance of the transaction were a lending of money to the defendant, that he might buy intoxicating liquors to be afterwards sold and charged to the associates, or if he was authorized to sell, or did sell, or keep any of the liquors with intent to sell, to any persons not members of the club, he might well be convicted."

There is nothing in the agreed statement of facts to show that the Elks' Club room at Macon was other than a private place. Clearly, then, this club would come under the provisions of subdivision 47 of section 2 of the tax act of 1907 (Acts 1907, p. 35), unless the mayor and council of the city of Macon has power to supersede, exclude, or annul, by ordinance, that provision of law. By the tax act of 1907, *supra*, the Legislature levied a tax "upon every club, corporation, or association of persons who shall keep or permit to be kept in any room or place, or any place connected therewith directly or indirectly, in which the members of such club, corporation or association assemble or frequent, any intoxicating liquors, the sum of five hundred dollars." The Elks' Club of Macon, according to the agreed statement of facts above quoted, kept and permitted to be kept intoxicating liquors in a "place connected" with the "place in which the members of the club assembled or frequented," and it is admitted that the tax of \$500 has been paid. The simple question raised, therefore, is whether the license of the state, for which the fee of \$500 has been paid, or the ordinance of the city forbidding this assembling of liquors, shall prevail.

The city of Macon is but the creature of the state. All its powers of legislation are the gift of the sovereign state, and each and every power conveyed may be withdrawn at the pleasure of the state. But for the passage of the license tax by the state there could be no question in our minds that the mayor and council of the City of Macon, under the provisions of the charter, could have adopted the ordinance in question. The general welfare clause of the charter of Macon vests the mayor and council with "full

power and authority from time to time to make and establish such rules and ordinances * * * as they shall deem requisite and proper for the security, welfare, health, and convenience of the city, and for preserving the peace, order, and good government of the same." It is now universally recognized that regulation of the liquor traffic, even amounting to total prohibition, is but the exercise of police power. It is likewise recognized that municipal corporations, in the exercise of police power, may pass ordinances in aid of the criminal statutes of the state, and, following the trend of the state's general policy, may extend them to subject-matters not included within the exact terms of the state's legislation; that is to say, that the municipal corporation, in aiding the state to carry out its general policy upon a certain subject-matter, may reach and control matters which have not been dealt with by the state. It is evident that the general policy of the state, in the passage of the general prohibition act of 1907, was to stop, or at least to decrease, the drinking of intoxicating liquor; and, the ordinance of the City of Macon now before us being in aid of that general policy, we think it could be extended to preventing the assembling of liquors at a place where drinking, instead of being decreased, would be increased, although the possession and property right in such liquors was legal, and the place at which such liquors were assembled was not a public place; and, although it is always to be borne in mind that delegated powers are to be strictly construed and reasonably exercised, we think the passage of the ordinance in question by the Mayor and Council of the city of Macon, prohibiting the assembling of intoxicating liquors at clubs, is not an unreasonable exercise of the police power, and is fully warranted by the general welfare clause which we have quoted above.

It was insisted on the argument that the purchase and the possession of intoxicating liquors for private use by the citizen is an inalienable right, and that the same right would exist as to a number of citizens lawfully assembled and not otherwise acting in conflict with the provisions of the prohibition law. Without expressing our individual views upon this subject, the argument is plainly answered by the opinion in *Plumb v. Christie*, 103 Ga. 692, 30 S. E. 759, 42 L. R. A. 181. In that case, the lamented Justice Lewis, delivering the opinion of the court, uses the following striking language to enforce an irresistible argument: "It is idle, in a court of law created for the purpose of declaring legal principles or passing upon legal rights of litigants at issue, to discuss 'inherent and inalienable rights,' supposed to exist in the enlightened conscience or consciousness of mankind, yet undefined by any rule known to the organic or statute laws of a state. In discussing the validity of an act passed by the legislative branch of the

government, no light can be gathered by an attempt to show that it contravenes the general purpose for which a free government is established. In all independent states and nations absolute power rests somewhere. In this country it is neither lodged with the executive, nor the legislative, nor the judicial branches of the government nor with all combined; but sovereignty rests with the people of the several states. The ultimate source of legislative power is traceable to them; and in their sovereign capacity they have a right to frame laws for their own government, and for the regulation of human conduct on all matters over which exclusive power has not by them been delegated to the federal government. Acting in their organized capacity, and under the forms of existing laws, they can rend assunder all bonds that are thrown as restraint around individual action, unbridle liberty, and make license as free as the winds of heaven and as wild as the waves of the sea. They can, on the other hand, so frame their organic and statute laws as to place upon their own necks a yoke as galling as ever serf carried under the edict of a despot. It is eminently in this sense that we live under a free government, which simply means a government created by the people, and which they are absolutely free to change or modify at their pleasure. It is worse than useless, then, for the courts to undertake to pass upon the validity of a statute by an inquiry as to whether or not it is just or oppressive. To enter into such a field of investigation would be like embarking upon the sea without rudder or compass. A law is not necessarily unconstitutional or otherwise invalid because it is unjust. We live under a constitutional government and written laws; and the courts can enforce only such rights as they protect, and remedy such wrongs as they redress." This authority binds this court.

It was held in *Fears v. State*, 102 Ga. 279, 29 S. E. 463, that a municipal corporation could not pass an ordinance which would destroy all rights in property legally held in possession, by making it unlawful to hold it; and in *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384, it was held that the general welfare clause in a municipal charter did not authorize the passage of an ordinance making it penal to receive alcoholic liquors, legally purchased, unless the specific tax for so receiving was paid. Both of these cases originated in prohibition counties. In the *Fears* Case it was sought to enjoin the sheriff from selling, under judicial process, a stock of liquors which had been levied upon under a mortgage foreclosure. The reasoning of the court bears some similarity to that by which we are controlled in the present case; that is, that the general sovereign power of the state to control cannot be affected by the provisions of enactments affecting

merely inferior subdivisions of the state. The decision in the *Henderson* Case, *supra*, is not applicable in the present instance, because in that case the court was dealing with the fact that no law had been passed which prohibited the purchase of intoxicating liquors. Since the decision in the *Henderson* Case the general prohibition law of 1907 has been passed, designed, as we have stated above, to prevent, as far as possible, the evil of social drinking; and we therefore conceive that an ordinance which prevents the assembling of liquors for drinking purposes is in accord with the general trend of the state's policy, as evidenced by the state prohibition law, and is directed more towards the method in which intoxicating liquor is used than designed to affect the intrinsic private property right in such liquor.

A statute prohibiting the citizen from carrying a pistol concealed, or from carrying a pistol to a public gathering, is not violative of the constitutional right of every citizen to have and bear arms. The state, either itself directly, or by the delegation of appropriate powers to municipalities, may prescribe the regulations under which the property right in whisky or any other form of property may be exercised, without infringing upon the property right in such articles. Nay, the state may go further, as a matter of police regulation, in carrying out its paramount duty of protecting the peace, good order, and dignity of its citizens, and prohibit altogether the exercise of a property right in such articles as it adjudges to be dangerous to the welfare of its citizens. This is the theory of the decision to which we have referred; but it is unnecessary for us to decide at this time how far this ruling is applicable, for the reason that by the tax act of 1907 the Legislature took from the city the power to regulate clubs and associations, that might permit their members to have and use intoxicating liquors at their meeting places, by expressly licensing such clubs and authorizing them to do the very things prohibited by this city ordinance. The general prohibition law (Acts 1907, p. 82) is exclusive of municipal legislation upon the subject of where liquor may not be kept, so far as it deals with the subject; and the Legislature having adopted certain specific regulations, the power was taken from the city of doing more than aiding the state in the enforcement of these regulations.

The prohibition law covers (1) the sale or barter of intoxicating liquors; (2) the giving away of such liquors to induce trade at the place of business; (3) the keeping or furnishing them at any public place; (4) the manufacture; (5) the keeping on hand at the place of business of the owner. The city could not punish for a violation of the prohibition law in any of these five respects, because the power of the state to deal with

them has been exclusively retained. In this state of the law, we think a municipal corporation might have imposed regulations as to the keeping of liquors at private places, in the exercise of their police power, and perhaps it may still do so, provided the private place is not one of the clubs mentioned in subdivision 47 of section 2 of the tax act of 1907. Having passed a general prohibition bill, which did not deal with intoxicating liquors in a private place, the Legislature proceeded to deal with that subject in a tax act, as we have stated above, expressly licensing the assembling of liquors at certain places designated. This was tantamount to a withdrawal from all of the subdivisions of the state of the right to enforce any prohibitory ordinance in conflict with the policy declared by the state in the tax act, because no local exception was expressed. "The courts will not infer that the Legislature intends to authorize a local departure from the general policy of the state, unless the local exception is expressed in specific terms. *Sanders v. Butler*, 30 Ga. 679; *Ordinary of Baldwin County v. Retailers, etc.*, 42 Ga. 325; *Miller v. Shropshire*, 124 Ga. 829, 53 S. E. 335; *Watson v. Thomson*, 116 Ga. 549, 42 S. E. 747, 59 L. R. A. 602, 94 Am. St. Rep. 137; *Henderson v. Heyward*, 109 Ga. 378, 380, 34 S. E. 590, 47 L. R. A. 386, 77 Am. St. Rep. 384; *Fears v. State*, 102 Ga. 274, 29 S. E. 463; 17 Am. & Eng. Enc. L. (2d Ed.) 378, 380.

In the *Watson Case*, supra, the court deals fully with the principle that a municipal corporation, under the general welfare clause of its charter, may pass ordinances in aid of the enforcement of state laws, and yet that it is not to be presumed that the General Assembly intended that the general welfare clause, though broad in its terms, should be construed as authority for the municipal corporation to interfere with one doing something lawful for him to do under a settled policy of the state, expressed in its laws. By the imposition of the \$500 tax upon clubs the state declared its policy with reference to such keeping of liquor as is dealt with in the tax act; and any departure from this policy must commence with the General Assembly itself, either by direct law to this effect, or by granting some subordinate public corporation express authority to make such departure.

Counsel for the defendant in error recognized the force of this principle, and contended that the express authority to pass the ordinance in question is conveyed by the proviso contained in the tax act. The proviso to subdivision 47, quoted above, is in these words: "Provided that nothing in this section shall be construed to license or permit the keeping of any intoxicating liquors in any place now prohibited by law or which may hereafter be prohibited by law." The contention of counsel for the defendant in

error is that the prohibition contained in the ordinance of the city of Macon in question is prohibition by law within the terms and meaning of the proviso in the tax act. We cannot concur in this contention. It is clear that the Legislature, in providing that the license specified in the tax act should not permit the keeping of intoxicating liquors in any place now prohibited, referred to those places, mentioned in the prohibition act, to which we have adverted—public places and places of business, these being the only places where the keeping of liquor was prohibited—and that the concluding clause, referring to places which may hereafter be prohibited by law, was an expression on the part of the Legislature of its reservation of the right hereafter to prohibit the keeping of intoxicating liquors at such additional places as it might see fit.

The contention that municipal ordinances are necessarily included or intended by the use of the word "law," in the proviso to the tax act, cannot be sustained. Ordinances are mere rules or by-laws of a municipal corporation. In *Bearden v. Madison*, 73 Ga. 184, it was held that the ordinances referred to had the force of laws, and yet they are distinguished from the law of the land. As stated by Blackstone, any rule of conduct is, in one sense, a law. But it cannot be presumed that the Legislature, in using the word "law," in the proviso to subdivision 47 of section 2 of the tax act, had in mind the by-laws of a municipality, any more than it was considering the laws of nature; for the courts do not take judicial cognizance of municipal ordinances. *Mayson v. Atlanta*, 77 Ga. 663 (5). If the courts are not presumed to know the municipal ordinances of the various municipalities, can it be presumed that the Legislature knew? And, if not, can it be presumed that the Legislature had them in mind? And if the Legislature intended municipal ordinances to conflict with the tax regulations which it was passing, and intended to except such municipalities as saw fit to prohibit all keeping of intoxicating liquors for any purpose whatever, we are of the opinion that the Legislature would have added to the word "law," in the proviso, the words, "or by the municipal ordinances of any city or town in this state," so that the proviso would have read, "provided that nothing in this section shall be construed to license or permit the keeping of any intoxicating liquors in any place now prohibited by law, or which may hereafter be prohibited by law, or by the ordinance of any city or town in this state." In *Haywood v. Savannah*, 12 Ga. 410, Judge Lumpkin said: "If, then, the act of 1809 (Laws 1801-1810, p. 540) is not repealed, either directly or by implication, by the act of 1849 (Laws 1849-50, p. 88), surely it will not be seriously contended that such a construction should be put upon the general powers granted to this corporation under the latter

act as would enable them to repeal, by an ordinance, a law of the state. We deny the right of the Legislature to confer such a power upon a subordinate authority." It is held that "the General Assembly cannot confer upon a corporation the power by ordinance to repeal a statute of the state. A by-law of a corporation, repugnant to the Constitution, or common or statute law of the state, is void." *Id.* 405 (5).

We cite this for the reason that it affords additional ground for supposing that the Legislature did not intend municipal ordinances, when the term "law" was used in the ordinance. That the word "law" does not ordinarily include municipal ordinances, see 21 Am. & Eng. Enc. L. (2d Ed.) 947; 29 Cent. Dig. 834, § 122; *Williams v. Augusta*, 4 Ga. 513; *Mabra v. Atlanta*, 78 Ga. 679, 4 S. E. 154; *Haywood v. Savannah*, supra. In *Hill v. Dalton*, 72 Ga. 319, where the right of trial by jury was being insisted upon in a trial for a violation for a municipal ordinance, Chief Justice Jackson held that the right of jury trial could not be maintained, because the offense was against the city, and not against the laws of the state; thus clearly distinguishing the ordinance of the city from the law of the land, and, by implication, holding that city ordinances are not included within the term "law" as used in this state. In *Mabra v. Atlanta*, supra, Justice Hall draws the same distinction, and cites, as pointing out the distinction between infraction of municipal ordinances and violation of the public law. *Floyd v. Commissioners*, 14 Ga. 354, 58 Am. Dec. 559; *Mayor, etc., of Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *McRae v. Americus*, 59 Ga. 168, 27 Am. Rep. 390; *Rothschild v. Darien*, 69 Ga. 503. The Code (Pol. Code 1895, § 1) specifically declares what are the laws of this state, and the only "ordinances" mentioned are those of the convention of 1877.

Aside from any other consideration to which we have adverted, our judgment is controlled by the forty-seventh subdivision of the tax act of 1907 (Acts 1907, p. 35), which we have already quoted, and the decision of the Supreme Court in *Miller v. Shropshire*, 124 Ga. 829, 53 S. E. 335, in which the Supreme Court, in passing upon the "bucket shop tax," said: "The licensing of the business of speculating in 'futures' does not necessarily imprint sovereign approval upon that occupation, but it enables persons who are thus permitted to engage in the business to escape the consequences which would ensue, were they warned not to pursue their calling upon peril of being subjected to a deterring penalty, to be enforced by a criminal proceeding, or both. It is undoubtedly within the province of our General Assembly to divide those who hazard their money upon chance into two distinct classes; one to be known as 'gamblers,'

the others as 'financiers.' It may not be equally apparent that the interests of the commonwealth are best conserved by sending the gamster to the chain-gang and licensing the professional speculator to open a place of business and invite the public at large to there call upon him and place their bets upon the probable rise or fall in the stock market. But, be this as it may, the General Assembly has advisedly adopted, and has for many years pursued, this definite business policy, and we cannot defeat it. The general tax acts above referred to are purely revenue measures, though enforceable by penalty for failing to pay the imposed tax, as distinguished from police measures designed to regulate internal affairs. *Racine Iron Co. v. McCommons*, 111 Ga. 542-3, 36 S. E. 866, 51 L. R. A. 134." In support of the ruling the cases of *Houghton v. State*, 41 Tex. 136, *Overby v. State*, 18 Fla. 178, and *Rodgers v. State*, 26 Ala. 76, are cited.

When the Legislature, as a revenue measure, imposed a tax of \$500 upon "locker clubs," and especially when attention was called, by the proviso, to the contents of the previous prohibition bill, a general policy was fixed by the General Assembly; and the courts will not infer that the Legislature intends to permit any departure on the part of the subordinate local municipal governments from the general policy which has been adopted by the state, unless the exception is specifically and expressly denominated. *Sanders v. Butler*, *Ordinary v. Retailers*, *Miller v. Shropshire*, *Henderson v. Heyward*, and *Fears v. State*, supra; 17 Am. & Eng. Enc. L. (2d Ed.) 378-380.

Under the ruling in *Miller v. Shropshire*, supra, we conclude that the Legislature, having determined that the keeping of liquors in private places should not be prohibited in the exercise of the police power inherent in the state, it determined to raise a revenue by imposing a tax on "locker clubs," and a proviso was added, making it clear that no part of the recently enacted prohibition law was intended to be repealed or modified thereby. It is idle to discuss the policy or morality of this species of legislation, because we cannot question the right or power of the lawmakers to adopt a general public policy upon any subject, even though it be "for revenue only." The trial judge erred in not sustaining the certiorari.

Judgment reversed.

POWELL, J. (specially concurring). I concur, because obedience to the spirit of the binding precedent of *Miller v. Shropshire*, 124 Ga. 829, 53 S. E. 335, forbids that I should do otherwise. My personal judgment has never yielded assent to the principle of that case; for, if it means anything, it means that the state, by taxing a noxious occupation, gives such countenance to it as

to amount to the state's consent for it to be conducted free from penalties which otherwise would ensue. I have always thought that the better view was expressed by Judge Cooley in *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 664. I quote this language:

"The idea that the state lends its countenance to any particular traffic by taxing it seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that always must underlie taxation. Taxes are not favors. They are burdens. They are necessary, it is true, to the existence of the government, but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government when this burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the burden is withheld. It is safe to predict that, if such were the legal doctrine, any citizen would prefer to be visited with the untaxed frowns of government rather than with those testimonials of approval which are represented by the demands of the tax gatherer. It may be supposed that some idea of special protection is involved when a business is taxed; taxation and protection being reciprocal. If the tax upon any particular thing was the consideration for the protection given to the owner in respect to it, this might be so; but the maxim of reciprocity in taxation has no such meaning."

(6 Ga. App. 213)

CAMPBELL v. CITY OF THOMASVILLE.

JONES v. MAYOR, ETC., OF WAY-CROSS. (Nos. 1,813, 1,820.)

(Court of Appeals of Georgia. May 18, 1909.)

1. COURTS (§ 217*)—JURISDICTION—COURT OF APPEALS — CONSTITUTIONALITY OF ORDINANCE.

The Court of Appeals has jurisdiction to determine the constitutionality of a municipal ordinance.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 217.*]

2. INTOXICATING LIQUORS (§ 134*)—"NEAR BEER."

"Near beer" is a term of common currency, used to designate all that class of malt liquors which contain so little alcohol that they will not produce intoxication, though drunk to excess, and includes in its meaning all malt liquors which are not within the purview of the general prohibition law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 142; Dec. Dig. § 134.*]

3. INTOXICATING LIQUORS (§ 11*)—POWER TO CONTROL TRAFFIC—CONFLICTING REGULATIONS BY STATE AND MUNICIPALITY.

Since the General Assembly, by the "near beer" tax act of 1908 (Acts 1908, p. 1112), has by implication expressed the general policy of permitting the sale of "near beer" by those who pay the tax, the municipalities may not, in the absence of express charter authority, prohibit its sale entirely. They may, however, under the usual general welfare clause, enact reasonable regulations governing its sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 13; Dec. Dig. § 11.*]

4. INTOXICATING LIQUORS (§ 110*)—POWER TO CONTROL TRAFFIC SALE OF NEAR BEER.

The selling of "near beer" is a business which, from its very nature, admits of strict regulation under the police power. It stands legitimately in a different class from the business of selling drugs, soda water, and similar liquids. Regulations may be upheld as applied to this occupation which would be arbitrary and unreasonable if there were an attempt to apply them to other businesses.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 110.*]

5. INTOXICATING LIQUORS (§ 64*)—REGULATION OF SALE OF NEAR BEER—REASONABLENESS.

Any fair and apposite regulation designed to confine the business of selling "near beer" to persons of good character is reasonable.

(a) In order that the municipal governing body may have an opportunity to pass upon the character of the applicant, they may require the making of a written application and the granting of a permit or license thereon as a condition precedent to one's engaging in the business.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 64.*]

6. INTOXICATING LIQUORS (§§ 59, 130*)—REGULATION OF SALE OF NEAR BEER—TERRITORIAL LIMITS—REASONABLENESS.

The business of selling "near beer" may be confined to reasonable territorial limits within the municipality. The limits, however, should be fairly extensive, and not arbitrarily narrowed.

(a) The municipal governing body may legitimately refuse to grant a permit to sell at a place within the designated limits, where, for some special reason, it should appear that the sale in that particular place or building would be subversive of these objects which municipal government is designed to protect.

(b) The limits prescribed by the ordinance of the city of Waycross are, under all the facts appearing in the record, unreasonable.

(c) The ordinance just referred to was manifestly designed, not to regulate the sale of "near beer," but to prohibit it absolutely under the guise of regulation.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 138½; Dec. Dig. §§ 59, 130.*]

7. INTOXICATING LIQUORS (§§ 83, 84*)—REGULATION OF SALE OF NEAR BEER—BOND.

It is a reasonable regulation that every one who engages in the selling of "near beer" in a municipality shall give a good and solvent bond, conditioned that he will keep an orderly house, will not violate the state liquor laws, and will obey the municipal ordinances of the city regulating the business.

(a) A provision that the only acceptable surety on the bond shall be a guaranty company is unreasonable.

(b) A provision that the only acceptable sure-

ties on the bond shall be freeholders of the city is unreasonable.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. §§ 83, 84.*]

8. INTOXICATING LIQUORS (§ 116*)—REGULATION OF SALE OF NEAR BEER—REASONABLENESS.

Regulations forbidding the proprietors of "near beer" stands from allowing drinking on the premises, and also from permitting persons to loiter and idle there, are reasonable. Likewise a regulation forbidding the keeping of chairs, tables, gaming stands, etc., in the room is valid. It may also be required that the "near beer" business shall not be carried on in connection with any other business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 126; Dec. Dig. § 116.*]

9. INTOXICATING LIQUORS (§ 120*)—REGULATION OF SALE OF NEAR BEER—KEEPING OPEN.

A regulation that "near beer" stands shall not be kept open during night hours, or on Sundays, election days, or legal holidays, is valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 128-130; Dec. Dig. § 120.*]

10. INTOXICATING LIQUORS (§ 115*)—REGULATION OF SALE OF NEAR BEER—OBSCURING VIEW OF INTERIOR OF ROOM.

A regulation prohibiting the keepers of "near beer" stands from having in their places of business, screens, shades, stained windows, and other devices for obscuring the view of the interior of the room, is valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 125; Dec. Dig. § 115.*]

11. INTOXICATING LIQUORS (§§ 11, 119*) — REGULATION OF SALE OF NEAR BEER—OFFENSE AGAINST STATE—SALES TO FEMALES.

A regulation that minors shall not be permitted to enter the place where "near beer" is sold is valid. A provision in a municipal ordinance against selling "near beer" to a minor is unenforceable, as that is an offense against the general law of the state. Sales to females may be prohibited.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. §§ 11, 119.*]

12. INTOXICATING LIQUORS (§ 124*)—REGULATION OF SALE OF NEAR BEER—QUANTITY.

A regulation forbidding sales of less than a pint of "near beer" is valid; but it is unreasonable to forbid the sale of more than one quart to one person in one day.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 133; Dec. Dig. § 124.*]

13. INTOXICATING LIQUORS (§ 106*)—REGULATION OF SALE OF NEAR BEER—FORFEITURE OF LICENSE.

A provision, in a municipal ordinance regulating the licensing of the business of selling "near beer," that the license shall be forfeited if the holder is convicted of violating the state liquor laws or the ordinances of the municipality, is valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 113, 115-116; Dec. Dig. § 106.*]

14. INTOXICATING LIQUORS (§ 122*)—REGULATION OF SALE OF NEAR BEER—MARKING BOTTLES—SUBMITTING SAMPLES.

A municipality may lawfully ordain that all bottles, vessels, barrels, etc., containing

"near beer" shall have stamped thereon a designation of their contents and the name of the manufacturer thereof. It may also require all dealers in "near beer" to submit samples to be tested.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 122.*]

15. MUNICIPAL CORPORATIONS (§ 121*)—ORDINANCES — PERSONS ENTITLED TO QUESTION.

An indigent Confederate soldier, duly certified by the ordinary of the county of his residence, being exempt by law from the payment of any municipal license fee required for the sale of "near beer," cannot raise the question that the license fee named in an ordinance regulating the sale of "near beer" is excessive. He is not legally interested in the question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 257; Dec. Dig. § 121.*]

16. INTOXICATING LIQUORS (§ 112*)—REGULATION OF SALE OF NEAR BEER—INDIGENT CONFEDERATE SOLDIER.

Indigent Confederate soldiers, who have paid the state tax on the sale of "near beer," are exempt from the payment of municipal license fees imposed upon that business; but they are not exempt from the operation of such other reasonable regulations as the municipality may impose upon those engaging therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 112.*]

17. CONSTITUTIONAL LAW (§§ 208, 240, 296*) — REGULATION OF SALE OF NEAR BEER—ARBITRARY CLASSIFICATION — EQUAL PROTECTION OF LAWS—DUE PROCESS OF LAW.

The ordinance enacted by the city of Thomasville, regulating the sale of "near beer," is not unconstitutional, as against a person desiring to engage in that occupation, on the ground that it makes an arbitrary classification, or that it denies him the equal and complete protection of the laws, or that it takes his property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 208, 240, 296.*]

18. MUNICIPAL CORPORATIONS (§§ 111, 121*)—INTOXICATING LIQUORS (§ 11*)—ORDINANCE VOID IN PART AND VALID IN PART—BOND—PERSONS ENTITLED TO OBJECT—POWER TO CONTROL TRAFFIC.

A municipal ordinance may be void in part and good in part. The void and the good may be so interdependent as to render the whole invalid, or may be so separable as to allow a segregation, and to permit of the enforcement of one part, while the remainder is nugatory.

(a) The unreasonable requirement of the "near beer" ordinance of the city of Thomasville, restricting the nature of the sureties to be taken on the prescribed bond, is not such a vital part of the ordinance, and is not so interwoven into the whole legislative scheme, as to render the entire ordinance void.

(b) One who has been convicted of selling "near beer" in violation of that ordinance, but who has made no application to the city council and has tendered no bond at all, is not in a position to complain of the illegality of the requirement that the sureties on the bond shall be freeholders. This provision being void, the presumption is that, if he had tendered a bond otherwise sufficient, the city council would have ignored the void provision and would have accepted the bond.

(c) In the "near beer" ordinance of the city of Waycross the void and the good are so in-

terwoven as to indicate an invalid legislative design, and that ordinance must fall entirely.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 248; Dec. Dig. §§ 111, 121; * *Intoxicating Liquors*, Cent. Dig. § 13; Dec. Dig. § 11.*]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Error from Superior Court, Ware County; T. A. Parker, Judge.

E. L. Campbell was convicted in the city court of Thomasville of violating the "near beer" ordinance of that city. He presented a petition for certiorari to the superior court, and, that court having refused to sanction it, he brings error. Affirmed.

J. B. Jones was convicted in the police court of Waycross for violating the "near beer" ordinance of that city, and presented a petition for certiorari to the superior court, and, that court having refused to sanction it, he brings error. Reversed.

Theo. Titus, for plaintiff in error Campbell. Roddenberg & Luke, for defendant in error City of Thomasville.

J. L. Sweat and Malcolm D. Jones, for plaintiff in error Jones. Wilson, Bennett & Lambdin, for defendant in error City of Waycross.

POWELL, J. These two cases are distinct and separate causes, but will be considered together, because of the fact that they both involve the same general questions. In No. 1,813 the plaintiff in error, Campbell, was convicted of violating what is known as the "near beer" ordinance of the city of Thomasville. He presented a petition for certiorari to the judge of the superior court, who refused to sanction it; and to this judgment he brings error. The ordinance under which he was convicted is as follows:

"Whereas, in the judgment of this council the keeping of 'near beer,' or any other imitation of beer, for sale in the city, is in the nature of a nuisance, and certain to become a nuisance unless carried on under proper regulations, and to be or become more injurious to the general welfare of the city: Therefore, be it ordained * * *:

"Section 1. That any person desiring to sell in said city any imitation of beer that is commonly called 'near beer,' or any other imitation of beer, must, before commencing said business, make application to the council, through the clerk thereof, which application must be signed by the party applying for such license and must plainly and fully describe the house in which such business is to be carried on, the location by street and number, and the applicant must agree and bind himself thereby to keep a decent and orderly house, and that there shall be no screens or partitions or other devices of any kind by which any one passing along the front of

said place of business will be prevented from having a full, free, and unobstructed view of the entire interior of said place and every one therein; that there shall be no tables or seats therein for the use of customers; that no person or persons shall be allowed to loiter or loaf in said place of business; that minors shall not be allowed in said place of business; that said place of business shall not be opened at all on Sundays, nor before 6 o'clock in the morning, nor after 7 o'clock in the evening, and that between said hours of 7 p. m. and 6 a. m. no one shall be allowed to enter said place or remain therein after the time of closing; that, said application having been duly made and filed, the applicant shall file a bond with two good securities, freeholders of said city, in the penal sum of \$3,000, conditioned for the faithful performance of all conditions of the application, and the payment of any fine or fines that may be imposed by the mayor, or acting mayor, for a failure to comply with all the agreements, or any of them, in said application contained. If said application and bond are approved by council and the clerk authorized to issue a license to said applicant, the clerk shall not issue any license to such person until the said party presents a receipt from the treasurer for the sum of \$1,000 paid as a license for the time between the date of said receipt and the first day of the next March.

"Sec. 2. That any person who has obtained a license by complying with all the requirements of the preceding section, and who shall thereafter fail to comply with the terms of said application, by failing to keep out of said place of business any and all screens, partitions, or other things that prevent or tend to prevent a full, free, and unobstructed view of the entire room or rooms in which such business is carried on, or that has in said place of business tables or seats for the convenience of customers, or that allows minors in said place of business, or that allows persons to loiter or loaf in said place of business, or that opens before the time specified, to wit, 6 o'clock a. m., or that fails to close said place on the stroke of 7 o'clock p. m., or that conducts said place of business in such a way as to annoy or disturb the neighbors, shall be deemed guilty of violating this ordinance, and on conviction thereof shall be punished as provided in the general Penal Code, section 1, and his license shall be revoked also, and he and the securities on his bond shall be liable for any fine imposed for any such violation of this ordinance.

"Sec. 3. That the application above described must be signed by any party desiring or intending to engage in the business of selling 'near beer' or any other imitation of beer, and all the rules and requirements and punishments in the foregoing sections shall apply to every person carrying on said business

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

in this city, regardless of any exemption by law or otherwise that may be claimed by any party from the payment of a license fee. Any person claiming an exemption from such payment, by reason of his service as a Confederate soldier, must produce his certificate from the ordinary of the county of his residence, and must show that he is personally in charge of and running said business, and owns the same in his own right; otherwise the marshal shall close said place at once. Any such exemption from payment of license shall be construed to authorize the party holding same to run only one stand or place of business in this city.

"Sec. 4. Any person engaged in running a place where 'near beer' or any imitation of beer is sold shall be required to furnish the city with a sample of every brand or kind of such imitation of 'near beer' sold by him, whenever requested to do so by the marshal, for the purpose of having the same tested by the proper authorities as to the amount of alcohol therein, and a refusal to furnish such samples on request shall be deemed prima facie proof that such person is selling or keeping for sale at his place of business intoxicating liquors, and subject him to all the penalties for keeping for sale intoxicating liquors, prescribed by the city or the state."

Under the charter of the city of Thomasville (Acts 1889, p. 854) offenders may be brought to trial before the police court upon a summons "setting out in a plain, summary way the nature of the offense charged." The summons in the present case charged Campbell with "the offense of selling an imitation beer commonly called 'near beer' in the city of Thomasville, Ga., without complying with the regulations for the sale of same, as prescribed in the 'near beer' ordinance of said city." The defendant, upon arraignment in the police court, demurred to the summons, on the ground that it was too vague, indefinite, and uncertain to put him on notice as to what was charged against him. The demurrer elaborates this ground; but we do not deem it necessary to go into the details of these objections, as we think the summons sufficiently complies with the requirement of the charter that it shall set out the nature of the offense "in a plain summary way."

The defendant, by his demurrer, also attacked the ordinance in question as follows:

"Defendant says that said ordinance as it is written is void in its entirety, for the reason that it shows upon its face that it is not an attempt by the municipal authorities, by way of police regulations, to regulate and reasonably restrict or govern dealers in 'near beer'; but that, on the contrary, the said ordinance shows on its face that it is arbitrary and unreasonable, and intended by said city to be vexatious, and for the purpose of driving persons engaged in the 'near beer' business in said city, under a license from the state of Georgia, out of said city, and de-

stroying and depriving them of their right, given by law, to conduct said business, same being a property right.

"For further ground of demurrer defendant says that said ordinance is void, and incapable of enforcement as to any provisions thereof, because it is apparent from the general scheme of the ordinance that the same was intended to be enforced as a whole, and it was not the intention of the makers thereof that any particular portion of said ordinance should be enforced; and, further, said ordinance shows that it is incapable of enforcement, except in its entirety, for the reason that an attempt to enforce a part only of it would cause the entire legislative scheme to fail.

"For further ground of demurrer defendant says that said ordinance is void because it violates paragraph 1, section 4, of article 1 of the Constitution of Georgia, in that it is a local law and in direct conflict with section 1642 of the Political Code of 1895, and Acts Leg. 1897, p. 24, amendatory to said Code section, conferring upon Confederate soldiers the right to peddle or carry on business in any city in Georgia, in that said ordinance, by reason of its unreasonableness, is destructive and prohibitive of the right so conferred upon confederate soldiers by the general law to conduct business without giving bond; the said ordinance making no exceptions as to them.

"For further ground of demurrer, defendant says that said ordinance is void because, as it is written, it is conflicting with the general law of Georgia, approved September 5, 1908 (Acts 1908, p. 1112), same being an act to provide a revenue for development and conduct of the penitentiary system of the state, etc., because, by reason of its arbitrariness and unreasonableness, it renders it impossible for any person, after having paid the state of Georgia the license tax of \$200, as contemplated by said act, to conduct the business authorized by said license from the state in said city of Thomasville, by requiring a license which is prohibitory, and a \$3,000 bond, which is likewise prohibitory; and for this reason it is violative of the provisions of the Constitution aforesaid, and therefore unconstitutional, and for this reason is also void, because, as it is written, it is contrary to the public policy of the state of Georgia, as outlined in said act referred to.

"For further ground of demurrer defendant says that said ordinance is unconstitutional and void because it violates paragraph 2, section 1, article 1 of the Constitution of Georgia, in that it denies to persons engaged in the 'near beer' business in said city impartial and complete protection of their persons and property, guaranteed by the Constitution, for the reason that it arbitrarily taxes one class of dealers in nonintoxicating malt liquors, and undertakes to classify them, and to impose upon them restrictions and regulations and licenses, without placing any re-

strictions and regulations and licenses upon any other class of dealers in nonintoxicating malt liquors in said city, such as licensed druggists; and for the further reason that the requirements of said ordinance are such as to totally destroy and impair the property right of such dealers in said business, acquired by the payment of the license tax to the state of Georgia.

"For further ground of demurrer defendant says said ordinance is null and void because in conflict with article 1, section 1, paragraph 3, of the Constitution of Georgia, and is likewise in conflict with the fourteenth amendment of the Constitution of the United States (Civ. Code 1895, § 6080), because it deprives the defendant of his property without due process of law, and denies him the equal protection of the laws, because the provision in said ordinance requiring the defendant to make bond in the penal sum of \$3,000, conditioned to pay any fine that might be assessed against him, which bond must be signed by two good securities, freeholders of said city, and the additional requirement that he pay a license fee of \$1,000, are absolutely prohibitive and destructive of the defendant's right to carry on the business authorized by the state of Georgia, in consideration of the license tax of \$200, and because, the business of dealing in 'near beer' being authorized and licensed by the state of Georgia solely on the idea that the beverage is not an intoxicant, the said ordinance, arbitrarily taxing such dealers, and segregating and classifying them and their business, and imposing upon it unreasonable restrictions and regulations and prohibitions, without putting any such regulations and restrictions upon persons carrying on any other business in said city, and especially in distinguishing 'near beer' dealers from all other dealers in nonintoxicating malt liquors, is denying to the defendant the equal protection of the laws."

Upon the trial it appeared that the defendant had paid the state tax on dealers in imitation or "near beer"; also that he was an indigent Confederate soldier and possessed the certificate of the ordinary of the county of his residence, upon which he was entitled to the benefit of the statute exempting indigent soldiers from the payment of certain occupation taxes. It was proved that he had sold "near beer" without complying with the requirements of the ordinance. No point is made upon the adequacy of the evidence. The only grounds of error are that the conviction is contrary to law, for the lack of a legal ordinance, and that the mayor presiding in the police court erred in overruling the demurrer.

In No. 1,820 the plaintiff in error, Jones, was convicted in the police court of Waycross, for the violation of what is called the "near beer" ordinance of that city. He also excepts to the fact that the judge of the

superior court refused to sanction a certiorari. Upon arraignment the defendant filed pleading, which he designated as an answer, and which presents his attack upon the ordinance, as follows: "Defendant admits having violated 'an ordinance to license and regulate the sale of "near beer" and similar beverages within the corporate limits of the city of Waycross, and for other purposes,' adopted March 3, 1909, a certified copy of which is hereto attached, by engaging in the sale at retail, in store No. 17 on Albany avenue, in said city, of a nonintoxicating beverage manufactured by the Acme Brewing Company, of Macon, Ga., and of a similar nonintoxicating beverage manufactured by the Savannah Brewing Company, of Savannah, Ga., with the name of each company plainly stamped on the bottles containing same, respectively, commonly known as 'near beer,' contrary to the provisions of said ordinance; but defendant says that he should not be adjudged guilty, and punished as prescribed in said ordinance, because the same is illegal, invalid, and contrary to the law of the state.

"(2) Defendant further says that, if said ordinance shall be deemed valid and binding, he should not be adjudged guilty and punished as prescribed therein, because on February 28, 1909, he paid to the ordinary of Ware county, in which said city of Waycross is located, the sum of \$200, the amount of the state license tax required for the sale of 'near beer,' obtaining his receipt or license therefor, and thereupon rented said store No. 17 on Albany avenue, in said city, fronting on the courthouse square and one of the business streets of said city, for one year at the monthly rental of \$10, paying to the owner the rent for the month of March 1909, and on the 1st day of said month and prior to the adoption of said ordinance engaged in the business of selling at retail said 'near beer,' and, as defendant holds a license duly issued to him as a Confederate soldier by Warren Lott, ordinary of said county of Ware, dated October 21, 1899, he is exempt from the payment of any license tax to said city of Waycross.

"(3) Further answering, defendant says that said ordinance is illegal because its terms and conditions are unreasonable and cannot be complied with, and hence it is prohibitive of a lawful business being engaged in within said city of Waycross, in that it limits and restricts the carrying on of said business only upon that portion of one of the business streets of said city known as Plant avenue, between Gordon street and Frances street, where a store cannot be rented for that purpose, and furthermore requires the written consent of all the owners and occupants of stores, shops, residences, and other buildings within a radius of 100 yards of the place where said business is to be conducted, which cannot be obtained, and fixes the license fee therefor at the unreasonable sum

of \$1,000 per annum for all others than Confederate soldiers, and requires of every one engaged in said business, including Confederate soldiers, to give a bond, with a reliable guaranty company as surety, in the unreasonable sum of \$5,000, which defendant cannot give, as the agents for all such companies doing business in Waycross refuse to make the same, and, moreover, it limits the quantity of said 'near beer' to be sold by any one person in any one day to not more than one quart, and prevents the carrying on of said business except between the hours of 8 o'clock a. m. and 5 o'clock p. m., the same being an unreasonable restriction, as said business could be made most profitable between the hours of 5 o'clock p. m. and 10 o'clock p. m., and as it also prevents the drinking of said 'near beer' in the building or on the premises where such business is located, which is necessary, as the retail dealer is expected to open same and furnish glasses for the purpose, and return the empty bottles to the manufacturer, and as it also prevents any person lingering in or about such place of business or on the premises for any length of time whatever, and prohibits the sale of cigars or any other thing at such place of business.

"For all of which said reasons defendant says he should not be adjudged guilty and punished as prescribed in said ordinance. Wherefore, having fully answered, defendant prays to be hence discharged."

As an exhibit, the ordinance is set out as follows:

"Section 1. Be it ordained by the mayor and council of the city of Waycross, and it is hereby ordained by authority of the same, that from and after the passage of this ordinance it shall not be lawful for any person, firm, or corporation to sell, or offer for sale, or to have on hand for the purpose of sale, any preparation or beverage known as 'near beer,' or 'Bud,' or 'Malt Mead,' or 'Acme Brew,' or 'Red Buck Ale,' or similar drinks or beverages or substitutes, within the corporate limits of the city of Waycross, unless such person, firm, or corporation shall comply with the following conditions, namely: (1) An application in writing shall be made to the mayor and council for a license, and such application shall state the place where said 'near beer' or similar beverages will be sold, which application must have indorsed thereon the written consent of *all* [italics ours] the owners and occupants of stores, shops, residences, and other buildings within a radius of one hundred yards of the place where said business is to be conducted, and same shall be granted only by a majority vote of council. The provisions of this section, as to securing the written consent of the parties named therein, shall also apply to those persons who may be exempted by law from having to secure license from municipal authorities in order to engage in such business,

and such persons shall be required, before opening up or carrying on such business, to secure such written consent. (2) The amount to be paid by the applicant for such license shall be \$1,000 per annum, payable in advance. (3) No person, firm, or corporation shall be allowed to sell such 'near beer,' or similar beverages, except on the following street, to wit, on Plant avenue, between Gordon street and Frances street. (4) Every applicant for such license, and any other person or persons engaging in said business who may be by law authorized to do so without a license from the municipal authorities of said city, shall be required to give a good and sufficient bond, with a reliable guaranty company as surety, to be approved by said mayor and council, and payable to said municipal corporation, in the sum of \$5,000, conditioned to keep a clean and orderly house and place of business and to comply with all the rules, regulations, and requirements adopted by said mayor and council, or that may hereafter be adopted by them, touching the conduct of such business and regulating the sale of such 'near beer' or other beverages.

"Sec. 2. Be it further ordained, that it shall not be lawful for any person, firm, or corporation to sell to any one person, on any one day, more than one quart of such 'near beer' or other beverage, and the quantity sold to any one person at any one time shall not be less than one pint; nor shall same be sold to minors or females.

"Sec. 3. Be it further ordained, that no 'near beer' or other similar beverages shall be drunk in the building or on the premises where such business is located, and it shall not be lawful for any person, firm, or corporation selling 'near beer' or other similar beverage to sell same or keep open their place of business, except between the hours of 8 o'clock a. m. and 5 o'clock p. m. Said places of business shall be closed on Sundays, public holidays, and election days, and such other days as the mayor and council may direct.

"Sec. 4. Be it further ordained, that it shall not be lawful for any kind of table, stand, cards, games, machines, board, billiard table, or pool table, or any other device or implement, for playing any game, to be allowed or kept in the building or on the premises where said business shall be located.

"Sec. 5. Be it further ordained, that it shall not be lawful for any place of business, where said 'near beer' or similar beverage is sold, to be provided with screens or shades, or for the front doors or windows to be painted or frosted over, or otherwise darkened or obscured; but the interior of such place of business shall always be kept in open view of the street in front.

"Sec. 6. Be it further ordained, that it shall not be lawful for any person, firm, or corporation doing such business to allow any person or persons to linger or loiter in or about such place of business, or on the premi-

ses on which same is located; and likewise any person failing or refusing to leave said place of business or premises shall be punished as hereinafter provided.

"Sec. 7. Be it further ordained, that it shall be unlawful for any person, firm, or corporation to sell or offer for sale anything or any other article of merchandise except such 'near beer' or similar beverage at the place of business where same is sold, or to carry on or conduct any other business, vocation, or calling at such place.

"Sec. 8. Be it further ordained, that it shall not be lawful for any person, firm, or corporation as aforesaid to keep on hand, or to allow or suffer any other person, firm, or corporation to keep or store at such place of business, or on the premises connected therewith, any other kinds of beer, wines, or liquors, or to allow or suffer any person to drink any kinds of beers, wines, or malt, spirituous, or intoxicating liquors at such place of business or on the premises where same is located.

"Sec. 9. Be it further ordained, that any person, firm, or corporation selling 'near beer' or other similar beverage in kegs, bottles, or otherwise shall have the kegs or other vessels so stamped as to show the name of the manufacturer of such 'near beer' or similar beverage.

"Sec. 10. Be it further ordained, that it shall be unlawful for any person, firm, or corporation, their agents or employes, to take or keep intoxicating liquors on deposit in soft drink or 'near beer' stands. Persons holding such licenses or carrying on such business shall not receive or retain at such places intoxicating liquor or beer on deposit or to be kept there until called for, or allow same to be left with them for any purpose, or allow people to drink beer or whisky so left at their places or brought to their places; and it shall likewise be unlawful for any person, firm, or corporation, their agents or employes, to receive intoxicating liquors or beer where the same is left with them on a claim that it is deposited for the time being and will be called for afterwards.

"Sec. 11. Be it further ordained, that any person, firm, or corporation violating any of the provisions of this ordinance shall, on conviction, for each offense be punished as provided by section 23 of the charter of this city, and on conviction of any person, firm, or corporation holding a license to sell 'near beer' or other similar beverages as above provided for, such license shall be ipso facto revoked, and it shall thereafter be unlawful to sell or furnish 'near beer' or other beverage at such place of business; and any person, firm, or corporation so offending shall likewise on conviction, be punished as provided by section 23 of the charter of this city.

"Sec. 12. Be it further ordained, that each and every provision of this ordinance, except alone the provision requiring the payment of \$1,000 license fee, shall apply to all persons

who may by law be not subject to the license tax imposed upon the sale of 'near beer' and similar beverages, as well as to other persons, firms, and corporations selling 'near beer' or other similar beverages within the corporate limits of this city."

Further facts necessary to an understanding of the points decided will be stated in the course of the opinion.

1. As a preliminary proposition we will dispose of the suggestion that this court should certify to the Supreme Court the questions growing out of the constitutional attacks made upon the ordinances. The constitutional amendment creating this court and separating its jurisdiction from the Supreme Court provides that "where, in a case pending in the Court of Appeals, a question is raised as to the construction of a provision of the Constitution of this state or of the United States, or as to the constitutionality of an act of the General Assembly of this state, and a decision of the question is necessary to the determination of the case, the Court of Appeals shall so certify to the Supreme Court," etc. Laws Ga. 1906, p. 26; 1 Ga. App. viii. It will be seen that as to enactments, laws, ordinances, rules, and regulations, etc., other than acts of the General Assembly of this state, the Court of Appeals has the jurisdiction to determine their constitutionality, and it is not necessary to certify such questions to the Supreme Court, unless they also involve the construction of some provision of the Constitution of this state or of the United States.

2. Also, at the beginning of the opinion, we may as well introduce to bench and bar this new recruit in the ranks of that army of subjects which are wont to trouble the courts, "near beer," and give its name a place in the roll of judicial definitions. "Near beer" is a term now of general currency in this state, and perhaps elsewhere, used to designate any and all of that class of malt liquors which contain so little alcohol that they will not produce intoxication, even though drunk to excess. It includes all malt liquors which are not within the purview of the general prohibition law.

3. There would be but little difficulty in convincing any one who is familiar with the general purport of the decisions, state and federal, which have been rendered concerning that subtle and apparently undefinable essence of local sovereignty which is called the "police power," that as a general proposition, uninfluenced by any inconsistent legislative declarations, a municipal government would have the power, under the usual general welfare clause, even to prohibit the sale of "near beer" and of imitations and substitutes for beer and other intoxicating liquors. However, in this state we must approach the subject with the fact in mind that the General Assembly, at its last session, placed a license tax upon the sale of these very things. In what is known as the

"Locker Club Tax Case" (Wright v. Mayor, etc., of Macon, 64 S. E. 807, decided October 28, 1908) this court (with expressions of personal reluctance on the part of the judges, it is true, yet with due alacrity of obedience to the precedent of the case of Miller v. Shropshire, 124 Ga. 829, 59 S. E. 335), held that the placing by the state of an occupation tax or license fee upon a particular business evinced such a legislative policy as to forbid a municipality, in the absence of an express delegation of authority, from prohibiting that business or occupation. To be valid, therefore, an ordinance adopted by a municipality to which no express authority on the subject has been delegated must, as regards the business of selling "near beer" and other imitations of and substitutes for intoxicating liquors, stop short of actual or substantial prohibition.

4. That the municipalities may reasonably regulate the sale of these nonintoxicating liquors seems to us to be perfectly clear. A case closely in point is that of Monroe v. City of Lawrence, 44 Kan. 609, 24 Pac. 1113, 10 L. R. A. 520. The ordinance in that case provided that no person should sell or give away cider in less quantities than one gallon, or permit the same to be drunk on the premises. The point presented and decided will be plainly seen from the following quotation from the unanimous opinion of the court:

"The appellant contends that cider is a harmless and wholesome drink, and that the restriction upon its sale is unreasonable, and an unlawful restraint of trade, in contravention of a common right, and is therefore unconstitutional. The ordinance was manifestly not enacted in pursuance of the prohibitory law, nor for the regulation of the sale of intoxicating liquors. The ordinance inferentially permits the sale of cider in quantities of a gallon or more, and the penalty for its violation may be \$10, without imprisonment. These provisions are not consonant with the law prohibiting and punishing the unlawful sale of intoxicating liquors, and hence we must infer that the ordinance was passed for the purpose of controlling the sale and disposition of cider that was not intoxicating. It will be observed that the ordinance regulates, rather than prohibits, the sale of cider, and the legislative power to regulate the sale of an article or liquid, which in some stages is harmless and in others hurtful, is no longer open to question. The juice of apples quickly changes from fresh to hard cider, and hard cider is presumptively not only a fermented, but an intoxicating, liquor. State v. Schaefer, 44 Kan. 90, 24 Pac. 92. It is difficult to show when the change occurs, and when it reaches such a stage as will produce intoxication. It may have been thought that the drinking of cider might foster a taste for strong liquors, and that, if the unrestricted sale of cider by the glass was permitted, the officers might be easily deceived as to the character of the

drinks sold, and that a tippling shop might be carried on under the guise of a place to sell cider. In the interest of the health of the people and the peace and good order of the communities, it was deemed wise to regulate the traffic. To sell it by the glass and allow it to be drunk upon the premises where sold was deemed to be subversive of good order, and dangerous to the health and morals of the people; and hence they imposed a regulation that it should not be sold in less quantities than one gallon and should not be drunk at the place of sale. Such a regulation violates no private right, and does not unreasonably or improperly restrain trade. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; Stokes v. New York, 14 Wend. (N. Y.) 88; Mobile v. Yuille, 8 Ala. 137, 36 Am. Dec. 441; State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419, and note.

"The principal contention, however, is that the power to regulate the sale was not conferred on the city council. There is no provision of statute directly authorizing the enactment of such an ordinance; but the Legislature, after conferring power to pass ordinances for certain specific purposes, authorizes 'city councils to enact and make all such ordinances, by-laws, rules and regulations not inconsistent with the laws of the state, as may be expedient for maintaining the peace, good government and welfare of the city, and its trade and commerce.' Gen. St. 1889, par. 824. The same section of the statute provides that the ordinances passed in pursuance of this authority shall be enforced by suitable penalties therein prescribed. The ordinance under consideration is not repugnant to the Constitution or laws of the state, and, as we have seen, the regulation of the same is neither unreasonable nor unjust. Every statute of the state shows the solicitude of the law to protect the health and morals of the people, and preserve the peace and good order of the communities; and it is manifest that the Legislature intended that ample authority should be conferred, either by express grant or by virtue of the general powers, to carry out this purpose. Instead of specifically defining every regulation which might be necessary to the health, peace, and convenience of the public, the Legislature enacted the general welfare clause; and it seems to us that it furnished sufficient authority for the council to pass an ordinance so clearly in the interest of peace, good order, and health as the one in question."

Every argument why cider should be regarded as within the police power which is delegated to municipalities by the ordinary general welfare clause is emphasized in the case of "near beer" and similar liquors. The very name "near beer" is as suggestive to the guardian of the police power of a necessity for close oversight, regulation, and control as it is to the drinking classes of possibilities which they may hope to find in the

beverage. Its very name, so to speak, is a transcript of its character. A liquor that is "near beer," looks like beer, smells like beer, tastes somewhat like beer, capable of cheering, though not of inebriating, well deserves the attention of those whose duty it is to protect the health, peace, and good order of the community. The argument that, since "near beer" is not an intoxicating liquor, dealers in it should stand on the same footing as dealers in soda water and other similar beverages, well comports with the zeal and partizanship which is to be expected of counsel in the case; but we would stultify ourselves if we did not recognize an essential distinction and a well-marked difference between the two classes. Both businesses are in a certain sense alike legitimate; but there are many varieties of legitimate businesses. An occupation may be lawful and yet may be neither useful nor necessary—in fact, may have a harmful tendency. Is the supposition to be indulged for an instant that a state tax of \$200 on each soda water dealer, in addition to such municipal taxes as might lawfully be collected, would cause to be poured into the treasury the vast sums of money which the "near beer" tax has brought in? And yet, prior to the adoption of the prohibition law, when "near beer" and soda water were on an equality so far as taxation was concerned, who ever heard of a "near beer" dealer? Who, prior to the advent of prohibition, would have paid even \$10 per annum for the privilege of selling imitations and substitutes for beer and other intoxicating liquors? What does all this suggest to the reasoning mind? Are we, as judges, to be blind to that which all our fellow citizens see and know—that this recently born desire of so many people to sell "near beer" springs from a recognition on their part of the fact that the prohibition law did not kill out old cravings, but perhaps stimulated them; that "near beer," though but a poor substitute, is nevertheless adequate somewhat to palliate the special thirst; that, though not strong enough to intoxicate, it nevertheless affords something in that direction; that "near beer" is capable of making men "near intoxicated"; and that there is a profit to be made in pandering to those desires the gratifying of which tends to suppress the judgment and sense of discretion in men and to stimulate their emotional faculties? Not only that, but what other business so facilitates the operation of a "blind tiger" and the sale of liquors that are intoxicating?

The state, and under its authority the municipalities, have the right "to enact rules for the conduct of the most necessary and common occupations, when from their nature they offer peculiar opportunities for imposition and fraud." *Bazemore v. State*, 121 Ga. 620, 49 S. E. 701, citing *Cooley*, Const. Limitations (7th Ed.) 887, and *Turner v. Maryland*, 107 U. S. 41, 2 Sup. Ct. 44, 27 L. Ed. 370 et seq. In *Powell v. Pennsylvania*,

127 U. S. 684, 8 Sup. Ct. 992, 1257, 32 L. Ed. 256, the United States Supreme Court held that the possibility that "the manufacture of oleomargarine or imitation butter of the kind described in the statute is or may be conducted in such a way or with such skill and secrecy as to baffle ordinary inspection" is a ground for even its entire prohibition, and, of course, as a consequence therefrom, the strictest regulation under the police power, and upheld the statute as applied to that case, notwithstanding the fact that *Powell's* particular oleomargarine was properly manufactured and was no menace to health. This ruling was followed in the case of *Capital City Dairy Co. v. Ohio*, 183 U. S. 245, 22 Sup. Ct. 123, 46 L. Ed. 175, in which the court said: "The proposition is that, as by the Ohio statutes harmless coloring matter is permitted to be used in butter, the effect of prohibiting the use of such harmless ingredients in oleomargarine is to deprive the manufacturer of oleomargarine of equal protection of the laws, and to take from him his property without due process of law." The Supreme Court of Ohio, however, having before it the evidence introduced upon the issues of fact made in the pleadings, held that oleomargarine was an article which might easily be manufactured so as to be hurtful, and thus result in fraud upon and injury to the public, and that the inhibition of the use of coloring matter in oleomargarine was a reasonable police regulation tending to insure the public against fraud and injury." And the statute was held to be a valid exercise of the police power. See, also, *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223.

The very possibility which "near beer" and imitations and substitutes for beer and other intoxicating liquors afford toward the palming off of real beer and actual intoxicating liquors under that guise, as well as of selling beverages dangerous to the public health, places the business of dealing in them under the guardianship and control of the police power. Therefore, while the municipalities in this state, under their general welfare clauses and in the absence of broader and express delegation of authority, may, as to the business of dealing in the class of beverages here under discussion, regulate only, and not prohibit, and while the regulation must be reasonable, and not arbitrary, yet regulations may be sustained as being reasonable, as applied to such occupations, which would be void for unreasonableness if they were made to relate to callings of a different nature. On this general subject, see 28 Cyc. 733, 734; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 638, 44 L. Ed. 725; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; *Ex parte Byrd*, 84 Ala. 17, 4 South. 397, 5 Am. St.

Rep. 328; *Turner v. Maryland*, 107 U. S. 41, 2 Sup. Ct. 44, 27 L. Ed. 370; *Holden v. Hardy*, 169 U. S. 393, 18 Sup. Ct. 383, 42 L. Ed. 780; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Williams v. City Council of Augusta*, 4 Ga. 509; *Green v. Mayor, etc., of Savannah*, 6 Ga. 13; *Nagle v. Augusta*, 5 Ga. 546; *Watson v. Mayor, etc., of Thompson*, 116 Ga. 546, 42 S. E. 747, 59 L. R. A. 602, 94 Am. St. Rep. 137; *Badkins v. Robinson*, 53 Ga. 614; *Bearden v. Madison*, 73 Ga. 184; *Cosgrove v. Augusta*, 103 Ga. 835; 31 S. E. 445, 42 L. R. A. 711, 68 Am. St. Rep. 149; *Crum v. Bray*, 121 Ga. 709, 49 S. E. 686; *Bazemore v. State*, 121 Ga. 620, 49 S. E. 701.

We have intentionally omitted the citation of a great number of intoxicating liquor cases, to which reference might be had on the general subject, for fear that we may give the impression that we are deciding this case as if the sale of intoxicating beverages were involved. Fundamentally, however, the right to regulate the sale of intoxicating liquors differs only in degree from the right to regulate imitations and substitutes for such beverages, and especially those which approach closely to the border line of being intoxicating. In general terms it may be said that municipal corporations, in dealing with the sale of "near beer" and like beverages, may, under the general welfare clause, adopt all fair and appropriate regulations which would tend to prevent the business from becoming a nuisance by attracting together idle or disorderly persons, or by otherwise tending to disturb the public peace and tranquility, or from becoming a menace to health by reason of the sale of impure or unwholesome liquors, or from becoming a means of violating the law as to the sale or keeping of intoxicating liquors. Keeping in mind these general principles, as well as the recognized doctrine that municipal ordinances are to be considered *prima facie* as reasonable, and that all serious doubt is to be resolved in favor of their validity, we will now proceed to take up the particular provisions of the ordinances before us for consideration.

5. One of the most apposite and effective means of securing the public against nuisance, menace to health, or violation of law as a result of the sale of "near beer" is to confine the business to persons of good character. Regulation to this extent has frequently been upheld. In *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, it is held that it is reasonable for a municipality to require evidence of the applicant's good character as a condition precedent to the issuance to him of a license to sell cigarettes. It is further held that it is not arbitrary or unreasonable to require the applicant to submit this question to some designated official or tribunal; it being presumed, until the contrary appears, that the

question will be honestly and impartially decided. Hence we hold that, so far as the ordinances in question require a written application to be made to the governing body of the respective cities and require a permit or license from them, it is valid. If the right to sell were arbitrarily refused in any case, the courts would have adequate power to correct that wrong. See *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. But, as the Supreme Court of the United States held in the case of *Gundling v. Chicago*, supra, no such question arises until there has been an application for a license and a refusal to grant it.

6. It is, of course, proper to require the applicant to designate, and, if necessary, to describe, the room and building in which he proposes to locate the business. For obvious reasons it would be manifestly proper for the tribunal passing on the application to refuse it, if it appeared that the business was about to be carried on in some remote section of the city, or in a residential portion, or near a church or school, or in some upstairs back room; and this enumeration is not exhaustive. Indeed, we think it would be perfectly legitimate for the municipal legislature to confine, by general ordinance, the business to certain reasonable limits. As to this, see *Ex parte Byrd*, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328; *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Holden v. Hardy*, 169 U. S. 393, 18 Sup. Ct. 383, 42 L. Ed. 780; *Sanders v. Elberton*, 50 Ga. 178, and cases there cited; *Badkins v. Robinson*, 53 Ga. 615. When only the power to regulate and not also to prohibit is possessed by the municipality, these limits must be such in extent as to afford a reasonable opportunity that the business may be conducted within them. What is reasonable is a fact primarily for the municipal body; but the courts are under the duty of declaring the limitation void if, from allunde facts appearing in the record, its unreasonableness is established. *Yick Wo v. Hopkins*, supra; *Bearden v. Madison*, 73 Ga. 184.

It appears from the record in the *Waycross* case, under consideration, that the limitation that the business shall be conducted only "on Plant avenue, between Gordon street and Frances street," especially when taken in connection with the provision requiring the consent of all owners and occupants of stores, shops, residences, and other buildings within a radius of 100 yards of the place where the business is to be conducted, is unreasonable; that it amounts to substantial prohibition, and not to regulation. It appeared on the trial that the distance along Plant avenue, from Gordon street to Frances street, is 900 yards, including the parks and intersecting street, and that there were 55 storerooms fronting on this portion of the avenue; that this was the principal business street of the city, but that several other

parallel and intersecting streets in this section of the city were also devoted to business purposes, and were equally open to police patrol and protection. It further appeared that the owners of all the vacant houses on Plant avenue, within the designated limits, had been applied to and had refused to rent their property for the sale of "near beer." Indeed, it is impossible to read this provision of the ordinance in connection with the testimony in the record without reaching the conclusion that the object of the city council was not to regulate the business in question, but to prohibit the defendant and all others from engaging in it at all. The provision in the Waycross ordinance that the applicant shall present the "written consent of all the owners and occupants of stores, shops, residences, and other buildings within a radius of one hundred yards of the place where the business is to be conducted" smacks of prohibition, rather than regulation. It would be a legitimate exercise of discretion for a city council to refuse to allow a "near beer" stand to be located in a place where it would be generally objectionable to the neighbors; but to allow the arbitrary refusal of consent by one property holder, or one occupant of a building, to defeat the right to carry on the business, when all the others similarly situated have consented, is hardly reasonable. If the provision were that a majority, or perhaps even two-thirds, of the neighbors should consent, we would uphold it; but, as it is, we are constrained to declare it void.

There is nothing unreasonable in requiring one who is about to engage in selling "near beer" to give bond to keep an orderly house, or to comply with the regulations governing the business, and not to violate the state law, or even, as is provided in the Thomasville ordinance, to pay such fines as may be imposed for violations of the ordinance. Such a provision is a wholesome deterrent in several respects. The very requirement that the applicant shall bring sponsors for his conduct tends of itself to confine the business to persons of good character. If the applicant is a person of good character, and his neighbors know that he will likely obey the law and keep an orderly house, he will usually have but little difficulty in getting sureties for his bond, no matter how poor he may be. On the other hand, most persons would be chary of signing such a bond for even a rich man if he were of bad character and would likely violate the law. Besides, the very fact of being under bond for good conduct tends to make most men feel the responsibility more vividly. So far, therefore, as the ordinances require bonds they are valid.

However, we do not find them so reasonable when we come to consider some of the limitations which have been prescribed as to the nature of the bonds required. In the

Waycross ordinance the requirement is "for a good and sufficient bond, with a reliable guaranty company as surety." No good reason appears for the requirement of a guaranty company as the only acceptable surety. The requirement seems to be purely arbitrary, and designed for the purpose of preventing the bond from being made; for it appears from the testimony that none of the guaranty companies doing business in Waycross will undertake such an obligation as that imposed by the ordinance. If the object of the ordinance were merely to secure, through the requiring of the bond, those legitimate purposes to which we have referred above, there is no reason why solvent personal sureties would not be equally, if not more, acceptable.

So, too, the requirement in the Thomasville ordinance that "the applicant shall file a bond with two good securities, freeholders of said city," is arbitrary and unreasonable, so far as it prescribes that the sureties shall be freeholders of the city of Thomasville. Why would not a citizen of Thomasville having lands in the county or in an adjoining county be just as acceptable? We can see why the bond should be signed by some obligor residing in the county, so as to give jurisdiction to the local courts in the event of a breach and of an ensuing action on it; but the provision in the ordinance goes far beyond this. Any solvent surety in Thomas county ought to be acceptable.

8. Both the ordinances prohibit drinking on the premises, and have regulations against loitering and idling, and, also, in consonance with this general scheme, against having tables, gaming stands, etc., in connection with the business. These are salutary regulations, and enforceable. We need to cite only the Kansas case from which we have quoted so copiously in an earlier portion of this opinion. *Monroe v. City of Lawrence*, 44 Kan. 609, 24 Pac. 1113, 10 L. R. A. 520. The provision against having the "near beer" stand in a place devoted to other business does not seem to be arbitrary or unreasonable. Many reasons suggest themselves as to why this is best.

9. The provisions against keeping open during the night hours, and on Sundays, election days, and legal holidays, appear to be reasonable. Justice Cobb, speaking for the Supreme Court in the case of *Watson v. Thompson*, 116 Ga. 546, 42 S. E. 747, 59 L. R. A. 602, 94 Am. St. Rep. 137, after holding that a municipality may not, under its general welfare clause, prohibit an ordinary shopkeeper from following his calling on Christmas day, concluded the opinion as follows: "Of course, what is said above with reference to the power of a municipal corporation under the general welfare clause of its charter to prevent the carrying on of lawful occupations on public holidays is applicable only to occupations the prosecution

of which is not calculated to disturb on the particular day the peace, good order, and safety of the community, in the sense in which those terms are understood by the law. A municipal corporation would doubtless have the right even to prohibit entirely on a given day the carrying on of a business which, though lawful, was of such a character that its prohibition for the time was absolutely essential to the welfare, in a legal sense, of the community." It may be that the statement quoted above is subject to the criticism that it is obiter; but it is manifestly sound.

10. We also sustain the provisions of the ordinances which prohibit screens, shades, stained windows, and other devices for obscuring the view of the interior of the room in which the business is to be conducted. These regulations are legitimately designed to prevent violations of the law.

11. The requirement that the presence of minors shall not be allowed in the place of business is unquestionably valid, though the provision that "near beer" shall not be sold to minors is unenforceable, because that offense is already covered by the general law of the state. Pen. Code 1895, § 444; *Stoner v. State*, 5 Ga. App. —, 63 S. E. 602. With but little less doubt we hold the provision in the Waycross ordinance against selling to females to be valid, though it may become unreasonable in certain special cases.

12. The limitation in the Waycross ordinance that not less than one pint shall be sold seems to be sustainable upon the reasoning of the Kansas case of *Monroe v. City of Lawrence*, cited above; but the limiting of the maximum quantity of one quart seems to be arbitrary, when we reflect that, by its very definition, "near beer" is a beverage which, even if drunk to excess, will not produce intoxication.

13. The provision for the forfeiture of the license upon the holder being convicted of violating the provisions of the ordinance or the laws of the state is, of course, reasonable.

14. The requirement that the bottles, vessels, barrels, etc., containing the liquid shall be plainly stamped, so as to show their contents and the names of the manufacturers, is valid. So, also, is the provision of the Thomasville ordinance that the dealer shall furnish samples to be tested for the purpose of ascertaining the amount of alcohol contained in the different drinks offered for sale; and, while it is competent for the ordinance to provide that a failure to furnish the samples shall be taken as prima facie evidence that the dealer is keeping intoxicating liquors on hand for the purpose of illegal sale (the municipal offense), this provision is entirely nugatory so far as it attempts to create thereby a statutory presumption of his guilt of selling intoxicating liquor—an offense cognizable only in the state courts.

15. With the amount of license fee fixed in the ordinances these plaintiffs in error have

no concern. They are indigent Confederate soldiers, and therefore exempt. *Burch v. Ocilla*, 5 Ga. App. 65, 62 S. E. 666. We may say, in passing, however, that the provision in the Thomasville ordinance limiting the exemption to only one place of business seems to be contrary to the decision of the Supreme Court in the case of *Hartfield v. City of Columbus*, 109 Ga. 112, 34 S. E. 288. So, also, by way of obiter, we may call attention to the fact that under the sixteenth section of the charter of the city of Waycross (Acts 1889, p. 904) the mayor and aldermen are given the power to license the sale of malt liquors of every kind whatever; but the minimum fee is fixed at \$10,000. "Near beer" is a malt liquor, and is subject to taxation as such, irrespective of its lack of intoxicating quality. *Eaves v. State*, 113 Ga. 757, 39 S. E. 318. There is a perfectly good reason why the courts construe the words "malt liquors," in a prohibition statute, as including only intoxicating liquor, while they add no such limitation by construction if the words appear in a taxing statute.

16. There is involved in the contentions of the plaintiffs in error an insistence that, because they are indigent Confederate soldiers, they stand on some securer footing as to their right to engage in the business than other persons do. They are exempt from the payment of the municipal license fee. Both ordinances inferentially, if not directly, recognize that fact. Otherwise than this, indigent soldiers stand in regard to the reasonable police regulations of the municipalities just as all other citizens do. Section 1642 of the Political Code of 1895, as amended in 1897 (Acts 1897, p. 24; *Van Epps' Supp.* § 6146a), provides that these worthy objects of legislative grace may conduct business in any town or city "without paying license for the privilege." Certain exceptions are enumerated; but the selling of "near beer" is not one of the exceptions. *Burch v. Ocilla*, supra. They are not exempt from the state tax. Acts 1908, p. 1112. But, by exempting them from the payment of the municipal license fee, the Legislature did not intend that they should be exempt also from those reasonable police regulations which the cities and towns have the right to enact. Whatever business is open to other citizens, with or without restriction, upon the payment of a license fee, is open to them upon the same restrictions, without the payment of that fee. The writer, and, indeed, all the judges of this court, have the highest love and veneration for those veterans who served the state so unselfishly in perilous days gone by, and we have no desire to take away from them any exemptions or to limit any privilege extended to them by the laws of the state; but, with all our love for them, we must recognize that they are nevertheless subject to the laws and regulations enacted and adopted to preserve the health, peace, good order, and safety of

the state and the various communities thereof. See the concluding remarks of the opinion in *Land v. State*, 5 Ga. App. 98, 62 S. E. 885.

17. From what we have said above, it will appear that we are of the opinion that the constitutional objections urged against the Thomasville ordinance are not well taken. The classification of the business as being different in kind from that of selling drugs and ordinary nonintoxicating drinks, such as soda water, etc., is not arbitrary or factitious. It does not deny to the plaintiff in error, or to any one else, the impartial and complete protection contemplated by the Constitution; nor does it deprive him of his property without due process of law.

18. Coming, now, to the more specific application of these general principles to the cases made by the records before us, it will be seen that several provisions of the Waycross ordinance have been held to be unreasonable and void, and that one requirement of the Thomasville ordinance has been held to be invalid. What effect does this have upon the convictions? An ordinance may be void in part and good in part. The void and the good may be so interdependent as to render the whole void, or may be so separable as to allow a segregation and the enforcement of one part, while the remainder is nugatory. *Ex parte Byrd*, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328; *City Council of Augusta v. Clark*, 124 Ga. 254, 52 S. E. 881 (3, 4); *Joseph v. Milledgeville*, 97 Ga. 513, 25 S. E. 323; *Mattox v. State*, 115 Ga. 212, 41 S. E. 709 (2); *Duren v. Stephens*, 126 Ga. 496, 54 S. E. 1045; *Papworth v. State*, 103 Ga. 36, 31 S. E. 402. So, also, an ordinance apparently reasonable on its face may be shown to be unreasonable and invalid as actually applied to the existing state of circumstances. *Bearden v. Madison*, 78 Ga. 184; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

We do not think that the invalid requirement in the Thomasville ordinance is so material a part of the enactment, so interwoven into the whole legislative scheme, that its presence renders the entire ordinance void. Nor does the existence of this clause in the ordinance render the conviction of Campbell, the plaintiff in error, contrary to law. He made no attempt to comply with the ordinance. He made no application whatever to the council. He tendered no bond at all. The only unreasonable requirement is that the sureties tendered on the prescribed bond should be freeholders of the city of Thomasville. The defendant, who had ignored the ordinance entirely, stands somewhat upon the same footing as did Gundling in his case against Chicago. Mr. Justice Peckham, speaking for the United States Supreme Court in that case, said: "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary

power of the mayor to grant or refuse it. He made no application for a license, and, of course, the mayor has not refused it. Non constat that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error, so long as he made no application for the exercise of that discretion in his favor and was not refused a license." *Gundling v. Chicago*, supra.

In the case of *City Council of Augusta v. Clark*, 124 Ga. 260, 52 S. E. 881, it was contended that the requirement, in an ordinance then under consideration, for the giving of a certain bond, was void. The court said: "It is said that this act is unconstitutional, for various reasons set forth in the petition, and, the act being unconstitutional, as the ordinance requires a compliance with the act, the ordinance is void for requiring something to be done which the city council had no right to require. It is unnecessary in this case to pass upon the constitutionality of the act. If it is constitutional, then the plaintiffs, so far as the character of the business regulated by the act is concerned, would be compelled to give the bond therein required."

* * * But suppose the act is unconstitutional; then in order to obtain a license from the city of Augusta they would not be required to give a bond, because they could not be required to give bond under an unconstitutional law. The city council had a right to impose a tax upon the class of persons to which the plaintiffs belonged, and the tax as imposed is not subject to any of the objections urged by them. They are therefore subject to the payment of the tax. They have not paid the tax required of them. When they have paid or tendered this tax, and a license is refused them on the ground that they have not given the bond required by the ordinance, they can then raise the question whether the act referred to in the ordinance is not unconstitutional. The question as to the constitutionality of the act of 1904 (Acts 1904, p. 870) is therefore prematurely made. It may be that the city will not require the bond to be given. If it does, then the plaintiffs may with propriety invoke a decision of the court as to the validity of that law. If that part of the ordinance requiring the bond to be given is invalid, its invalidity would not void the whole ordinance, for the reasons given in a preceding portion of this opinion; and, until they have complied with that part of the ordinance which is unquestionably valid, they will not be heard to question the constitutionality of the act of the General Assembly that is made a part of the ordinance by reference to the same." *City Council of Augusta v. Clark*, 124 Ga. 260, 52 S. E. 881.

So, too, if the present plaintiff in error had made an application to the city council of Thomasville, accompanying it with a bond otherwise sufficient, and they had refused it

because the sureties were not freeholders of the city, he would have been in a position to insist on the point; but, as it is, he is not in a position to do so. The conviction in his case will be sustained.

In Jones' Case it appears that he did attempt to comply with the ordinance, and his efforts were met at the threshold by unreasonable requirements. Indeed, looking at the Waycross ordinance as a whole, it is impossible to escape the conclusion that its but thinly guised purpose was prohibition, and not regulation, and that it is therefore void for repugnancy to the general policy evinced by the Legislature in the passage of the "near beer" tax act of 1908. Therefore the conviction in the Jones Case will be set aside.

Judgment affirmed in case No. 1,813.

Judgment reversed in case No. 1,820.

(5 Ga. App. 766)

COLEMAN v. STATE. (No. 1,802.)

(Court of Appeals of Georgia. May 18, 1909.)

1. CRIMINAL LAW (§ 1024*)—WRIT OF ERROR—RIGHT OF PROSECUTION TO REVIEW.

The Court of Appeals is without jurisdiction to consider the grounds of a motion to dismiss a bill of exceptions, predicated upon matters arising prior to the judgment granting or overruling the motion for new trial. *Bryan v. State*, 3 Ga. App. 26, 59 S. E. 185 (1, b).

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1024.*]

2. DISORDERLY HOUSE (§ 4*)—KEEPING LEWD HOUSE.

In a prosecution for keeping a lewd house, evidence of the general reputation of the house and of the women living therein is admissible in corroboration of other facts and circumstances in the case; but it is error to instruct the jury that "it is not necessary for the state to prove that there were acts of adultery or fornication committed at such house." In order to authorize a conviction, the jury must be satisfied, either by direct evidence or by the circumstances, that the house was kept for the practice of adultery or fornication. It is the gist of the offense that the house was kept for that purpose. It was therefore error to instruct the jury that "it would be sufficient if the state proves to your reasonable satisfaction that she bears the general reputation of being a lewd woman, and that the house or place kept by her bears the general reputation of being a lewd house or place of prostitution, and that the women there at that house bear the general reputation of being lewd women, and that men were seen to frequent the place by day and by night." Reputation for lewdness may be a circumstance tending to show the character of the house; but the probative value of this circumstance is for the jury alone, and the facts and circumstances adduced in any case must reasonably satisfy the jury that the house was maintained for the purposes of prostitution, and that adultery or fornication was actually committed, and not merely that the reputation of the house or of its inmates is bad.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 4, 9-13; Dec. Dig. § 4.*]

(Syllabus by the Court.)

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Marie Coleman was convicted for keeping a lewd house, and she brings error. Reversed.

Crum & Jones, for plaintiff in error. Walter F. George, Sol. Gen., for the State.

RUSSELL, J. Marie Coleman was convicted of the offense of keeping a lewd house, and excepted to the overruling of her motion for a new trial. Several witnesses testified that the defendant kept and maintained a house which had the general reputation of being a lewd house, that the defendant and the other women living there had the reputation of being lewd women, that men frequented the house at all hours of the night and day, that when the women appeared on the streets they were nicely and neatly dressed, and so far as witnesses knew they were not married and had no lawful vocations. One of them, a policeman, said that he had been to the house several times to serve processes and papers, and had seen the women walking about the house, rather loosely dressed, in company with men who did not board there, and had heard them engaged in profane and vulgar conversation. He had also seen the women drinking with the men.

1. The motion to dismiss the bill of exceptions is based on alleged errors prior to the judgment overruling the motion for a new trial, and is governed by *Bryan v. State*, 3 Ga. App. 26, 59 S. E. 185.

2. The controlling question in the case arises upon an exception to the following excerpt from the charge of the judge: "In order to make out a case of that kind, it is not incumbent or necessary for the state to prove that there were really acts of adultery or fornication committed at such place as alleged. It would be sufficient if the state proves to your reasonable satisfaction that she bears the general reputation of being a lewd woman, and that the house or place kept by her bears the general reputation of being a lewd house or place of prostitution, and that the women there at that house bear the general reputation of being lewd women, and that men were seen to frequent the place by day and by night." A person who maintains a place where fornication or adultery is practiced is guilty of the offense of keeping a lewd house. Pen. Code 1895, § 391. The practice of adultery or fornication at the house is the very gist of the offense; and the state must prove that fact beyond a reasonable doubt before the jury would be authorized to convict the defendant. The method by which the ultimate fact may be proved is a different matter; but it must be proved either by direct or circumstantial evidence. The jury may infer the existence of the fact from relevant and probative circumstances; and where the circumstances detailed in the charge of the judge appear in the evidence,

and the jury find the defendant guilty, the verdict will not be set aside on the ground that it is without evidence to support it. *Mimbs v. State*, 2 Ga. App. 387, 58 S. E. 499; *Hogan v. State*, 76 Ga. 82.

But the jury were not bound to find the defendant guilty, even though they believed the circumstances in fact existed, because they might have taken the view that they could not infer therefrom beyond a reasonable doubt the ultimate fact which alone would legalize the conviction. When the judge charged the jury that "it is not incumbent or necessary for the state to prove that there were really acts of adultery or fornication committed at such place," he made an inaccurate statement of the law. The error was not cured by the subsequent statement that if the jury believed the circumstances enumerated "that would be sufficient evidence." As was said by Judge Bleckley in the case of *Kinnebrew v. State*, 80 Ga. 232, 237, 5 S. E. 56, 59: "The logical sufficiency of the facts to warrant the inference, and also the existence of the facts themselves, ought to be left to the jury for their determination. * * * The judge cannot pilot the jury in their passage by inference from fact to fact; but he can point out the line of transit which the law authorizes them to follow if they think the facts in evidence sustain them in taking that route. * * * To instruct them that they are legally authorized to infer one thing from another, or from certain others, but that they are to decide for themselves both whether the given premises are true and whether the inference can and ought in fact to be made, is only to say that the law permits them to reason in the manner indicated, if they determine that the evidence and the ordinary test of human experience warrant them in so doing. It is but to tell them that the law will be satisfied if they are, and that they will not have done a vain thing. No doubt there is danger of intimating an opinion, or of leading the jury to think that an opinion is intimated, though the purpose be only to discriminate between legal and logical sufficiency; and this danger is not lessened, but rather increased, by the fact that in most instances the one kind of sufficiency exists wherever the other does." The learned Chief Justice then cites and reviews a great number of cases, and illustrates how and when the judge may instruct the jury that, if they believe certain facts, they may infer another fact essential to conviction. He demonstrates that the judge is on dangerous ground, in view of the "dumb act," when he begins to instruct the jury in the rules of logic, and to tell them what conclusions they may draw from stated premises; and in no event should the jury be instructed that it is their duty to

draw the inference which they would be authorized to draw.

In the case at bar the charge of the judge in all probability took from the jury their right to acquit the defendant under the evidence introduced before them. The jury had a legal right to acquit the defendant, even though they believed all the state's evidence, if that evidence failed to satisfy them beyond a reasonable doubt of the existence of the ultimate fact which is the gist of the offense charged, to wit, that acts of adultery and fornication had been practiced at the house which the defendant is alleged to have maintained. The charge was apt to make them believe that under that evidence they had no discretion but to bring in a verdict of guilty. Compare *Patterson v. State*, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152; *Hayden v. Neal*, 62 Ga. 365.

Judgment reversed.

(65 W. Va. 558)

MCKAIN v. MULLEN.

(Supreme Court of Appeals of West Virginia.

April 27, 1909.)

1. APPEAL AND ERROR (§ 161*) — RIGHT TO APPEAL — WAIVER.

A party who accepts the benefit of a decree waives his right to appeal from that decree, unless he is so absolutely entitled to the benefit received that a reversal will not affect his right to it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 979-983; Dec. Dig. § 161.*]

2. APPEAL AND ERROR (§ 161*)—RIGHT TO APPEAL.

One cannot avail himself of that part of a decree which is favorable to him, accept its benefit, and then prosecute an appeal to reverse such portion of the same decree as militates against him, when the acceptance of the benefit from the one part is totally inconsistent with the appeal from the other.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 980; Dec. Dig. § 161.*]

3. APPEAL AND ERROR (§ 162*)—RIGHT TO APPEAL—ACCEPTANCE OF BENEFITS.

The defendant in a suit by which his tax deed is set aside cannot unreservedly accept the taxes, interest, and charges tendered by the bill and ordered by the decree to be paid him, and then appeal from the decree. His acceptance is a positively implied waiver of his right to appeal. Nor will an offer to return the money, made long after its acceptance, avail to prevent dismissal of an appeal in such case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 984-991; Dec. Dig. § 162.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by George L. McKain against E. M. Mullen. Decree for plaintiff, and defendant appeals. Dismissed.

F. P. Moats and Geo. W. Johnson, for appellant. F. H. McGregor, for appellee.

ROBINSON, J. Mullen purchased real estate at a tax sale. The sale was made

for a delinquency upon an assessment, in the name of the Little Kanawha Lumber Company, of a lot on Depot street, in the city of Parkersburg. The lot was not redeemed from this sale. After the expiration of the statutory period for redemption, Mullen received a deed for the lot from the county clerk. McKain, who had purchased, through McGraw, the title of the Little Kanawha Lumber Company to the lot in question, sought by suit in chancery to set aside Mullen's tax deed for irregularities alleged. He had tendered to Mullen a proper amount for redemption before the institution of his suit. The tender was refused. In his bill he kept this tender good, brought the money into court, and it was deposited with the clerk. This suit resulted in a decree annulling the tax deed, and directing the clerk to pay Mullen the amount necessary to reimburse him in the premises. Mullen accepted that amount pursuant to the terms of the decree. He receipted to the clerk therefor. More than one year afterwards he applied for an appeal from the decree. The appeal was allowed him. The appellee, McKain, moved to dismiss the appeal upon the ground that, by the acceptance of the taxes, interest, and charges, pursuant to the terms of the decree, Mullen acquiesced in the decree setting aside his tax deed, recognized the validity of that decree, and thereby waived his right to appeal from it. After this motion was made, Mullen sought to return the money to the clerk from whom he had accepted it. The clerk would not take it back. He then replied to the motion to dismiss, bringing the money into this court. He insists that he has a right to make restitution of the money he accepted, and that his right of appeal is not affected in the premises.

The motion to dismiss the appeal is, of course, first in order. If that motion is well taken, we have nothing to do with the merits of the errors assigned and submitted for our consideration.

Did Mullen lose his right to appeal? Clearly so, by reason and authority. The money he accepted represented what he had paid for the title declared void. It was tendered him by the decree as essential to the action of the court in setting aside the tax deed. Its tender to him was a substantial portion of the decree made upon the equities arising between the parties. That portion of the decree was inseparably connected with the order annulling the tax title. And so inseparably was it connected therewith that it could not be recognized by Mullen without his recognizing the decree annulling his tax deed. As the decree stood, it gave him benefit. True, it gave him not what he had sought in the litigation, but it gave him the fruits of the controversy that the court in equity and law deemed to be his. He voluntarily accepted these fruits, yet he seeks by appeal to destroy the rights under the de-

cree belonging to the other party. He cannot have the one and deny the other. The acceptance of the taxes tendered and deposited was a recognition of McKain's title, and it is inconsistent with the prosecution of this appeal which attacks the title. The money was tendered, and later decreed to be paid, for the sole purpose of clearing that title of a claim to it. Therefore the acceptance of the money so tendered and decreed plainly recognized the clearing away of the claim. Mullen had no right to the money, except as compensation for what he had paid out, as a basis of his claim of title to the land. When he accepted the money he relinquished something for it. That which he relinquished was the claim that he was a valid tax purchaser. Surely he was not entitled to both the lot and this money. He could claim only the one or the other. The claim of the one is totally inconsistent with any claim of the other. His acceptance of one can mean nothing but his release of the other. Any other view is at variance with reason and right. The clerk could pay him the money only for one purpose—to reimburse him for giving up his claim of title set aside by the decree. When he accepted the money, he must have recognized this fact. And his acceptance can be taken to mean nothing but that he meant to be so reimbursed. He could not be so reimbursed without giving up his further claim of title upon the tax purchase. He knew that the money proffered him by the decree represented his relinquishment of this claim. When he accepted the money, he also accepted that which it represented. He is bound by his act. It cannot be otherwise in conscience, reason, or law.

"It is a general rule that a party who accepts the benefit of a judgment waives a right to prosecute an appeal from it." Elliott on App. Pro. § 150. This principle has been almost universally approved. 2 Cyc. 651; 2 Enc. Pl. & Pr. 174; Paine v. Woolley, 80 Ky. 568; Dunham v. Randall, 11 Tex. Civ. App. 265, 32 S. W. 720; Tyler v. Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660. Extensive notes of cases touching the subject are found in 13 Am. Dec. 546, and in 45 Am. St. Rep. 271. The rule does not apply "to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal of it will not affect his right to it." 2 Cyc. 653; Embry v. Palmer, 107 U. S. 8, 2 Sup. Ct. 25, 27 L. Ed. 346; Reynes v. Dumont, 130 U. S. 394, 9 Sup. Ct. 486, 32 L. Ed. 934. The case before us is plainly without the scope of this exception. Mullen's act in accepting the money decreed was wholly inconsistent with his appeal. He was not so absolutely entitled to the sum that a reversal would not affect his rights to it. A reversal, such as he seeks, would declare that he had no right whatever to the money which he re-

celved under the decree. "He stands thus in the attitude of holding the fruit of the judgment to which he may not be entitled if his appeal succeeds and yet persisting in his appeal. The trouble is that he cannot gain the right to recover more without incurring the hazard of recovering less." *Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37. A party cannot avail himself of that part of a decree which is favorable to him, and accept its benefit, while prosecuting an appeal to reverse such portion of the same decree as militates against him, when the acceptance of the benefit from the one part is inconsistent with the appeal from the other. *Moore v. Williams*, 29 Ill. App. 597; *Albright v. Oyster*, 60 Fed. 644, 9 O. C. A. 173; *Chase v. Driver*, 92 Fed. 780, 34 O. C. A. 668; *Webster-Glover Lumber & Mfg. Co. v. St. Croix Co.*, 71 Wis. 317, 36 N. W. 864. "The defendant could not proceed to enforce such portions as were in his favor, and appeal from those which were against him. The right to proceed on the judgment and enjoy its fruits and the right of appeal were not concurrent; on the contrary, were totally inconsistent. An election to take one of these courses was therefore a renunciation of the other." *Bennett v. Van Syckel*, 18 N. Y. 481. So connected was the money with the order sought to be reversed that Mullen could not convert it to his use without acquiescing in the decree against him. "If a party to an action acquiesces in a judgment or order against him, he thereby waives his right to have such judgment or order reviewed by an appellate court." 2 Cyc. 644. Nothing can be implied from Mullen's voluntary act in accepting, without reservation, what the decree gave him, but that he recognized the validity of the decree against him. "Any act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it." 2 Cyc. 654. "A person who does a positive act which according to its natural import is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that such right has been dispensed with will be deemed to have waived it." 29 Am. & Eng. Enc. of Law (2d Ed.) 1103. It is this principle of acquiescence and waiver which gives existence to the general rule we have quoted. True, the law favors appeal. The act of waiver must be clear and decisive. And it has been authoritatively said that "no waiver or release of errors operating as a bar to the further prosecution of an appeal or writ of error can be implied except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring in review." *Embry v. Palmer*, 107 U. S. 8, 2 Sup. Ct. 25, 27 L. Ed. 346. This court held at this term in *Shields v. Simonton*, 63

S. E. 972, that appellant's act did not amount to a waiver of appeal, because it was not inconsistent, under the circumstances presented, with a claim of right to reverse the decree. In that case the act itself had in its purview the continuance of the appeal. The force of the act was expressly contingent upon the result of the appeal. In the case now before us it is not so. No other import than that of waiver of right to reverse can be implied from Mullen's act in taking that which the decree gave him. It was his privilege to accept what the decree offered in redemption of the lot from his claim thereto. His acceptance of the offer consummated this redemption. This principle of waiver of right to appeal by an act, without reservation, clearly inconsistent with the right, is distinctly acknowledged in the dictum of Judge Haymond in *Kable v. Mitchell*, 9 W. Va. 520.

Mullen, when he was awarded his appeal, plainly had no right to it. Does his offer to make restitution avail him? We hold that it does not. Repayment cannot reinstate a right that he did not have. More than a year elapsed between his acceptance of the money decreed to him and his taking this appeal. During all that time he was enjoying what the decree had given—a return of the money he had invested in the claim of tax title. And during all that time, by his act, he was causing McKain to believe that all litigation affecting his lot by reason of the tax sale was at an end. Acting upon this belief, McKain had a right to treat the property as clear, to make improvements upon it, or to dispose of it without risk of further claim thereto by Mullen or depreciation in value of the lot. Shall we now change the situation that Mullen's own act brought forth? It would not be right to do so. Mullen, having elected to adopt a course of action, must be confined to it, so as not to prejudice McKain. He cannot in fairness revoke his acceptance of the money and his positively implied waiver of appeal. "A party waives an error when he goes by and proceeds in the case with other matters, so that it would be unjust or unfair to go back and take advantage of it." Powell on App. Pro. § 96. We assume that McKain relied upon the waiver, as he had a right to do. After the right of appeal had been lost to Mullen, then McKain had a vested right to his decree, free from review. No further right of appeal from the decree can be conferred. 7 Cur. Law, 130. "In some decisions it has been intimated that a restitution of the money collected upon a judgment restores the right to appeal, or bring error; but in those jurisdictions where the question has been directly passed upon it has been held otherwise." 2 Cyc. 654. "The appellant cannot revive his right of appeal, lost by acceptance of payment, by tendering the money received back to the appellee."

2 Enc. of Pl. & Pr. 177. Many cases that have considered this point so hold. Among them are *Paine v. Woolley*, supra; *Dunham v. Randall*, supra; *Portland Con. Co. v. O'Neil*, 24 Or. 54, 32 Pac. 764; *Morgan v. Ladd*, 7 Ill. 414. "Payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements." *Freeman on Judgments*, § 468.

The motion is sustained. The appeal will be dismissed.

(65 W. Va. 484)

TOWN OF CAMERON v. HICKS.

(Supreme Court of Appeals of West Virginia.
April 20, 1909.)

1. PLEADING (§ 34*) — RULES OF CONSTRUCTION.

In their general nature, the rules of interpretation and construction applicable to pleadings are the same as those pertaining to other writings and documents.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.*]

2. PLEADING (§ 21*)—CONSTRUCTION—REPUGNANCY.

If terms used in a declaration signify in the abstract something different from what they mean when read with the context or as a part of the whole instrument, they are to be taken in the latter sense. To vitiate a pleading on the ground of repugnancy, the conflict or inconsistency must be irreconcilable. If the intent is clear, nice exceptions are ignored.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 44; Dec. Dig. § 21.*]

3. EXECUTORS AND ADMINISTRATORS (§ 444*)—ACTIONS AGAINST—DECLARATION—SUFFICIENCY.

Though, in charging an administrator in respect to a debt made by his decedent, it is usual to allege that he detains, or owes and detains, the money, the omission of the word "detains" and use of the word "owes" only do not vitiate a declaration, charging the defendant as administrator and setting forth facts, imposing liability in a representative capacity only.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1815; Dec. Dig. § 444.*]

4. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—ACTIONS ON BONDS—DECLARATION—ALLEGATION OF DEMAND.

In an action by a municipal corporation on the bond of an officer thereof for the recovery of money received by him *virtute officii*, it is not necessary to aver presentation to him for payment of an order drawn for the amount or service upon him of a copy of an order made and entered by the council, requiring him to pay it, unless such mode of procedure is prescribed by a statute or ordinance, or stipulated in the contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 406; Dec. Dig. § 173.*]

5. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—ACTIONS ON BONDS—DECLARATION—ALLEGATION OF DEMAND.

As the custody of public funds by municipal officers partakes of the nature of a bailment for hire, a demand for payment is a condition

precedent to a right of action for the money, but, in the absence of a prescribed or stipulated form of demand, it suffices to aver any facts showing authority in the defendant to pay, and a desire on the part of the plaintiff for payment, known to the defendant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 406; Dec. Dig. § 173.*]

6. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—ACTIONS ON BONDS—ALLEGATION OF DEMAND.

In such case, it is sufficient to aver the making and entry of an order by the town, requiring payment of the money and notice thereof on the part of the officer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 406; Dec. Dig. § 173.*]

7. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—ACTIONS ON BONDS—ALLEGATION OF DEMAND.

As a municipal corporation can move, in respect to such matters, only through its council or governing tribunal, acting as a body, the declaration should allege the making of an order to pay.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 406; Dec. Dig. § 173.*]

8. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—ACTIONS ON BONDS—DECLARATION—SUFFICIENCY.

Though inartistic and variant from good form, an averment that the town, not its council, made an order or passed an ordinance, is sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 406; Dec. Dig. § 173.*]

9. PLEADING (§ 21*)—DECLARATION—INCONSISTENT ALLEGATIONS.

If there be joint liability on the part of a defendant and others in respect to duty, but, for some reason disclosed by the declaration, a separate right of action against him, allegations, applicable to all, concerning the duty, and others, applicable to the defendant only, pertaining to the remedy, are neither inconsistent nor objectionable on demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 44; Dec. Dig. § 21.*]

10. DEPOSITARIES (§ 10*)—PUBLIC MONEY—INSURER.

For reasons of public policy the custodian of public money is held liable and must account therefor as a debtor or insurer, notwithstanding the relation, subsisting between him and the state or municipality, is substantially that of bailment for hire, and no loss of the fund otherwise than by an act of God or the public enemy, will relieve him from the obligation to pay it. Loss by fire, theft, burglary, bank failure, or the like does not relieve him, however careful and prudent he may have been.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 23; Dec. Dig. § 10.*]

(Syllabus by the Court.)

11. PLEADING (§ 21*)—"REPUGNANCY."

Repugnancy only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or, being apparently so, is not accompanied by anything to explain or define them.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 44; Dec. Dig. § 21.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7786.]

Error to Circuit Court, Marshall County.

Action by the Town of Cameron against John A. Hicks, as administrator of the estate of C. Y. Benedum, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

C. C. Newman, for plaintiff in error. McCamic & Clarke, for defendant in error.

POFFENBARGER, J. The town of Cameron recovered a judgment against John A. Hicks, as administrator of the estate of O. Y. Benedum, for the sum of \$3,484.77, in an action of debt in the circuit court of Marshall county, on a submission thereof to the court in lieu of a jury.

The overruling of the demurrer to the declaration, rejection of a certain plea, and the finding on the evidence are the subjects of complaint. The grounds of demurrer are: (1) The charge is that the defendant owes, not that he detains or owes and detains. (2) The allegation, respecting the making and service of an order, requiring the decedent to pay over the money, are insufficient.

Tested by the facts, the declaration sets forth liability in a representative capacity only. According to these, the town issued and sold its bonds for sewerage purposes, and placed the proceeds thereof in the hands of T. C. Pipes, Clell Nichols, and A. E. Fox, whom it had appointed its bond commissioners. Benedum, the decedent, became surety on the bond of Fox in the penalty of \$4,000, the condition whereof was that Fox should faithfully perform the duties of bond commissioner and account for and pay over all money that should come into his hands by virtue of his office. Some of the counts say he received, as such commissioner, \$3,300, and others that he, Pipes and Nichols, as such, received \$10,000, and charge, as a breach of the condition, the nonpayment by Fox of \$3,255.56, part thereof, after demand therefor. There is no suggestion of a devistavit, and the charge is that the defendant owes the money as administrator. It therefore imports an obligation in that capacity, and no other, to pay it. Strictly and technically speaking, he detains the money. The word "owes," standing alone, would have a broader meaning, but it must be read in connection with other parts of the declaration. Its true meaning, as used in that instrument, is determined, not by its form or significance in the abstract, but by the context. In their general nature the rules of construction applicable to pleadings are not materially different from those pertaining to other documents or writings. It is true everything must be taken most strongly against the party pleading, but this maxim is operative only when two meanings present themselves. If, on a fair and reasonable interpretation of the words used, no ambiguity appears, it has no application. 1 Chitty on Pleading (11th Ed.) 237, says: "But, in ap-

plying this maxim, the other rules must be kept in view, and particularly those relating to the degree of certainty or precision required in pleading. The maxim must be received with this qualification: That the language of the pleading is to have a reasonable intendment and construction; and, where an expression is capable of different meanings, that shall be taken which will support the declaration, etc., and not the other, which would defeat it. * * * But, if it be clearly capable of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense, in which the party framing the charge must be understood to have used it, if he intended that his charge should be consistent with itself. * * * And if, where the sense may be ambiguous, it is sufficiently marked by the context or other means in what sense they were intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or, being apparently so, is not accompanied by anything to explain or define them. If the case be clear, nice exceptions ought not to be regarded." We applied this principle in *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138. From what has been said it must be apparent that the use of the word "owes" and the omission of the word "detains" constitute nothing more than a formal defect, if, indeed, any at all. It amounts to a departure from the customary form of allegation, an immaterial matter, if the declaration is sufficient in substance and certain to a "certain intent in general."

The allegation as to the order to pay over the money is that the town of Cameron on a certain day made an order requiring the three commissioners, not Fox alone, to pay it to the town sergeant, naming him, and that the latter had notice thereof. The first and second counts say Fox alone received \$3,300; while the third charges all three with \$10,000. As to the first and second, an order binding all three would bind Fox; for the fund in his possession was subject to the control and disposition of the council, and in a certain sense his custody thereof and action relating thereto were the custody and action of all three. In both of these counts it appears that these three persons were named in the ordinance authorizing the issuance and sale of the bonds as commissioners to dispose of them and receive the proceeds, in pursuance of which the bond sued on was executed. This made them joint commissioners, and the acts of each were prima facie the acts of all in respect to the management and control of the fund under the direction of the council. The third count is consistent with the charge. It charges all with the receipt of \$10,000 and the issuance of an order requiring all to pay it over.

In respect to the averments of notice and demand for payment, the criticism is more difficult to answer. The first count says the bond commissioners and the administrator had notice of the making of the order, and that the money had been demanded of Fox and his administrator; second, that Fox had notice of the making of the order, and that the money had been demanded of him as bond commissioner; and, the third, that he had notice of the making of the order, and the sum of \$10,000 had been demanded of the bond commissioners. In none of them is it charged that the order to pay over made by the council was presented to, or served upon, any of the commissioners. Necessity of averment of presentation for payment of an order drawn on the commissioners in favor of the sergeant or service of a copy of the order entered on the minutes of the council, directing payment, is predicated on the principles declared in *State v. Hayes*, 30 W. Va. 107, 3 S. E. 177. An examination of that case, however, discloses the basis of the decision to be the statutory provisions, prescribing the mode of disbursement of county and district funds by county and district treasurers, and positively inhibiting payment otherwise than on orders or judgments and decrees. These provisions are not in terms applicable to the officers of municipal corporations, and the mode of disbursement of the funds of such corporations seems to be left, by the general statute (chapter 47, Code 1899 [Code 1906, §§ 1941-1910]), as a subject for determination and regulation by ordinances of the council. The declaration does not disclose any provisions of the ordinance by or under which the commissioners were appointed, defining their powers, duties, or rights as against the town, except in the general manner already indicated. It only says an ordinance passed by the council under which they were appointed and requiring them to execute bonds was ratified by the voters at a special election, and they executed the official bonds, sold the municipal bonds, received the money, and failed to pay over a part of it on demand after an order had been made and entered of record, requiring them to do so, and of which they had notice. Nor is any other ordinance set forth prescribing a particular mode of accounting or disbursement. Whether any such ordinance provisions exist we are unable to say. The prevailing rule is that courts other than those of the municipality will not take judicial notice of city ordinances. *Smith*, *Munic. Cor.* § 556, note 422; *Dill*, *Munic. Cor.* §§ 83, 413. In the absence of statutory or other provisions introducing into the contract between the decedent and the town covenants or conditions imposing upon the latter the duty to perform conditions precedent to the right of action, and specifying the manner of performance, a general demand, sufficient to terminate a bailment, if it were a mere bailment, is sufficient. It is not perceived how anything more could

be required. If we should say the demand must be made in a particular way, that would render a demand made in any other form ineffectual, and there is no reason for our giving preference to one form or mode over another. If the plaintiff had assumed the necessity of making and averring the demand in a particular manner, it could only have surmised or guessed at what in the opinion of this court that manner would be, and proceeded at its peril. On the other hand, the averment of a demand in general terms, stating sufficient facts to enable the court to see that payment was requested, not a mere conclusion of law, admits evidence to prove it, and exposes the defendant to no danger whatever, since the court may be trusted to say whether the facts stated amount to a request. In other words, while no particular form of demand is necessary, and it is not sufficient merely to say the plaintiff demanded payment, it does suffice to aver facts from which the court may see that payment was requested. Such a request by a town council must necessarily differ in form from one made by an individual, since it must act officially and as a body. Its action is always evidenced or manifested by the adoption of a motion, order, resolution, or ordinance. As this is essential, it should, of course, be averred, and, as such action could be taken in the absence of the agent having the custody of the funds, notice to him of the action taken should be alleged. This seems to be all the rule declared in *Board v. Parsons*, 22 W. Va. 308, requires. In that case the board of education made an order requiring the sheriff to pay its school funds to his successor and caused a copy of it to be served on him, and the court said it thereupon became his duty to pay the money. Authority to pay and notice thereof and of the desire of the board that payment be made seem to have been regarded as amply sufficient to confer a right of action. Nor do we think any particular form of notice essential. No statute nor ordinance prescribes it. The case last cited does not go so far as to say that knowledge of the order to pay over the money derived otherwise than from the service of a copy thereof would not be sufficient. All it decides in this respect is that the making of the order and service of a copy thereof is sufficient. That any other form of notice would be insufficient is neither suggested nor implied.

It is equally unimportant and immaterial in our opinion that some of the counts aver notice to Fox only and his administrator, while the others aver notice to all three of the bond commissioners. Notice to one would bind them all. They acted as a body, and all stood on the same footing; no one of the three holding a superior position to, or one of authority over, the others. They were all responsible and legally bound to see that the trust was faithfully executed. One of them called upon for the performance of a trust

duty that he could not perform without the aid of the others was bound to procure their assistance, or at least request it, and his request would convey notice. It is said the averment of an order directing all three of the commissioners to pay over the fund in the counts in which Fox alone is charged with having received money vitiates those counts. We are unable to concur in this view. These counts make the bond commissioners joint officials, and this character is not changed by the averment that Fox alone received or had in his hands part of the money, or was liable to be proceeded against separately by reason of his having given a separate bond. His liability was one thing and the security for the faithful performance of his duty a different thing. In charging him jointly with his associates in respect to liability, and charging him separately in respect to remedy and the security he gave, there is no inconsistency. The differences in statement are plainly referable to the difference in status as regards liability and remedy. An order directed to all requiring payment gave a right of action as to all, and the execution of separate bonds gave a right to separate actions to enforce the liability.

Another ground of criticism is found in the averment as to the form of the order; it being stated, not that the council of the town made and entered the order, but that the town of Cameron made and entered it. We think this averment is sufficient. A valid order could only be made by the council. The town, as a corporation, could not act otherwise than by its council. The council is an agency or instrumentality through which it acts. What it does by its agent it does itself in contemplation of law. If the making of the order by the council had been alleged, the legal effect would be that the town had made the order. This is the primary or ultimate fact. The means by which it was effected is mere evidence, which need not be pleaded. *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Lydick v. Baltimore & Ohio Ry. Co.*, 17 W. Va. 427; *Waggener v. Point Pleasant*, 42 W. Va. 798, 800, 26 S. E. 352.

The rejection of plea No. 3 and the finding on the evidence may be considered together. The plea was one of confession and avoidance, showing that the money in question had been deposited by the commissioners in a certain bank which had failed, and thereby inflicted a loss which, it is claimed, the commissioners cannot be required to make up. It proceeds upon the legal principle of bailment for hire, averring the duty of the commissioners to have been only that of keeping or preserving the fund for the use of the town. The evidence is in conformity with the rejected plea, and the contention is that the loss of the fund in that way should exonerate the commissioners; no misconduct nor lack of care on their part being disclosed. The question thus presented is purely one of

law, namely, whether the bond commissioners were bailees for hire, charged with ordinary prudence, diligence, and care for the safety of the fund or sureties, bound to account for and pay over unless prevented by an act of God or the public enemy. By the great weight of authority, the custodian of public money is not a bailee, bound only to the exercise of a high degree of care, prudence, and diligence for its safety, and excusable for the loss thereof by fire, robbery, theft, or bank failure, when such loss is not in any sense due to negligence or misconduct on his part, but a debtor and insurer to the extent of the amount received, excusable for no losses except those resulting from acts of God or the public enemy. Some decisions hold the contrary, but they are comparatively few in number. In New York the declarations of the courts were for many years somewhat contradictory and inconsistent, but in *Tillinghast v. Merrill*, 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612, the previous decisions were reviewed and discussed, and the question settled in conformity with the weight of authority throughout the country. In Alabama, Maine, South Carolina, and Louisiana the courts adhere to the rule of common-law liability, treating the officer as a bailee for hire. But in practically all of the other states in which the question has been presented the decisions hold the officer to the rule of strict liability. *State v. Clarke*, 78 N. C. 255; *Inhabitants v. Hazard*, 12 Cush. (Mass.) 113, 59 Am. Dec. 171; *Inhabitants v. McEachron*, 33 N. J. Law, 339; *Board, etc., v. Jewell*, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586; *County Com'r v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *State v. Nevin*, 19 Nev. 162, 7 Pac. 650, 3 Am. St. Rep. 878; *State v. Moore*, 74 Mo. 418, 41 Am. Rep. 322; *Taylor Township v. Morton*, 87 Iowa, 550; *Rock v. Stinger*, 36 Ind. 346; *Clay County v. Simonson*, 1 Dak. 403, 46 N. W. 592; *Lowery v. Polk County*, 51 Iowa, 50, 49 N. W. 1049, 83 Am. Rep. 114; *Nason v. Poor Directors*, 126 Pa. 445, 17 Atl. 616; *State v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637. The decisions of the United States Supreme Court are uniform to the same effect. *Boyd v. United States*, 18 Wall. 17, 20 L. Ed. 527; *United States v. Prescott*, 3 How. 578, 11 L. Ed. 734; *United States v. Thomas*, 15 Wall. 337, 21 L. Ed. 89; *Smith v. United States*, 188 U. S. 156, 23 Sup. Ct. 279, 47 L. Ed. 425; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977. In some instances the courts have excepted such custodians from the common-law rule on the ground of statutory duties imposed. In others, including the federal decisions, the ground of the exception is the express contract in the bond to account for and pay over the money, and in still others the rule of

strict liability is based solely upon public policy, the courts declaring that the public good will be better subserved and the public interests safeguarded, and that the danger of loss through fraud and imposition by means of simulated robberies, thefts, burglaries, and fires under the operation of the common-law rule is so great as to justify and demand a stricter rule, even though it occasionally results in hardship and injustice. After a careful consideration of the matter, we are of the opinion that the reasons of public policy advanced in support of the rule of strict liability amply justify its adoption.

It follows from what has been said that the judgment must be affirmed.

Affirmed.

(65 W. Va. 531)

EASTERN OIL CO. v. COULEHAN et al.

(Supreme Court of Appeals of West Virginia.
April 27, 1909.)

1. EQUITY (§ 46*)—ADEQUACY OF DEFENSE AT LAW.

Although one have a defense at law, yet if it be doubtful, and he has also an equitable defense, and his defense at law would not be as complete, adequate, and certain as in a court of equity, he should not be required to relinquish his equitable right or defense and to depend solely on his defense at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152; Dec. Dig. § 46.*]

2. EQUITY (§ 43*) — RIGHT TO SUE — ACTION PENDING AT LAW.

A defendant at law, having a legal defense to an action and a distinct ground for equitable relief against the plaintiff's claim, may bring his suit in equity without waiting for the determination of the action at law, and may, without being compelled to waive his legal defense by confessing judgment or otherwise, have a hearing in a court of equity on the merits of his case, and a decree for the proper relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121, 164; Dec. Dig. § 43.*]

3. MINES AND MINERALS (§ 73½*) — LEASES — CONSTRUCTION.

Where, in a lease for oil and gas, there is a habendum "to have and to hold the same unto the lessee for the term of five years from this date, and as much longer as oil or gas is produced or the rental paid thereon," and whereby, in order to extend the term of such lease as provided, oil or gas is required to be produced within such five years' limitation, the date of the lease should be excluded in the computation of time, unless it is plainly manifest therefrom that it should be included.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 200; Dec. Dig. § 73½.*]

4. MINES AND MINERALS (§ 78*)—DISCOVERY OF OIL OR GAS—EFFECT.

The discovery of oil or gas under a lease giving right of exploration and production, unless there is something in the lease manifesting a contrary intention, is sufficient to create vested estate in the lessee in the exclusive right to produce oil or gas provided for therein—a right, however, which may be lost by abandonment, by failure to produce oil or gas, or pursue the work of production, or development of the property.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 205; Dec. Dig. § 78.*]

5. MINES AND MINERALS (§ 78*)—RIGHT TO PRODUCE—ABANDONMENT OR FORFEITURE.

Such right, once vested by discovery of oil or gas in an upper sand, will not be lost if the lessee continues to drill deeper in search of oil or gas in a lower sand, although he does not succeed in finding oil in the lower sand within the limitation prescribed by the lease; but, if oil or gas be not found in the lower strata, production from the upper sand could not long be deferred without incurring the penalty of abandonment or forfeiture if forfeiture be prescribed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 205; Dec. Dig. § 78.*]

6. CONTRACTS (§ 294*) — SUBSTANTIAL PERFORMANCE.

Where, before the time has expired for the performance of a contract, there has been such a substantial compliance therewith by a party thereto that gross injustice would be done him by denying him relief, equity will grant him relief as from a forfeiture.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1361; Dec. Dig. § 294.*]

(Syllabus by the Court.)

7. EVIDENCE (§ 7*)—JUDICIAL NOTICE.

Judicial notice will be taken that gas, unlike oil, cannot be brought to the surface and stored to await a market for it, but must remain in the ground, and, unless allowed to waste away, taken out only as and when producer may be able to find a customer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 6; Dec. Dig. § 7.*]

Appeal from Circuit Court, Doddridge County.

Bill by the Eastern Oil Company against John C. Coulehan and others. Decree for defendants and complainant appeals. Reversed and rendered.

W. S. Stuart and Van Winkle & Ambler, for appellant. J. V. Blair and G. W. Farr, for appellees.

MILLER, P. August 3, 1901, defendant and wife executed and delivered to West Union Gas Company a lease, which on the same day it assigned to plaintiff, and whereby, in consideration of \$250 and other valuable considerations, the said lessors granted and demised unto said lessee all the oil and gas in and under a tract of 118 acres in Doddridge county, and also said tract of land for the purpose and exclusive right of operating thereon for oil and gas, together with other rights usually appertaining to such leases, and containing this habendum: "To have and to hold the same unto the lessee for the term of five years from this date, and as much longer as oil or gas is produced, or the rental paid thereon." The lease also stipulates: That the lessor shall be paid a royalty of one-eighth part of all the oil produced and saved, and thereafter at the rate of \$200 yearly for each gas well as long as gas therefrom is sold, payable within 60 days after commencing to use gas therefrom; the lessor to have gas for his dwelling from any gas well free by making connections, and, in case no well shall be completed within three months from the date thereof, the same

to become absolutely void and of no further effect whatever on either party, unless the lessee shall pay for further continuances of the privileges therein mentioned the sum of \$50 quarterly, payable in advance until a well shall be completed. That the lessee may at any time reconvey the premises "thereby granted" and thereupon be forever discharged from all liability to the lessors under any and every provision thereof accruing after such reconveyance and the instrument be no longer binding on either party. In Ohio a lease of this character, for a consideration, with granting clause, a habendum, a condition subsequent or defeasance clause, and a surrendering clause, is held to be a lease and not merely a license. *Brown v. Fowler*, 65 Ohio St. 507, 521, 63 N. E. 76, citing *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62, and *Martin v. Jones*, 62 Ohio St. 519, 525, 57 N. E. 238. In this state and in Pennsylvania such leases are generally treated as mere licenses vesting no estate; the title thereto, both as to the period of years and the term thereafter, remaining inchoate and contingent on the finding of oil and gas. *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *Steelsmith v. Gartian*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744.

The plaintiff, having paid the cash consideration, entered, and regularly paid the quarter annual installments of rent in advance for the full period of five years, but did not begin the work of drilling for oil or gas until June, 1906, after the last quarter had begun. It owned other leases adjoining and in the same neighborhood, on some of which it had put down wells, the wells drilled, defining defendant's land as gas, but not oil, producing territory. We take judicial notice that gas, unlike oil, cannot be brought to the surface and stored to await a market for it, but must remain in nature's storehouse, and, unless allowed to waste away, taken out only as and when the producer may be able to find customers to take and consume it.

Plaintiff, having then invested in bonus money and rentals \$1,200, in June, 1906, began a well on defendant's land, and about July 20th struck gas in the salt sand at the depth of about 1,240 feet, which, when gauged and tested, showed a capacity of about 3,000,000 cubic feet per day. After striking this gas, however, he concluded to go deeper, to the lower or Indian sand. The well was begun in ample time to have completed it in the lower sand, but shortage of water, due to the drought, caused a delay of several days. Finding the time growing short, and defendant declining to extend the term except upon terms deemed oppressive, orders were given the drillers to work on Sunday. The defendant seeing the drillers

at work suggested that they were laying themselves liable to arrest and conviction for working on Sunday, and they were frightened away and refused to work. Thirty minutes, about, after midnight of August 2, 1906, defendant, with witnesses, appeared at the well, where the drillers were at work on the night tower, and, inquiring of and being informed by them that the well was not yet completed in the lower sand, notified them that the lease had expired at midnight, that the rights of lessee had ceased, and that all from that time would be treated as trespassers. The drillers, in the absence of the owners, stopped drilling, went home, and went to bed, and work was not resumed until noon of August 3d, a loss of about 12 hours in time. The drilling then begun was continued until shortly before 1 o'clock of August 4th, when gas in immense quantities was struck in the Indian sand; the only interruption being the second appearance of the defendant with witnesses shortly after the previous midnight to again notify the drillers that the lease had then expired and ordering them off the premises. The plaintiff having refused to vacate the premises, the defendant on August 4, 1906, instituted against the plaintiff in the circuit court of Doddridge county a suit in unlawful detainer to recover possession of the property.

On December 8, 1906, the plaintiff upon its original bill obtained from said circuit court of Doddridge county an injunction protecting it in the possession and occupancy of said land, and enjoining defendant from in any manner interfering with any of its rights specified in said lease of August 3, 1901, and from in any manner interfering with it in the use, occupancy, and operation of said land for oil and gas purposes under said lease, and also from prosecuting his said action of unlawful detainer until plaintiff's rights under said lease should be settled and determined in this suit, and until the further order of the court. The further prayer of the bill was on the grounds alleged that the court would decree plaintiff vested with the title to and interest in all the oil and gas according to and subject to the terms of said lease, and that the said lease be held firm and valid. At January rules, 1907, the plaintiff filed an amended bill amplifying the grounds of relief alleged in the original bill, renewing the prayer thereof, and upon hearing upon said original and amended bill and the separate answer of John C. Coulehan thereto, and upon the depositions and proofs taken and filed in the cause, the decree of September 7, 1907, appealed from, was pronounced by the circuit court, whereby the court, being of opinion that the evidence did not sustain the material grounds for relief alleged, decreed that said injunction be wholly dissolved, the plaintiff's original and amended bills dismissed, but, though expressing no opinion as to the production of gas in the

salt sand, reserved to plaintiff the right to interpose the same as a defense to said action of unlawful detainer.

The grounds for relief alleged and especially relied upon by plaintiff are: (1) That having, for the consideration paid and acknowledged, purchased the lease, promptly paid all the bonus and rental money for the full term of five years, and within that period having actually discovered and produced gas in the salt sand, it thereby acquired a vested estate in and the right to produce oil and gas according to the provision of the lease. (2) That whether or not the first ground be good it could, and but for the alleged improper conduct and interference of defendant it would, have discovered and produced gas in the Indian sand before the five years expired.

The defendant relies upon the theories: (1) That even if oil and gas was discovered in the salt sand in July, it was not utilized, but abandoned, evidenced by drilling deeper, pulling the casing, whereby it was drowned out by the water, and defendant thereby deprived of the use of the gas therefrom for domestic purposes according to the terms of the lease. (2) That by the provision of the lease the term of five years expired at midnight of August 2d, and not as plaintiff claims at midnight of August 3, 1906, and that there was no such interference on his part with the completion of the well in the Indian sand within the five years, as claimed by him, as to entitle plaintiff at law or in equity to an extension of time, and that therefore the rights of plaintiff under the lease were wholly terminated at midnight of August 2d, if not then certainly at midnight of August 3d. (3) That equity has no jurisdiction of the subject-matter of plaintiff's bill.

By its decree the court below was manifestly of the opinion that the bill presented no grounds of equitable relief, and that whatever rights, if any, plaintiff acquired by its alleged discovery of gas within the five years, was available at law as a defense to defendant's suit of unlawful detainer, wherefore its reservation in the said decree. If plaintiff's rights depended solely on discovery of gas in the first sand, there would be force in this view of the court, although jurisdiction in equity to settle all questions as to the validity and priority of leases, for oil and gas and other minerals and mineral rights, where the parties claim under the same title, has been established by a long line of decisions of this court, beginning perhaps with *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522, and including *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222, *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566, *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220, *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, *Lowther Oil Co. v. Guffey*, 52 W. Va. 83, 43 S. E. 101, *Lowther Oil Co. v. Miller-Sibley Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027, *Pyle v. Henderson*, 55 W. Va. 122, 46 S. E. 791,

Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179, and other cases, and ending with *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307, and *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618. Jurisdiction in equity was maintained in many of these cases on the well-recognized grounds of avoidance of multiplicity of suits, removal of cloud and quieting of title, accounting, avoidance of forfeiture, and specific execution of contracts. And it has been held by this court in *Kilcoyne v. Oil Co.*, 61 W. Va. 538, 56 S. E. 888, *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, and *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744, that the covenant for peaceable and quiet possession implied in every lease for oil and gas is not limited to the right of exploration, but extends also to the right, after finding oil or gas, to produce the same, and that injunction is the proper remedy for enforcement of such covenant or to protect the exclusive right of the lessee under the contract. *Transportation Co. v. Pipe Line Co.*, 22 W. Va. 621, 46 Am. Rep. 527; *Tufts v. Copen*, 87 W. Va. 623, 16 S. E. 793; *Brown v. Spillman*, 155 U. S. 673, 15 Sup. Ct. 245, 39 L. Ed. 304. In Pennsylvania we find it has been held that a preliminary injunction will be awarded against a lessor where he has made a re-entry under a claim of forfeiture and the claim is disputed on every ground on which he puts it. *Thornton on Oil & Gas*, 120, citing *Poterie Gas Co. v. Poterie*, 153 Pa. 10, 25 Atl. 1107, and *Duffield v. Rosenzweig*, 144 Pa. 520, 23 Atl. 4. The doctrine of these cases on the subject of equitable jurisdiction has never, we believe, been questioned in this court, except that in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, the first point of the syllabus of *Bettman v. Harness*, supra, so far as it relates to the jurisdiction to settle the title and boundary of lands as between adverse claimants, when the plaintiff has no equity against the party who claims adversely to him, was overruled.

But as we view this case the rights of the plaintiff are not wholly dependent on the discovery of gas in the salt sand. The fact of such discovery within the meaning of the lease is controverted. The question whether the gas in that sand was not abandoned and the rights of the plaintiff, if any, lost thereby, are raised here, and no doubt would be raised in the trial of the action at law, so that if the plaintiff has any other rights of an equitable nature to assert against the defendant of which a court of equity can take cognizance, or its defense at law would not be as complete, adequate, and certain as in a court of equity it should not be required to relinquish its equitable rights. *Hogg's Equity Proc.* § 3, and state and federal cases cited; *Eaton on Equity*, 31, and cases cited. As the court said in *Nease v. Insurance Co.*, 32 W. Va. 283, 9 S. E. 233: "A doubtful or partial remedy at law does not exclude the injured party from relief in equity." And in

Robinson v. Braiden, 44 W. Va. 183, 28 S. E. 798: "A defendant at law, having a legal defense to the action and a distinct ground for equitable relief against the plaintiff's claim, may bring his suit in equity without waiting for the determination of the action at law, and may, without being compelled to waive his legal defense by confessing judgment, have a hearing in the court of equity on the merits of his case and a decree for the proper relief." These cases were affirmed in *Gas Co. v. Window Glass Co.*, 63 W. Va. 266, 61 S. E. 329. Equity retains its jurisdiction to relieve from a forfeiture notwithstanding it may be relieved at law. *Hogg's Equity Proc.* § 587, p. 678, citing 2 Story, *Equity Jur.* (4th Ed.) § 1301. Indeed, this is such a well-recognized rule that it requires no citation of authority to sustain it.

One of the questions presented, but particularly applicable to the rights of the plaintiff involved in the discovery of gas in the second sand, but somewhat apropos also to the discovery of gas in the salt sand is: When did the five-year term expire? It is urgently insisted for plaintiff that "five years from August 3, 1901, did not expire until the end of August 3, 1906," and it is with equal energy insisted for defendant that in construing a lease contract of this character which it is said must be regarded as having become effective on the day of its date, that day must not be excluded but included in reckoning time. We perceive that a rule which might be applicable to a mere deed of grant and conveyance, passing present title, and containing no words of condition, limitation, or defeasance would not be applicable to a deed of lease of this character, making the subsequent rights of the lessee depend upon things to be done and covenants to be performed on his part thereunder. The plaintiff, in addition to the rule at common law, relies upon section 288, Code 1906, providing that: "The time within which an act is to be done shall be computed by excluding the first day and including the last; or, if the last be Sunday, it shall also be excluded; but this provision shall not be deemed to change any rule of law applicable to bills of exchange, or negotiable notes." It is suggested by counsel for defendants that this statute is only applicable where the act to be done is one required by some provision of the statute law, and has no application to things to be done under a contract; but the title of the chapter under which this section occurs is: "Of the promulgation, proof, commencement and construction of laws; effect of the common law and ancient statutes." This title seems to imply a broader meaning than that given it by defendants' counsel.

In 28 Am. & Eng. Ency. of Law, 211, the common-law rule supported by the weight of authority is said to be that the date of the act or the happening of the event is to be excluded and the last day of the period included. The authorities, both English and

American, are there collected in a note, and at page 215 of 28 Am. & Eng. Ency. of Law, referring to the distinction drawn in the early cases between the terms "day" and "day of date," holding that where the computation was from the former the day of the date was included, but when from the latter the day of the date was excluded, says: "It is obvious that this distinction is without merit and only calculated to mislead, and it is now recognized that there is no distinction between the two phrases, and the universal rule is that the day of the date is excluded and the last day of the period included, whether the computation be from the date or from the day of the date"—citing in note the English and American cases on the subject. In *Atkins v. Sleeper*, 89 Mass. 487, it was held that "a lease for a term of years from the 1st day of July begins on the 2d day of July." In *Pugh v. Leeds*, 2 Cowper, 714, where under a power to make a lease in possession but not in reversion a lease was granted for 21 years to commence from the day of the date, it was held that from the day, etc., was to be regarded as inclusive and not exclusive of the date. This construction was given to the instrument, however, for the purpose of upholding it under the power. But Lord Mansfield said: "The ground of the opinion and judgment which I now deliver is that 'from' may in vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive." And the rule seems to be that the first and last days will be included or excluded in the computation of time as it may be necessary to give effect to an instrument, save a right or prevent a forfeiture, if this can be done without violating a clear intention or a positive provision thereof. *Weeks v. Hull*, 19 Conn. 376, 378, 50 Am. Dec. 249; *Sands v. Lyon*, 18 Conn. 18; *Bigelow v. Willson*, 18 Mass. 485; *State v. Gasconade County Ct.*, 33 Mo. 102; 28 Am. & Eng. Ency. of Law, 215, and other cases cited in notes. Our conclusion, based on our statute and these authorities, is that, where a contract of lease of the character of that involved here requires of the lessee affirmative acts to be done within a certain period stipulated from the date thereof, unless there is something in the instrument itself evincing a different intention on the part of the parties thereto, the date of the instrument will be excluded in the computation of time.

But it is claimed that the receipts taken by plaintiff for the quarterly installments of rent show a different construction by the parties, which should prevail. We do not think so. The rule invoked is applicable only when the words of the instrument are ambiguous.

Now as to the two main questions: First, was gas discovered in the salt sand, and, if so, did the plaintiff thereby become vested with an estate in the right to produce oil and gas, which has not been lost by abandonment or otherwise? It is not controverted that

gas in some quantity was struck in this sand; but an effort was made, and some evidence offered, tending to show that it was not of sufficient quantity for profitable production, and it is claimed the plaintiff by going on down with same well to deeper sand, and by subsequently pulling the casing and allowing the water to come in and flood out the gas in the first sand, must be treated as having abandoned the gas in that sand, and therefore as not having acquired any vested right to produce gas from it or from the lower sand. But the positive evidence of the drillers and others, tested by the gauge, is that gas sufficient for profitable production was obtained in this first sand, and plaintiff denies any intention to abandon it, claiming that in going to the deeper rock its intention was to also test the land for oil and gas in that sand. Our cases seem to clearly hold that discovery of oil or gas is alone sufficient to vest the right—a right, it is true, which may be lost by abandonment, manifested by neglect to produce, or pursue the work of production and further development. *Steel-smith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; *Lowther Oil Co. v. Miller-Sibley Co.*, 53 W. Va. 505, 44 S. E. 433, 97 Am. St. Rep. 1027; *Oil Co. v. Gas Co.*, 51 W. Va. 583, 591, 42 S. E. 655, 59 L. R. A. 566. See, also, *Thornton on Oil & Gas*, §§ 53, 70, and cases cited. In *Oil Co. v. Gas Co.*, supra, at page 591 of 51 W. Va., at page 658 of 42 S. E. (59 L. R. A. 566), it is said: "After the discovery of oil in paying quantities, it is held that title does vest in the lessee; but there is no case which goes so far as to announce that, after mere discovery of oil, the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it for speculative purposes, or to await his own pleasure as to the time of development."

But what of the fact here? After discovery of gas in the first sand, the lessee went right on down, with the same hole, it is true, succeeding thereby in finding greater quantities of gas in the lower strata, and rendering the defendants' land and its lease still more valuable. We have no case directly holding that, where, oil or gas has not been first produced from the rock in which they are first found, there is no abandonment by going deeper for the product in some lower strata; but we have a case, where a well had ceased to produce oil in the first sand, saying: "No one can claim that under such lease, if the lessee go on in further exploration, his right is lost. He may go on in a reasonable time." *Ammons v. Toothman*, 59 W. Va. 165, 169, 53 S. E. 13, 115 Am. St. Rep. 908. We would have to say on the weight of the evidence that gas was found by plaintiff in the first sand, in sufficient quantities to vest in it the right to produce oil or gas from said land, and that there was no intention to abandon

that right by going deeper with the same well to the lower rock. Having discovered gas in the first sand, and almost immediately thereafter in larger quantities in the lower sand, what was to preclude plaintiff from returning to the first sand, and either from the same well, or from a new well drilled, again tapping that reservoir, discovered by it, and producing gas also from it? Of course, if gas had not been found in the lower rock, on the principle announced in the case last cited, production of gas from the first sand, after discovery, could not long be deferred, without incurring the penalty of forfeiture or abandonment.

But suppose we are wrong in our conclusion on the first question, what rights, if any, did the plaintiff acquire by the slightly belated discovery of gas in the Indian sand? It is conceded the Indian sand was not penetrated and the gas gotten there until about 1 o'clock of August 4th, some 12 hours after the 5 years had expired. What is the proper construction of the lease as to time? It is for five years from date and as much longer as oil or gas is produced or the rental paid thereon. If oil or gas was produced within the five years given for exploration, the full term thereof was as surely for as much longer as oil or gas should be produced, as it was for the term of five years in which to explore. Failure to produce oil or gas within that time therefore, while not strictly or technically working a forfeiture of any further right to explore or produce oil or gas, resulted in the same thing to plaintiff, and we perceive no reason why in a proper case equitable principles applicable in cases of technical forfeiture should not be applied. The same necessity therefor, in order to prevent a gross injustice, may arise in the one case as in the other. It is said, however, that in contracts of this kind time is of the essence thereof, and this proposition, for which authorities are cited by counsel, is not controverted; but the case we have in hand is one where the plaintiff was legally entitled to the full term of five years given for exploration, without let or hindrance of the lessor. Indeed, the lessee by the implied covenants of his deed was entitled to the protection of the lessor therein. The evidence satisfies us that, though defendant may not have been guilty of serious breach of the implied covenants of his deed, yet that he was anxious the lessee should fail to get to the Indian sand in time, did nothing to aid him, and actually succeeded by his suggestions in preventing work on Sunday, and caused a loss of about 12 hours' time after midnight of August 2d, when he had no right of interference, but owed a positive duty to plaintiff to protect it in its rights. The drillers Kenney and Gaffney give it as their opinion that had they not been thus interrupted the well could have been drilled into the Indian sand and gas produced from it before the time expired.

Do these facts and circumstances give rise

to no equitable rights against defendant? Shall he be permitted to take advantage of his own wrong in this way? And if he had not so interfered and the well could not have been drilled in within the time, are there no principles available to a court of equity upon which the plaintiff can be relieved from the gross injustice which the defendant seeks to inflict upon it? The plaintiff was acting in good faith, had invested large sums of money. The plaintiff lost nothing, but he got the benefit of the successful search, and wherein has he been wronged? Defendant's counsel cite us to *Thornton on Oil & Gas*, § 141, for the proposition that, "although a well be commenced in time, if it be not completed in time the lease will terminate." For this Thornton cites *Cleminger v. Baden*, 159 Pa. 16, 23 Atl. 293, a case in which, though the well was commenced in time, there was no intention to complete it in time. It was not begun in good faith, and it was very properly held the beginning of the well did not prevent a forfeiture. The other cases cited are of the same character, and are not, we think, in conflict with the conclusion we have reached in this case. A lessor should not be heard to complain of a default caused by himself, or permitted to take advantage of his own wrong. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; *Stahl v. Van Vleck*, 53 Ohio St. 136, 41 N. E. 35; *Hukill v. Guffey*, 37 W. Va. 426, 16 S. E. 544.

We perceive that, upon the facts shown, the plaintiff is entitled to relief by injunction upon at least two well-recognized grounds of equitable jurisdiction: First, upon the principle applicable in cases calling for relief from a forfeiture; second, upon the ground that where there has been a substantial compliance with the contract, and gross injustice would be inflicted upon the plaintiff by denying him relief, relief should be granted. As we have said, the case in hand does not, strictly speaking, involve forfeiture, but is one, we think, calling for the application of the same principles. The reasons therefor are the same in both cases. "The reason of the law is the life of the law." "Affirmative relief against penalties and forfeitures," as was said by this court in *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363, "was one of the springs or fountains of equity jurisdiction, and the jurisdiction was very early exercised; and it would be going in the very opposite direction and acting contrary to its very essential principles to affirmatively enforce a forfeiture," citing *Story*, *Pomeroy*, and *Bishop* on this subject. Unless the delinquency has been willful, the court has discretionary power in relation thereto. *Railroad Co. v. Triadelphia*, 58 W. Va. 516, 52 S. E. 499, citing *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657, and

other cases. In *Pheasant v. Hanna*, *supra*, jurisdiction in equity was upheld to relieve a mining lessee from a mere technical forfeiture.

Now on the subject of substantial performance of the contract: There can certainly be no question as to the fact that the plaintiff substantially performed its contract. It had discovered gas in one sand, and was about to find it in a lower sand in still greater quantities, and we cannot say from the evidence that, but for the improper interference by the defendant with its operation, it would not have discovered the gas in the lower sand within the term of five years. Where there has been such substantial performance of a contract, equity may set aside or disregard a forfeiture occasioned by a failure to comply with the very letter of an agreement. 1 *Pomeroy*, § 451, p. 756, citing *Hagar v. Buck*, 44 Vt. 285, 5 Am. Rep. 368, and *Bliley v. Wheeler*, 5 Colo. App. 287, 38 Pac. 603. And this court, in *Railroad Co. v. Triadelphia*, page 517 of 58 W. Va., page 511 of 52 S. E., recognizes the doctrine announced in *Henry v. Tupper*, 29 Vt. 358, opinion by Chief Justice Redfield, that relief may be granted in equity even where the condition is for the performance of collateral acts.

For the reasons given we think the plaintiff has made out a case entitling it to relief in equity, and the decree which the circuit court should have entered will be entered here, making perpetual the injunction awarded upon the original and prayed for therein and in the amended bill, and that the plaintiff have its costs in this court and in the circuit court in this behalf expended.

(65 W. Va. 544)

JOHNSTON v. MACK MFG. CO.

(Supreme Court of Appeals of West Virginia.
April 27, 1909.)

1. ANIMALS (§ 70*) — PERSONAL INJURIES — LIABILITY OF OWNER.

The owner and keeper of a boar is not liable for a personal injury inflicted by him, unless it appear that he was vicious, and that such owner and keeper had previous knowledge of his vicious propensity, or unless the injury was done while trespassing upon lands inclosed by a lawful fence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 228-232; Dec. Dig. § 70.*]

2. EVIDENCE (§ 507*)—EXPERT TESTIMONY—VICIOUS PROPENSITY OF ANIMALS.

The habits and propensities of domestic animals are matters of common knowledge to all men, and expert testimony to prove the vicious propensities of a particular kind of animals in general, after they become a certain age, is inadmissible for the purpose of proving that the owner of an animal of that class had knowledge of his vicious propensity.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2310; Dec. Dig. § 507.*]

3. ANIMALS (§ 50*) — RUNNING AT LARGE — STATUTORY REGULATIONS.

So much of section 2730, Code 1906, as relates to the running at large of bulls, buck

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sheep, and boars, is the law only in those counties wherein it has been adopted by a vote of the people taken in the manner provided by section 2733 of the Code.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 148-151; Dec. Dig. § 50.*]

(Syllabus by the Court.)

Error from Circuit Court, Hancock County.

Action by George H. Johnston against the Mack Manufacturing Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. A. Hart, J. A. McKenzie, J. R. Donehoo, and O. S. Marshall, for plaintiff in error. G. L. Hambrick and Alfred Marland, for defendant in error.

WILLIAMS, J. This is an action of trespass on the case for personal injuries inflicted upon plaintiff by a large boar, the property of defendant. Plaintiff and defendant owned adjoining lands in Hancock county, and defendant was the keeper and owner of a number of hogs, among them a large boar of the Berkshire breed, about 5 or 6 years old and weighing from 300 to 500 pounds. There was no lawful fence dividing their lands, and on the 16th day of April, 1906, this boar strayed onto the lands of plaintiff, and was endeavoring to break through plaintiff's inside inclosure to get to plaintiff's hogs. Plaintiff was engaged at the time in repairing the roof of his springhouse nearby, and did not see the hog at first. His daughter, who happened to be nearby, called his attention to the hog, and plaintiff got down from the building, dropped the hatchet with which he had been working, and went to the hog to drive it away, whereupon it savagely attacked him, throwing him down, lacerating both legs badly, and causing a compound fracture of the large bone of one leg just above the ankle, and altogether injured him so badly that he was confined to his bed for a period of about six weeks. On the 19th of April, 1907, a trial was had resulting in a verdict for plaintiff for \$3,660.33. Defendant moved to set the verdict aside and grant it a new trial. The court took time to consider the motion, and, after due consideration, on the 26th of August, 1907, overruled the motion and rendered judgment on the verdict. Defendant presented several bills of exceptions embodying all the evidence and the rulings of the court complained of, which were signed by the judge and made a part of the record.

The case is here for review upon writ of error granted to the defendant. A number of errors are assigned; but the case depends upon a decision of the following questions: (1) Is the owner of a boar guilty of such negligence in suffering him to run at large as will render him liable for an injury inflicted on the person of another while straying on the land of the injured person? (2) In such

case is it necessary to prove that the owner had previous knowledge of the vicious propensity of the animal? (3) If so, is it proper to prove such knowledge constructively by expert testimony concerning the propensity of boar hogs in general to become vicious after a certain age?

It was the rule of the common law that the owner of animals was required to confine them on his own premises, and if he failed to do so, and they trespassed upon the lands of another and did injury either to his close, person, or animals, defendant was liable. Thus it was held in an English case where a horse bit and kicked a mare through a fence that the owner of the horse was liable. Lord Coleridge in that case says: "It seems to me sufficiently clear that some portion of the defendant's horse's body must have been over the boundary. That may be a very small trespass; but it is trespass in law." *Ellis v. Loftus Iron Co.*, L. R. 10, C. P. 10. But the rule of the common law requiring the owners of animals to keep them confined on his own land is no part of the law of West Virginia. This court decided in *Blaine v. Railroad Co.*, 9 W. Va. 252, and *Baylor v. Railroad Co.*, 9 W. Va. 270, that this rule of the common law had no general application in this state, except in regard to animals that are unruly and dangerous. These decisions were later approved in the case of *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123. Section 2730, Code 1906, has no bearing on this case. Acts 1882, p. 412, c. 131, of which said section is a part (in section 4 of said act, or section 2733 of the Code), excepts from the operation of the act so much thereof as relates to the running at large of "bulls over one year old, buck sheep over four months old and boars over two months old," unless and until it shall have been adopted by a vote of the people of any county desiring to put such part of the act in operation in such county; and there is no evidence in the case that such provision was ever adopted as a part of the law in Hancock county. Therefore defendant was not negligent in permitting its boar to run at large. This answers the first question, unless the animal was vicious and dangerous.

But plaintiff alleges that defendant had knowledge of the vicious propensity of the boar. It was also necessary to prove it had such knowledge. Domestic animals, as a general rule, are not vicious, and are not liable to attack mankind; and, in order to make out a case entitling one to recover for injury to his person inflicted by such domestic animals, it is necessary to allege and prove a scienter. Ingham in his work on the Law of Animals, § 94, says: "Except in the case of animals *feræ naturæ*, it is essential to show that the owner or keeper of an animal knew of its vicious or dangerous disposition; otherwise, there can be no recovery."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ery for an injury committed by it." And in support of this he cites a long list of decisions by both the courts of England and of this country. These authorities we deem it unnecessary to review in this opinion, since this is well-established law, stated by all the text-writers, and recognized by all the courts. The rule is thus stated in 2 Am. & Eng. Ency. of Law, 384: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animals; and, in an action for such injuries, knowledge on the part of the owner must be alleged and proved." This is no variation from the rule above quoted from Ingham, as applied in the present case, because the law in West Virginia is that a man must fence against trespassing animals, and not that the owner of such animals must confine them on his own land. There being no lawful fence inclosing plaintiff's land, the hog was not trespassing at the time it inflicted the personal injury on plaintiff. 1 Thompson on Negligence, § 845, says that the trend of most decisions is to break away from the ancient rule which made the keeper of a vicious animal, having knowledge of its vicious propensity, liable at all hazards for injury done by it, and to hold him liable only in case of some negligent act as the proximate cause of the injury. But it matters not which principle be applied in deciding this case, as either one leads to the same conclusion. In either case proof of scienter is necessary. In the one case if he does not take reasonable precaution to restrain the animal after such knowledge, actual or constructive, he is liable for negligence; and in the other he is liable in any event as an insurer against injury by such vicious animal. There was no negligence on the part of the defendant in suffering the boar to run at large because defendant did not know its boar was vicious, and because it was not obliged, by the laws of this state, to confine it on its own land. The rule is laid down by the Supreme Court of Maine in the case of Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99, as follows: "If damage be done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence without proof that he knew that the animal was accustomed to do mischief before, if such animal is rightfully in the place where it does the mischief." In the next point of the syllabus the converse of the rule is stated: "If domestic animals are wrongfully in the place where they do the mischief, the owner is liable for it, though he had no notice that they had been accustomed to do such mischief before." There are two elements of negligence involved in this Maine case, only one of which has application to the case under review, and that is the keeping of a vicious domestic animal

with knowledge of its vicious propensity. The second element does not apply in West Virginia, unless the animal trespasses upon the land of another inclosed by a lawful fence. In such case the owner of the trespassing animal might be liable, under section 2735, for a personal injury inflicted by the animal, as well as for injury done to the close. This question, however, we do not decide, as it does not arise in the case. In Maine the rule of the common law of England prevails, making it the duty of the owner of animals to keep them on his own land. All of the following cases hold the owner of the animal liable either on the ground that the owner kept the animal after having knowledge, actual or constructive, of his vicious character, or that he negligently permitted the animal to trespass on the lands of another: Cockerham v. Nixon, 33 N. C. 269; Vrooman v. Lawyer, 13 Johns. (N. Y.) 339; Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751; Knowles v. Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Turner v. Craighead, 83 Hun, 112, 31 N. Y. Supp. 369; McIlvaine v. Lantz, 100 Pa. 586, 45 Am. Rep. 400; Lyons v. Merrick, 105 Mass. 71; Jenkins v. Turner, 1 Ld. Raym. 109. In the case of Hayes v. Smith (decided by the Supreme Court of Ohio in 1900) 62 Ohio St. 161, 56 N. E. 879, which was an action for damages for personal injuries inflicted by a vicious dog, the court based the right of recovery upon the "keeping of the dog in a negligent manner, after knowledge of his vicious propensities, rather than the keeping of the animal with such knowledge." The case of Springs Company v. Edgar, decided by the Supreme Court of the United States, and reported in 99 U. S. 645, 25 L. Ed. 487, is a case upon which defendant in error apparently places greatest reliance. That was an action brought by a lady who had been attacked and injured by a buck deer kept by the Springs Company in its park among others of its kind to enhance the attractions of the park, which apparently was a health and pleasure resort. The plaintiff recovered a verdict for \$6,500, and the court refused to disturb the judgment of the lower court. It does not appear that the animal had ever attacked a person on any previous occasion; but there was expert testimony in the case to show that a buck deer in the fall of the year, the season at which this complainant was injured, is liable to become vicious and attack persons. And there was further evidence that there were signs posted up at various places in the park warning persons to "Beware of the Buck." There was no other evidence that the company had any knowledge of the vicious propensity of the animal. But that was an action for an injury done by an animal *feræ naturæ*; and the liability in such case depends upon a different rule of law than it does in case of

injury done by domestic animals. Mr. Justice Clifford, speaking apparently for the whole court, in the opinion makes the distinction clear. In the opinion he says: "Owners of wild beasts that are in their nature vicious are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous; for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large." On the same page of the opinion the judge further says: "Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that, if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal, after the knowledge of its vicious propensity." In support of this proposition he cites a number of authorities. We find no authorities which hold that the owner or keeper of a domestic animal liable on account of injury done to another unless it is shown (1) that the owner continued to keep the animal after knowledge, either actual or constructive, of the vicious propensity of the animal, some of the court holding that after such knowledge he is liable in any event, and other courts holding that he is liable only in the event of the negligent keeping of the animal; or (2) that the injury was committed while the animal was trespassing on the lands of another, in which case it is only necessary to show negligence in the owner in failing to keep the animal on his own land, knowledge of the vicious propensity of the animal in the latter case being unnecessary.

Apart from the attack made on the defendant, the only other evidence of the hog's viciousness is the testimony of J. D. Stewart and of a son of plaintiff, George Johnston, Jr. The latter testified that he had chased it off his father's place a few times, that one time he and his brother were chasing it off, and it turned on them; and he says: "We jumped over the fence into the pig yard, and got away from it." But he thought so little of the occurrence that he is not sure whether or not he so much as told his father of it, much less complained of it to the owner. Stewart said that on one occasion he was passing along the road, the boar was standing off to one side, and as he passed by the boar "made a jump at him," and that he jumped to one side and dodged him; that the boar turned and came back; and that he "picked up a boulder, and throwed it at him, and he started off." This was not identified as the same boar that injured plaintiff. Witness said that

he did not take notice whether or not it had tusks. There is no evidence whatever that defendant knew this particular hog was vicious, but, on the contrary, four or five witnesses prove that during the time, three or four months, that defendant owned it, it had free range of the fields of defendant with its other hogs; that it frequented the premises of defendant's numerous tenants; and that it had never at any time exhibited any signs of viciousness, or shown any disposition to attack any one. Two or three witnesses testify that they had kicked it out of their way; that they had seen children, not over 10 or 12 years old, drive it away from their houses with sticks. One witness says he saw his wife strike it over the head with a bucket and drive it from the trough where she had fed her own pigs; another man that he had driven it from his yard by the motion of his hands. So that the overwhelming weight of evidence shows that the particular hog in question was not as a matter of fact vicious.

The expert testimony of Howard A. Hill, a breeder of hogs, was received over the objection of defendant to prove that boar hogs become vicious, and are likely to attack other animals and even persons after a certain age, unless their tusks are broken off. But it is a matter of common knowledge that domestic animals are not vicious as a general rule; and upon this common knowledge rests the principle which requires proof of knowledge by the owner before he can be held liable for the vicious act of his animal, except, perhaps, in case of certain animals which the statute prohibits from running at large. The boar is not made an exception by the statute. The reverse of the fact testified to by the expert is a matter of common knowledge; and expert testimony cannot be received either to prove or to disprove those things which the law supposes to lie within the common experience and common education of all men. Rogers on Expert Testimony (2d Ed.) § 8; 1 Wharton on Evidence, § 436. But, if it could be said that this expert testimony was admissible, it would cut like a two-edged sword; because, while, it would prove negligence on the part of the defendant in failing to confine the boar, it would also affect plaintiff, and convict him of contributory negligence, as the proximate cause of his injury, in getting down from the building where he was at work, and approaching the hog unarmed to drive it away from the fence. This is the first time this court has been called upon to review a case involving personal injury inflicted by a vicious hog; nor have we been able to find where any other court has decided a similar case. Consequently the very novelty of the case, in view of the prevalence of the hog and man's familiarity with his natural propensities, is a contradiction of the expert testimony. Reports of the various courts of this country are replete with cases involving injuries from biting dogs, kicking

horses, vicious bulls, and an occasional case may be found where an owner has been held to account for the butting of his ram, but this is the first case of which we have any knowledge where the hog has so far departed from his usual habits of gentleness as to savagely bite and injure man. There would, therefore, seem to be less reason for demanding expert testimony to prove the general propensity of the hog than there would be in the case of the horse, the ox, or the sheep. All domestic animals stand in the same category, except where the rule applicable thereto has been modified by statute; and, under the law of this state, no evidence short of proof that defendant knew or by reasonable diligence should have known that its hog was of a vicious disposition or propensity will suffice to sustain a verdict for damages for the injury. We think the expert testimony was improperly admitted, and was prejudicial to plaintiff in error. Without such testimony there is not the slightest evidence in the record to support the verdict. It was an unfortunate occurrence, and a serious injury to plaintiff, but it is not shown that defendant was guilty of any wrong or negligence, and the law does not hold it liable.

We deem it unnecessary to review the other points of error assigned. Our conclusion is that the verdict is contrary to the law and the evidence, and that it was error not to set it aside. We therefore reverse the judgment, set aside the verdict, and, according to the established practice of this court, remand the cause for a new trial; it not being made to appear clearly that the plaintiff may not be able on a second trial to strengthen his case.

(65 W. Va. 537)

CAPITO v. TOPPING. SUTHERLAND v. SAME. REESE v. SAME.

(Supreme Court of Appeals of West Virginia.
April 27, 1909.)

1. MANDAMUS (§ 73*)—PURPOSES OF RELIEF—LEGISLATIVE OFFICERS.

Mandamus is an appropriate remedy to compel the keeper of the legislative rolls to deliver to a citizen requiring it a copy of an act passed by the Legislature, and also to compel him to promulgate the same with the other acts passed by printing and binding it with them for distribution and sale.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 73.*]

2. MANDAMUS (§ 82*)—PUBLIC OFFICER—DEFENSE.

Mere lack of possession by a public officer of a document, of which he is the legal custodian constitutes no defense to an application for a peremptory writ of mandamus to compel him to certify and deliver a copy thereof when the law requires it of him.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 139, 177-179; Dec. Dig. § 82.*]

3. CONSTITUTIONAL LAW (§ 42*)—WHO MAY RAISE—QUESTION.

Unconstitutionality of a legislative act cannot be set up by the keeper of the rolls as a de-

fense to a writ of mandamus to compel him to furnish a copy thereof; this defense being available only for protection of personal interests or rights invaded or encroached upon by unconstitutional legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

4. CONSTITUTIONAL LAW (§ 35*)—CONSTRUCTION OF CONSTITUTION—MANDATORY.

Being organic in character, constitutional provisions stand on a higher plane than statutes, and, as a rule, are mandatory, prescribing exact or exclusive times and methods of doing acts permitted or required.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 34½; Dec. Dig. § 35.*]

5. STATUTES (§ 29*)—VETO BY GOVERNOR.

The provision in section 14 of article 7 of the Constitution of this state (Code 1906, p. lxvii), requiring the Governor to file a bill, with the objections thereto, in the office of the Secretary of State, within five days after the adjournment of the Legislature, in order to effect a veto thereof, is mandatory, in respect to both the time and the manner of exercising the power.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 29.*]

6. TIME (§ 10*)—VETO—TIME FOR—EXCLUSION OF SUNDAY.

In computing the period of five days after adjournment allowed for the exercise of the power of executive disapproval, a Sunday occurring within five days after adjournment is to be excluded.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10; Statutes, Cent. Dig. § 31.]

7. EVIDENCE (§ 387*)—PAROL EVIDENCE.

When the records of the Legislature show the time of adjournment and are clear and unambiguous respecting the same, they are conclusive; and extraneous evidence cannot be admitted to show a different date of adjournment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1699; Dec. Dig. § 387.*]

8. STATES (§ 37*)—LEGISLATIVE RECORDS—CERTAINTY.

The date of adjournment of the Legislature, as shown by its journals, is not contradicted or rendered uncertain by record evidence therein of the transaction of a large amount of business within a short period of time.

[Ed. Note.—For other cases, see States, Dec. Dig. § 37.*]

9. STATUTES (§ 15*)—READING—AMENDMENTS.

Amendments to legislative bills read on three separate days, as required by the Constitution, made at a late stage of the proceedings, such as the third reading, do not make it necessary to repeat the constitutional readings thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 12, 13; Dec. Dig. § 15.*]

(Syllabus by the Court.)

Separate original applications for peremptory writs of mandamus by Charles Capito, Howard Sutherland, and Z. M. Reese were directed to C. L. Topping, Clerk of the House of Delegates. Writs awarded.

Price, Smith, Spilman & Clay and Kemble White, for petitioners. Wm. G. Conley, Wm. M. O. Dawson, and Linn & Byrne, for respondent.

POFFENBARGER, J. Chas. Capito applied to this court for a peremptory writ of mandamus, to compel O. L. Topping, clerk of the House of Delegates, to certify and deliver to him a copy of a certain document, known and designated in the legislative proceedings as Senate Bill No. 162, a bill to amend and re-enact a certain statute, constituting the charter of the city of Charleston, as an act passed by the Legislature. Howard Sutherland applied for two such writs, commanding said Topping to certify two other documents, relating to roads, as having become laws. Z. M. Reese also asked such a writ, commanding him to certify still another one, purporting to establish Grant Independent School District in Marion county, as a law passed. Another purpose of the applicants was to have these acts printed and bound with the other acts passed. Topping resisted all these applications, basing his defense on an alleged veto by the Governor in each case and unconstitutionality of some of the acts.

The facts disclosed are as follows: The legislative journals, as written up by the clerks, but not yet signed by the presiding officers, show the Legislature adjourned on the 26th day of February, 1909, but do not disclose the hour of adjournment. As shown by affidavits tendered, that body in point of fact adjourned on February 27, 1909, at 6:40 o'clock a. m. Within five days after February 26th, the Governor indorsed "Disapproved" on some of the bills, but did not return any of them to the office of the Secretary of State within that period, but did return them within five days after February 27th, excluding Sunday, to wit, on the 5th day of March, 1909, at 8:00 o'clock a. m.; that being more than five days after midnight of February 26th, excluding Sunday, February 28th. The legislative journals show a recess for 10 minutes at 11:30 o'clock p. m. on February 26th and the transaction of a large amount of business after that time.

Assuming the validity of the acts in question, the right of the applicants to have copies thereof and the propriety of the remedy invoked are clear beyond doubt. As citizens and taxpayers, they have a sufficient interest, and the statute makes the clerk of the House the keeper of the rolls, and requires him to make and deliver a copy of any act to any person requiring the same on payment of the fee allowed therefore. Code 1889, c. 12, §§ 13, 14 (Code 1906, §§ 266, 267). That mandamus is the proper remedy to enforce performance of this duty is obvious, in view of legal principles, and has been judicially declared. *Wise v. Bigger*, Clerk, 79 Va. 269; *Wolfe v. McCaull*, 76 Va. 876.

Unconstitutionality of the acts in question, treating them as having had bestowed upon them all the vital and essential requisites of passage in due form by both houses of the Legislature, and not having been vetoed, may be eliminated as a defense the respondent

cannot make in his ministerial and representative capacity, if it exists. That defense is open only to persons having a personal interest or right, which the unconstitutional act invades or violates. *Dillon v. County Court of Braxton County*, 60 W. Va. 339, 55 S. E. 382, Id., 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450.

Another objection preliminary in character is that the document is not in the custody of the respondent. If it became a legislative act, it should be in his possession; and, if it is not, he fails to show any excuse for not having it. His return stops with the mere statement that the Secretary of State, not he, has it. It fails to go further and show his inability to get it. It is not even suggested that he cannot obtain it, or that he has made any effort to do so. As the legal custodian of such records, he is bound to exercise some degree of diligence in respect to them. An impossibility would not be required of him, of course, and, if it appeared here that time were necessary to enable him by legal proceedings or otherwise to obtain the possession of it, that might constitute a defense. Whether it would or not we are not called upon to say, for it is not even suggested in the return. Insufficiency of this part of the return is obvious.

The constitutional provision involved and conferring and limiting the gubernatorial power of veto reads as follows: "Any bill which shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, shall be a law, in like manner as if he had signed it, unless the Legislature shall, by their adjournment prevent its return, in which case it shall be filed with his objections, in the office of the Secretary of State, within five days after such adjournment, or become a law." Const. art. 7, § 14 (Code 1906, p. lxvii). In view of the terms, as well as the nature of this clause, it must be held to be mandatory, not merely directory. Constitutional provisions are organic. They are adopted with the highest degree of solemnity. They are intended to remain unalterable except by the great body of the people, and are incapable of alteration without great trouble and expense. They are the framework of the state as a civil institution, giving cast and color to all its legislation, jurisprudence, institutions, and social and commercial life by confining the Legislature, the executive, and judiciary within prescribed limits. All the great potential, dominating, creative, destroying, and guiding forces of the state are brought within their control so far as they apply. Thus, to the extent of their duration, they define and limit the policy of the state more rigidly and unalterably than the sails and rudder of the ship when set govern and control its course. A more apt figure is made up of the great system of highways, including railroads, fixing the

mode, courses, and extent of travel and transportation. So they necessarily stand on a much higher plane than mere statutes, and the courts as a rule do not feel warranted in upholding deviations from them in respect to the manner and time of the performance of acts prescribed or required by them. *Wolfe v. McCaull*, 78 Va. 876; *Cooley, Cons. Lim.* (7th Ed.) 114, 219; *Lewis' Suth. Stat. Con.* § 164, p. 109. Tested by its terms, the clause under consideration may be said to be in mandatory form, though form is not always conclusive. The passage of the act makes it law, subject to a contingency, the executive veto. If the Governor desires to veto a bill after the adjournment of the Legislature, it must be filed, with his objections, "in the office of the Secretary of State within five days after such adjournment, or become a law." It is alternative and emphatic, saying, if a certain thing is not done, another shall happen. Unlike many other provisions, it does not stop with the prescription of the affirmative act, leaving the consequence of failure to inference. It declares the sequence. We are aware of no decision authorizing the view that a constitutional clause dealing with matters so high and vital in character as the executive power of veto, and the making of laws, and having form and terms so emphatic, is merely directory. In our opinion this clause requires actual filing in the office of the Secretary of State within five days after adjournment. Otherwise, something other than the record indicated in it would have to be relied upon as evidence of the nonexistence of the law. Resort might be had to uncertain memoranda, or somebody's recollection or understanding. Laws should rest upon something more certain and durable, and the evidence of their existence should be a public record, kept in a certain place, that all may know where to look for it and be able to see it. The legislative journals show the passage of an act, making it a law subject to a contingency. This is evidenced by a public record. The veto annulling it after adjournment should also be evidenced by a record, and in framing the Constitution the people saw fit to designate a certain office as the repository of that evidence. Plainly no other place will do. If any other could be substituted, what one would it be? One man might say the Governor's office, another the Auditor's office, and so on, and there would be no certain place. The locality or name of the place of record is not of primary importance, but it is vital that there be a known, certain place. We think, therefore, the veto is not effective, unless the bill is filed with objections in the prescribed office. Nor have we any doubt that it must be filed within the prescribed time. If not within five days, then within how many? Who shall say? Is not a time limit beyond which the citizen may know the fate of an act passed important?

Two questions relating to the computation of time have been argued. One of these is whether a Sunday occurring within five days from adjournment is to be excluded. In our opinion the settled rules of construction, reason, and authority all point to an affirmative answer to this question. Sundays are excluded from the five days allowed the Governor for action on bills passed prior to adjournment. This defines the five-day period, subsequently used in the same section. The Governor is required to do certain work within five days, not to be engaged in a certain way or at a certain place for five days. As no intention to require work of him on Sunday can be presumed, and work for five days is marked out for him, it is reasonable to say five working days were contemplated. To this effect the authorities are almost, if not quite, uniform. Many decisions holding it proper to exclude from the count the first day in computing time under a clause, saying the Governor shall act upon a bill within five days after it shall have been presented to him, are relied upon, but they are not applicable here. We are not considering a clause of that kind. We do exclude the day of adjournment, which corresponds to the day of presentation under the other clause, but there is no authority for the exclusion of the day after adjournment after having excluded the day of adjournment.

There being no dispute as to the date of the filing of the bills in the office of the Secretary of State, the vital question is the date of adjournment, and this reduces itself to another, namely, how that is to be proved—whether by the legislative journals or extraneous evidence. It is admitted that no date subsequent to February 26th is disclosed by the journal or any record or memorandum of either house of the Legislature, and that both records show adjournment on that day. There is no uncertainty or ambiguity whatever in these records. Under such circumstances extraneous evidence to impeach the written record is inadmissible. *Wise v. Bigger*, 79 Va. 269; *State v. Abbott*, 59 Neb. 106, 80 N. W. 499; *Webster v. Hastings*, 59 Neb. 563, 81 N. W. 510; *In re Granger*, 56 Neb. 260, 76 N. W. 588; *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *State v. Moffitt*, 5 Ohio, 363. If the Legislature has failed to make any record of its adjournment, or its records are in such a state of confusion as to render ascertainment of the date impossible, then resort may be had to other evidence, but not otherwise. *Crocker v. Junkin*, 79 Neb. 532, 113 N. W. 256. The common practice of staying the hands of the clock to enable the Legislature to effect an adjournment apparently within the time fixed by the Constitution for the expiration of the term is dwelt upon in the argument as a serious trespass upon the rights of the executive in respect to the time allowed him for examination of, and action upon, bills un-

disposed of by him at the time of adjournment; it being pointed out that he might thus be deprived of the entire period of five days. In point of fact no serious curtailment of this period has ever occurred in the history of the state, and the assumption that it will ever occur would be a violent and highly improbable one. If it should, the resultant evil might be slight as compared with that of altering the probative force and character of legislative records, and making the proof of legislative action depend upon uncertain oral evidence, liable to loss by death or absence, and so imperfect on account of the treachery of memory. Long, long centuries ago, these considerations of public policy led to the adoption of the rule, giving verity and unimpeachability to legislative records. If that character is to be taken away for one purpose, it must be taken away for all, and the evidence of the laws of the state must rest upon a foundation less certain and durable than that afforded by the law to many contracts between private individuals concerning comparatively trifling matters. The Constitution was adopted by the people, with full knowledge of the existence of this rule of evidence, and no provision was inserted to protect the Governor or any person else from its operation and effect. How can we say they did not think it better for the public to take the risk of slight, or even great, abuse or perversion of it, than to innovate upon the rule, or that they did not rightly and safely assume that no substantial encroachment would ever be made by the Legislature upon the time of the executive in this way? In more than 45 years it has never yet occurred. The few hours so taken is in a practical sense no encroachment at all, since the Governor and Legislature may both work at the same time. If the evil should grow and become serious, the power of remedy is in the hands of the people rather than those of the courts.

It is said the journal of the senate properly interpreted shows an adjournment could not have occurred on or before midnight of February 26th, because a large amount of business was transacted, after a recess, terminating at 11:40 o'clock p. m. of that day. Some four or five reports of committees on enrolled bills and the report of a conference committee on the appropriation bill were received and acted upon, and there were two roll calls after that time. All this is remote and merely argumentative. What business was transacted is one thing. The time of adjournment is another. The journal says the Legislature adjourned on the 26th. This covers the point in issue. A mere uncertain inference cannot prevail over it. The court does not judicially know how much legislative business can be transacted in twenty minutes.

It has been suggested in argument that the

day of adjournment shown by the record extended to noon of February 27th. We are unable to concur in this view. The day indicated by the journals is a calendar day, a day of the month and year, not a day of the session. Even if we could say the 45-day constitutional period extended to noon of February 27th, it would be immaterial. The date of adjournment and the date of expiration of that period are different things. The Governor is not allowed for veto purposes five days after the expiration of the constitutional legislative period. His veto period is 5 days after adjournment, which might occur on any day in the 45-day period.

Another contention is that, owing to an alleged irregularity in the legislative proceedings shown by the journal, the bill did not pass. This is predicated on an amendment made on the third reading, although the bill is shown to have had its first, second, and third readings in both houses. We are aware of no law, constitutional or otherwise, requiring a repetition of the reading of bills in their entirety, when amendments are made at late stages of the proceedings.

Being of the opinion that none of the bills in question were vetoed, we awarded the writs.

(65 W. Va. 656)

MAY v. TOPPING.

(Supreme Court of Appeals of West Virginia.
May 4, 1909.)

STATUTES (§ 32*) — APPROPRIATION BILLS — VETO—"DISAPPROVAL."

In no event has the Governor power to disapprove a bill making appropriations of the public money, embracing distinct items, or to disapprove any item therein, without communicating his disapproval thereof, with his reasons therefor, to the house in which the bill originated before the adjournment of the legislative session.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 35; Dec. Dig. § 32.*]

(Syllabus by the Court.)

Application of Maude May for writ of mandamus against C. L. Topping, Clerk of the House of Delegates. Writ granted.

Mollohan, McClintic & Mathews, for petitioner. Wm. G. Conley, Frank Lively, and Wm. M. O. Dawson, for respondent.

ROBINSON, J. Maude May has applied for a peremptory writ of mandamus to compel the clerk of the House of Delegates of West Virginia, keeper of the rolls of the state, to make and deliver to her, upon payment of the fees therefor, a certified copy of House Bill No. 342, entitled "An act making appropriations of public money to pay general charges upon the treasury," and to include in such certified copy of that act the following: "To pay to Mrs. Maude May, executrix and devisee, widow of the late At-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

torney General, Clark W. May, deceased, the salary for the balance of the year in which said Clark W. May died, \$2,080.00"—as one of the acts legally passed by the Legislature of the state of West Virginia and duly enrolled pursuant to law, and also to include in the printed copy of the acts of the Legislature of 1909, to be published and issued by the keeper of the rolls according to law, House Bill No. 342, entitled as aforesaid, containing therein the item appropriating the sum of \$2,080, as in the words and figures given above, as a valid subsisting act in law, duly passed by the Legislature of the state of West Virginia, according to the provisions of the Constitution. The application for such mandamus is resisted by respondent. He maintains that the item appropriating the sum of \$2,080 in the words and figures recited above, was vetoed by the Governor. He therefore presents as his defense that such portion of the bill did not become a law, and that he has no power to certify and publish it as such.

The Legislature which passed the bill in question met on Wednesday, the 13th day of January, 1909. It adjourned by operation of the Constitution, wherein it limits the session to 45 days, on Friday, the 26th day of February, 1909. The journals of the Senate and House of Delegates, printed by the authority of the respective houses, show that House Bill No. 342 was constitutionally passed by each of them, presented to the Governor, and report of such presentation made to each house. The journals further show that a joint committee of the two houses waited upon the Governor; that he directed them to inform the two houses of the Legislature that he had no further communication to make to either of them; that the committee made such report; and that, thereupon, each house adjourned sine die. These printed journals bear the date of Friday, February 26, 1909. They show no extension of the session beyond the constitutional period.

Enrolled House Bill No. 342 was presented to the Governor, as attested by the printed journals of the two houses of the Legislature, on February 26, 1909. It remained in his possession and control until Friday, the 5th day of March, 1909. At the hour of 8 o'clock a. m. on that day, it was filed in the office of Secretary of State. As presented to the Governor, it contained the item of appropriation in favor of Mrs. May. As filed in the office of Secretary of State this item was stricken out by red ink, and there was indorsed on the bill, under the signature of the Governor and the date of March 3, 1909, his disapproval of all items indicated in the bill by red ink erasure, and his approval of all items not so indicated.

The right of petitioner to the remedy by mandamus, invoked to compel the certification and delivery to her of a copy of an act passed by the Legislature and to compel the

keeper of the rolls to promulgate the same with the other acts passed, has been determined and upheld by this court in the Cases of Capito, Sutherland, and Reese, 64 S. E. 845, applying for similar writs, at this term. The opinion in those cases is, to further extent, controlling in this case. We need not inquire to what extent. A reference suffices. Aside from the questions therein determined this case involves but one. That question is: Can the Governor veto an item in the general appropriation bill after the adjournment of the Legislature?

The question is, we are of opinion, answered by the plain terms of the Constitution wherein it prescribes that which governs in such cases. Article 7, § 15 (Code 1906, p. lxvii). This organic constitutional provision in view of its character and purpose is necessarily mandatory. It provides: "Every bill passed by the Legislature making appropriations of money, embracing distinct items, shall before it becomes a law, be presented to the Governor; if he disapprove the bill, or any item or appropriation therein contained, he shall communicate such disapproval with his reasons therefor to the House in which the bill originated; but all items not disapproved shall have the force and effect of law according to the original provisions of the bill. Any item or items so disapproved shall be void, unless repassed by a majority of each House according to the rules and limitations prescribed in the preceding section in reference to other bills." How is it ordained by this supreme and mandatory law that an item in an appropriation bill embracing distinct items shall be disapproved by the Governor? Plainly is it stated therein that, if he disapproved such item, he shall communicate such disapproval, with his reasons therefor, to the house in which the bill originated. It is this action of the Governor in communicating such disapproval, with his reasons therefor, to the house in which the bill originated that consummates and effects a veto of the item. The communication of his disapproval, with his reasons therefor, is the disapproval itself. The obligation upon the Governor to communicate his disapproval of an item, with his reasons therefor, to the house in which the bill originated, is a mandatory one to bring about the qualified veto that is given him in such instances. Unless he communicate as directed by this constitutional provision, he approves, and does not disapprove. The last clause of the section clearly discloses such interpretation. It says: "Any item or items so disapproved shall be void, unless repassed by a majority of each house." What do the words "so disapproved" mean? The use of these words makes one to inquire: How disapproved? Clearly they relate not simply to disapproval in the mind of the Governor, but to some act of disapproval, some manner of disapproval. That act or manner of disapproval provided

for just above these words, and to which "so disapproved" clearly relates, is by communication with reasons to the house in which the bill originated. "Any item or items so disapproved shall be void, unless repassed." The very connection between the words "so disapproved" and "unless repassed" show that the Constitution intends that the disapproval of the Governor, to be a disapproval at all, must be communicated to the house of the Legislature in which the bill originated, so that the Legislature may again act upon the item; so that it may repass it, if the Governor's reasons for disapproval do not persuade it to do otherwise, by a majority of each house according to the rules and limitations prescribed. Only by being "so disapproved" is the item declared void by the Constitution. Disapproval in any other form or manner does not affect it.

The plain terms of this constitutional provision should prevail. A Constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it; "for as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or obtruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." Cooley's Const. Lim. 81. The great Chief Justice Marshall in the interpretation of a provision of the national Constitution said: "As men whose intentions require no concealment generally employ the words which most distinctly and aptly express the ideas they intend to convey, the enlightened patriots who adopted it must be understood to have employed words in their natural sense, and to have intended what they said." *Gibbons v. Ogden*, 9 Wheat. 188, 6 L. Ed. 23. There is no ambiguity in section 14 of article 7 (Code 1906, p. lxvi). It is plain. It needs no construction. The terms used in common everyday interpretation can mean nothing but that the Governor disapproves a distinct item in an appropriation bill by communicating his dissent, and his reasons therefor, to the house that originated the bill, so that house may set in motion, if it desire, after hearing the Governor's reasons against the item, legislative action to repass the item by a majority of each house. The section plainly contemplates further legislative action, if the Legislature sees fit. Can there be such action after the Legislature has adjourned? The very fact that there cannot be determines that the Governor must express his disapproval before the adjournment.

The people of this state most evidently intended that the sovereign will, the Legisla-

ture, should have the ultimate power in the general expenditure of the public revenue. They have so expressed it in the fundamental compact of government. They provided, it is true, a check upon legislative action in this particular by ordaining that the Governor could disapprove the general appropriations and express such disapproval to the Legislature. It was so provided in order that the executive, versed in statecraft, should advise or reason against the general expenditure of public money or any item thereof. But the very language of the Constitution in this regard can mean nothing but that, after such reasons against an appropriation are communicated to the Legislature by the Governor, that Legislature, the sovereign body, still has the will to expend the public money notwithstanding the opinion and arguments of the executive head of the state. The people have reserved unto themselves by their many representatives, embodying the combined and versatile intelligence of the masses, the last word as to the policy and propriety of public expenditures. Such idea is most consistent with the republican form of government. But the people never intended, and it is not so expressed, that the intelligence or will of any one man in a matter so vital and varied as the expenditure of the public revenue, the very life-blood of the state, should prevail, except by argument, over the combined intelligence and will of their representatives in legislative assembly. "In the multitude of counsellors there is safety."

It has been submitted in the argument that the court will go far to uphold the veto power of the Governor. We have no power to change the Constitution; and, where that instrument is clear in its terms and of plain interpretation to any ordinary and reasonable mind, there is no room for construction, and it would be mischievous and unlawful to assume it. If the absolute veto power of the Governor was clearly expressed, we should declare its existence. Yet we have nothing to control us other than the plainly written language of the fundamental compact. In that instrument there is nothing to attach us to the idea that the veto power is so sacred that it should be made to prevail, in the face of plain words, against the supreme power of the people. The Governor is not vested with the absolute power of veto. The people have reserved unto themselves in every event the right and opportunity to accept his disapproval as sound or to overthrow it as not being for the commonweal. We iterate that nowhere in the Constitution is the Governor given the absolute power to prevent a bill that has passed the Legislature from becoming a law, providing that same Legislature, by a majority thereof, sees fit to make that bill a law. During the session every bill presented to the Governor must be returned by him to the house in which it originated, or it becomes a law. During that session he must express his dis-

approval to the house whence the bill came. The legislative assembly may then by a majority vote still persist in the bill's being a law. True it is that the legislative assembly may adjourn leaving bills in the hands of the Governor for his disapproval within five days after adjournment pursuant to article 7, § 14. But the Legislature has the discretion, the power, to deny to the Governor such absolute opportunity of disapproving legislation. It may so confide in him, or it may not so trust his judgment. It may remain in session for these five days or longer, presenting no bills to the Governor, solely for the purpose of receiving his disapproval of those already presented, and for the further purpose of ratifying or disaffirming any veto that he may make. If the Legislature desires to hold unto itself the power of acting upon the Governor's disapproval of bills, if it does not desire to vest him with absolute veto power as to any bill, it may five days or more before the day that it would adjourn complete the legislation for that session, present no more bills to the Governor, and remain in session solely for the purpose of receiving the Governor's disapproval, and of overruling any executive disapproval in the event that it should not meet the sanction of the legislative mind. Or, for the purpose of acting on bills that may be disapproved by the Governor, the Legislature may remain in session after the constitutional period by a concurrence of two-thirds of the members elected to each house. So most certain it is that the people have not given the absolute power of veto to the Governor. They have reserved unto themselves the ultimate question of the propriety of all legislation. They may, and they do, give such power to him as to bills other than an appropriation bill embracing distinct items, if the Legislature, representing the people, sees fit to adjourn before the time has expired for executive approval or disapproval of all such bills passed. Thus we see that the legislative, not the executive, will, has been made supreme. Then, shall we yield to the argument that the executive will is entitled to the doubt, if any exists, as to which is supreme, in relation to the bill herein involved? Is it not the legislative will in whose favor such doubt should be resolved?

It is insisted upon behalf of respondent that section 14 of article 7 should be read and applied in connection with section 15 thereof, and that, therefore, the Governor had five days after adjournment to exercise his disapproval by filing the bill with his objections in the office of the Secretary of State. If this were true, the item in the bill in question became a law; because, as we have held in the *Capito*, *Sutherland*, and *Reese* Cases, it was not filed for more than five days after adjournment. But we cannot read section 14 into section 15. They are distinct. If the provision as to the five days after adjournment was intended to apply to, and to be read

into, section 15, then why the necessity of the latter section at all? The mere inclusion of a few words in section 14 would have made it fit an appropriation bill embracing distinct items. In reason we must assume that there was a separate purpose for section 15, and that the section expresses that purpose. The only adoption that section 15 makes from the preceding section is, not as to that portion referring to disapproval within five days after adjournment, but as to the rules and limitations prescribed for the repassing of a bill after the Governor has disapproved it. And in that reference of the latter section to the former one, we observe that the promulgators of the Constitution, in effect, refer to section 14 as pertaining to bills other than the one provided for in section 15. The latter section says that the rules and limitations prescribed in the preceding section refer to "other bills." If the rules and limitations in section 14 apply to "other bills," does not the whole of section 14 apply to "other bills"? The clause of section 14 in reference to disapproval within five days after adjournment is not a rule or limitation for the repassing of a bill. We seek in vain for any tie by which that clause can be connected with the provisions of section 15. There is no rule of construction by which it can be so applied. A distinct section and provision was made relative to executive disapproval of a bill making appropriation of money embracing distinct items. The Constitution expresses itself in a distinct way as to executive disapproval of a bill making general appropriations of public money. The specific expression of this subject in the latter section is the exclusion of it in the preceding one. In the distinct section no power of disapproval after adjournment is prescribed. Yet in this distinct section it is positively ordained that only items so disapproved as therein provided shall be void unless repassed. To incorporate the last clause of section 14 would be inconsistent with the use of the clause: "Any item or items so disapproved shall be void, unless repassed."

We have been cited to the Journal of the constitutional convention of 1872 showing that section 14, as proposed to the convention, was adopted without change, and that section 15 was materially changed. It is argued that the changes which were made disclose interpretation to be given. It is needless to discuss these changes. There may be force in the argument made upon them. But, as we have hereinbefore said, the interpretation from the language of the provision is plain. The rule which permits a reference to the proceedings of the convention applies only where the meaning of the constitutional provision is doubtful. It cannot, it need not, apply here. *Cooley's Const. Lim.* 80.

On behalf of respondent, it is maintained, pursuant to allegations of his answer, that it has been the custom of the executive branch of the state government to approve general appropriation bills, or to disapprove some

Items therein, within five days after an adjournment of the Legislature, and that such action of the executive department has never been questioned. Such custom, if it has existed as alleged, has been directly contrary to the constitutional provision. No affirmative approval of a general appropriation bill is required, and no disapproval of such bill or any item therein is effective if expressed after adjournment. The rule of contemporaneous or practical construction is sought to be invoked. We are cited to Lewis' Sutherland on Statutory Construction, § 472 et seq. This celebrated authority does not justify the position nor does any authority in this case. The rule applies only where there is ambiguity and doubt. As said at section 473, in the work just mentioned: "Long usage is of no avail against a plain statute; it can be binding only as the interpreter of a doubtful law, and as affording a contemporary exposition." The rule cannot be applied to overthrow an unambiguous mandate of the law. The very growth of the rule sprung from doubtful provisions. In reference to this subject, Judge Cooley says: "Where, however, no ambiguity or doubt appears in the law, we think the same rule applies here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers." Const. Llm. 84. And in a renowned work by an eminent jurist, it is said: "Contemporary construction * * * can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries." Story on the Constitution, § 407.

It is further insisted that, since the general appropriation bill was passed during the last hours of the session, the Governor is denied time for consideration, unless the provision for disapproval of a bill after adjournment is made to apply. The legislative journals show that immediately before adjournment the Governor stated to a joint committee that waited upon him that he had no further communication to make to either house. This committee made such report. Must it not be presumed that the Legislature inferred from this that the general appropriation bill was approved? The Governor could have made reply to this committee that he had been given no time for consideration of the appropriation bill. It must be assumed in reason, fairness, and a recognition of statesmanship that the Legislature would then have provided for the time that the spirit of the Constitution intends that the Governor shall have. That body certainly would have corrected its fault in postponing the passage of this most vital bill to such late hour of the session. If the situation warranted it, he could have requested that the committee re-

port to the Legislature that, if the session was not extended to give him such time, he must veto the bill as a whole. He had full power to convene the body the next day in extraordinary session, limiting that session to the consideration of appropriations only. By such action the Legislature would have learned that the Governor meant to have time for consideration, as it was intended he should have, before final adjournment. It was never contemplated that the important matter of appropriating the public money should be left to the very last moments of a legislative session. Such practice is detrimental to the state and injurious to government. The Legislature should not countenance it. The executive should stamp it out, even if it must be by the immediate disapproval of a bill passed, at such a late hour, under the pressure of hurried legislative grind. The people rightfully assumed, when the Constitution was adopted, that the provision in reference to presenting bills to the Governor for his disapproval and objection, as well as all other provisions of the compact, would be recognized and respected. It should be so. The Legislature can give the executive a long time or a short time for consideration of a general appropriation bill. He does not have to return it to the house within five days after it is presented to him, as required in relation to other bills, unless the session would sooner adjourn. But it was surely believed that the legislative and executive branches, in the interest of the masses they represent, would treat each other fairly in such case. However, the failure of the Legislature or of the executive, whichever one may be at fault, properly to use the provisions of article 7, § 15, cannot alter those provisions. The instrument cannot be amended that way. If the Legislature unfairly denied the Governor time, or the Governor erroneously assumed that he had time after adjournment, these are not substantial reasons for changing, by construction, a mandate which means what it says. We repeat, it was reasonably supposed when these provisions were adopted that they would be fairly dealt with, appropriately and usefully applied, and quite as fairly, appropriately, and usefully interpreted by those to whom direction is given thereby. That the section has not hitherto received such interpretation and use is no reason why it should not in the future. "Two wrongs cannot make a right." That the provisions of the section would be used to the detriment of the proper consideration of bills by the Governor was never contemplated. That it should be misinterpreted to allow time for disapproval after adjournment was never anticipated. Neither of these exigencies need arise. It is hoped and believed that in the future they will not.

There have been addressed to the court considerations relating to the merit of the item in question, to the propriety of the alleged veto, and to the effect of the items sought to

be vetoed upon the amount of the public revenue available for expenditure. With these questions this court has nothing whatever to do. Let the bill or the item involved in this case be good or bad, we can concern ourselves with nothing but the question: Is it the legislative will? We can say it is legislation or not legislation, as the case may legally appear; but it is not for us to say that it is good or bad legislation. The policy and propriety of the law rest wholly with the legislative department, subject to the restricted power of disapproval given to the Governor, if exercised by him in proper time.

It appearing that the Governor did not disapprove the item of House Bill No. 342, making the appropriation to petitioner within the time prescribed by the Constitution and in the manner therein directed, the writ will be awarded.

(65 W. Va. 636)

PORTER v. MACK MFG. CO.

(Supreme Court of Appeals of West Virginia.
May 4, 1909.)

1. MINES AND MINERALS (§ 55*)—RESERVATION—RIGHTS OF GRANTOR IN SURFACE.

A deed conveying land, reserving to the grantor all the clay, fire clay, and other minerals, severs them in ownership from the land, creating two estates therein. The owner of the surface cannot obstruct the mineral owner from a use of the surface for a tramway or other means of transportation fairly useful and necessary.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 163, 164; Dec. Dig. § 55.*]

2. MINES AND MINERALS (§ 55*)—RIGHTS OF MINERAL OWNERS—USE OF SURFACE—INJUNCTION.

Injunction lies for one owning minerals in land, with right to use the surface for mining and removing them, to prevent the surface owner from unlawfully resisting and obstructing the mineral owner in the legitimate use of the surface for mining and removing the minerals.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 165; Dec. Dig. § 55.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Hancock County.

Bill by Fred G. Porter against the Mack Manufacturing Company. Decree for plaintiff, and defendant appeals. Affirmed.

Hart & McKenzie, for appellant. J. B. Donehoo and J. B. Sommerville, for appellee.

BRANNON, J. This is a chancery suit brought in the circuit court of Hancock county by Fred G. Porter against the Mack Manufacturing Company. Porter, claiming the fire clay, coal, and other minerals in a tract of land, went upon it with his hands to construct a tram road upon the surface for the purpose of conveying fire clay and perhaps other minerals which he owned, in order to use them in the manufacture of fire

brick in a plant of his upon adjoining land. The Mack Manufacturing Company denied his right to construct a tram road, and, indeed, denied the right, as its answer tells us, of Porter to use the surface for taking away the minerals. The Mack Manufacturing Company absolutely refused as owners of the surface to let Porter build the tram road. It caused a warrant to be sued out from a justice to arrest the employees of Porter for criminal trespass, and probably caused the indictment of Porter and his employees therefor. In short, the Mack Manufacturing Company admits in its answer that it opposed and resisted the right of Porter to go upon the land and construct a tram road or to use the surface. This suit by Porter was to enjoin the Mack Manufacturing Company from interfering with his use of the surface for the purpose of making a tram road and of mining the fire clay, and to declare the right of Porter to have a tramway for the conveyance of the clay, and to enjoin the Mack Manufacturing Company from interference with his right, and from obstructing Porter in its exercise. The circuit court entered a decree permitting Porter to construct and operate a single tramway over the surface of the tract by a certain route of sufficient width, strength, and capacity to remove from the mine fire clay and other minerals, and allowing Porter to open one pit or mine in the surface of the land at a certain point designated for the production of fire clay and other minerals, with the provision in the decree that Porter should so operate the mine, and so construct and operate the tramway with due regard for the rights of the Mack Manufacturing Company in the surface. The Mack Manufacturing Company has taken this appeal.

Desellem and Cooper were owners of the whole body, the corpus, of a tract of land, and by deed they conveyed the tract to Evans, the grantors "reserving to themselves all the clay, fire clay, coal, stone and minerals of whatever kind underlying the above-described tract of land, with the right to mine and remove the same." By this deed Desellem and Cooper granted the surface, granted the land, except that they did not grant, but retained, the minerals. In other words, they made two estates out of the land, two properties, one of the surface or body of the land, the other the minerals, which the deed operated to leave in them, or, rather, the minerals before vested in them remained in them. They thus severed the minerals from the balance of the land. Their deed did not pass the minerals. They had as full estate in the minerals as if the minerals had been separately granted to them by some one else. There is no difference as to title thereto between the case where minerals are granted to one by the owner of the body of the land and the case where the

owner of the body of the land grants the land away, excepting the minerals. *Preston v. White*, 57 W. Va. 278, 50 S. E. 236. If the deed of Deselle and Cooper had not reserved the right to mine and remove the minerals, there would have been an implied right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of their estates in the minerals. Without this right, what account would be the minerals which they reserved? But their deed expressly retained the right to mine and remove the minerals. In the great case of *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538, 14 Am. Rep. 322, this subject is discussed at great length and with great ability. It is true that before that case this question had been elucidated in English decisions. In that case it was held that: "A reservation in a deed of land of the minerals which may be found therein implies the right to penetrate the surface for the minerals, and to use such means in mining and removing them as are necessary; but the means used must be necessary as distinguished from convenient or reasonable, and the surface owner is entitled to subjacent support for the soil in its natural state." The court said: "The whole estate was at first in Parks. He severed it by his conveyance to Downs. He transferred to Downs and his grantees only the surface land. It is said that such a transference is of the surface, and of all profit which can be got from cultivating it or building upon it or using it; that thus much is intended to be conveyed. But as in the same conveyance there is a reserve to the grantor of an important part of the general estate, and of important incidents thereto, it is manifest that, if the reserve is effectual and still operative, there is imposed upon the estate conveyed a serious servitude, though it in its turn becomes to a certain extent dominant over the estate reserved." The deed in that case read: "Reserving always all mineral ores now known or that may hereafter be known, with the privilege of going to and from all beds of ores that may be hereafter worked, on the most convenient route to and from." The court said that this reservation "is also a privilege of way upon the premises." The court also said: "A reserve of minerals and mining rights is construed as an actual grant thereof. It differs not whether the right to mine is by an exception from a deed of the surface or by a grant of the mine by the owner of the whole estate therein reserving to himself the surface." It seems hardly necessary in this mining state to state these principles of law; but it may not be without benefit to do so. They are old and settled principles. I refer to 27 Cyc. 638, and to *Snyder on Mines*, §§ 1007, 1009. "As against the owner of the surface each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the sur-

face to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity if this becomes necessary; but, subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner." Section 1009. In *Charliers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645, we find this holding: "The owner of the surface of land who has granted to another person the coal under his land has a right, apart from any reservation in the deed, to access through the coal to the strata underlying it." Such were the rights reserved by Deselle and Cooper. By conveyance these mineral rights became vested in Fred G. Porter, and the right to the surface conveyed by Deselle and Cooper to Evans came to be vested in Mack Manufacturing Company.

Counsel for defense would oppose the plaintiff's suit, upon many authorities, on the theory that his right stands on the law of way of necessity, and that he must prove that necessity; say that the law of way of necessity is applicable. Do we not know without proof, that a use of the surface of necessity calls for a way of inlet and outlet to one who owns the coal or other mineral to produce and market it? The question submits the answer. But how can we logically talk about a way of necessity? That is obiter, because the deed reserves minerals "with the right to mine and remove the same." What use to mine without removal? How can removal be effected without a right to have a wagon way to transport outside the tract? A tramway is just as legitimate as a wagon way, perhaps more so. We do not deny that it must appear that the tram is necessary to the use of the minerals; but it is not technically a way of necessity over the grantor's remaining land.

It is even argued that Porter had to first prove that there are minerals in the land. This is not so. He had right to search for them, if they had not been before found. And he had right to build a tramway, or other way suitable, in anticipation of finding the minerals sought for. But, in fact, prior work had found the useful fire clay, and this tram was considered by Porter as a suitable, convenient, and necessary mode of transportation. It is so proven, if we cannot say so without proof, as we can.

It is said that equity has no jurisdiction because there is adequate remedy at law. That is a ground assigned in the demurrer, but not insisted upon in the brief. It is untenable. What remedy? We are not informed by counsel. An action at law might give

damages; but how measure damages? How many actions? For each day, week, or month? That would not give the easement, the ingress and egress. And that would say that Porter must give up his right of ingress and egress, his part of the body of the land. Indeed, there is no question of pecuniary damage. Porter owned part of the land, not the surface, but the minerals. He had a property therein, and a right as to surface, and this claim would deny this property right; would be akin to denial by a co-tenant of joint use. Porter has just as much right to his share or portion as has the defendant to the surface, and that property cannot be enjoyed without use of the surface. The deed to Evans reserved this property. The very nature of the case tells that equity is the only court that can give adequate relief. The equity remedy is well settled to restrain obstruction to clear right of way or easement. High on Injunction, §§ 886, 896; Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A. (N. S.) 461; Tufts v. Copen, 37 W. Va. 623, 16 S. E. 793. It cannot be said that Porter must first establish his right at law. It is not controverted, but admitted, that Porter is owner of the minerals. This ownership is conclusively established. "But it is not necessary that complainant's title should have been actually established by an action at law in order to give a court of equity jurisdiction; for if he makes out a prima facie title, and the same is not controverted by the defendant, he is entitled to an injunction to prevent trespass likely to result in irreparable injury to his property. Greater latitude is allowed in the case of trespass to mining property than in restraining ordinary trespass to realty, for the mineral is the chief value of this species of property, and, if the trespass were allowed to continue for a great length of time, it would deteriorate the value of the property." Snyder on Mines, §§ 480, 481.

Counsel says that the bill alleges irreparable injury without stating facts showing it. Clearly this position cannot be sustained. The bill shows a severance of minerals from the surface, a property in Porter of the minerals, and an acknowledged resistance by the surface owner of the right of way and right to open the surface to get the minerals, and a clear obstruction of the right. We judicially know that ownership of the minerals is a property right and of great value, and there is proven and admitted open denial, open resistance and obstruction of the right vested in Porter, not merely by implication, but by express reservation in the deed to Evans. The bill alleges, the evidence shows, that the tramway is a suitable and necessary means of transporting the fire clay, and that the opening allowed was necessary.

We see no error in the decree, and therefore affirm it.

(65 W. Va. 616)

HAYMOND et al. v. MURPHY et al.

(Supreme Court of Appeals of West Virginia.
May 4, 1909.)

1. VENDOR AND PURCHASER (§ 239*) — BONA FIDE PURCHASERS — FAILURE TO RECORD INSTRUMENT.

Neither by subrogation, marshaling of assets, nor otherwise can land, purchased for a valuable consideration and without notice, be subjected to the satisfaction of judgments rendered by justices of the peace against the vendor, not docketed at the time of the recordation of the deed or contract of purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 239.*]

2. MARSHALING ASSETS AND SECURITIES (§ 4*) — NATURE OF LIENS — VENDOR'S LIEN.

If the land so purchased be bound, along with other unsold land of the vendor, by a vendor's lien, constituting the first lien on both tracts, it should be relieved from the burden thereof, in whole or in part, according to the circumstances of the case, by application of the proceeds of the sale of such other land to the satisfaction of the lien.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. APPEAL AND ERROR (§ 266*)—OBJECTIONS TO COMMISSIONER'S REPORT—REVIEW.

Advantage of an error in a commissioner's report apparent upon the face thereof, or upon the record of the cause, may be taken in the appellate court, though not noted in any exception to the report nor insisted upon in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1553, 1554; Dec. Dig. § 266.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Braxton County.

Bill by W. E. Haymond and others against McComas Murphy and others. Decree for plaintiffs, and Tetrick Bros. & Stewart appeal. Reversed and remanded.

Hall Bros., for appellants. Haymond & Fox, for appellees.

POFFENBARGER, J. J. W. Tetrick, O. M. Tetrick, and O. E. Stewart, partners doing business as Tetrick Bros. & Stewart, claim to have been prejudiced by a decree pronounced in three consolidated creditors' suits against McComas Murphy and others in the circuit court of Braxton county. Murphy and his wife seem to have been trading extensively in real estate, town lots, and incurring heavy indebtedness, some of which was secured by vendor's liens and otherwise, and much of it unsecured. The appellants bought from them two town lots covered along with other property by a vendor's lien and a docketed justice's judgment. At the time of their purchase, there were a good many other undocketed judgments of that kind and a number of others were subsequently obtained. In the separate suits brought to enforce the liens some of the lots were sold, and while others remained unsold the suits were consol-

idated for convenience and the better protection of the interests of all parties.

The appellants were not interested otherwise than as purchasers of two lots as aforesaid. These were lots Nos. 1 and 2 in Hyer and Stalnaker's addition to the town of Burnsville. At the time of the purchase said lot No. 1, together with lots Nos. 5 and 6, were subject to a vendor's lien in favor of Hyer and Stalnaker for over \$400. On lots Nos. 5 and 6, so linked with No. 1, there was a deed of trust in favor of the Burnsville Exchange Bank and certain sureties for the sum of \$300. Hyer and Stalnaker held a vendor's lien on lots Nos. 69 and 70 and other land which Murphy, after his purchase thereof, had divided in lots, which he numbered 17 to 28, inclusive. Murphy was also indebted to W. T. Brosius, trustee, for purchase money of lot No. 3 in section A and lot No. 7 in section 3 of Offutt's addition, more than \$700, which debt was a lien on said lots. The vendor's lien on lots Nos. 1, 5, and 6 was ascertained to be \$410.06, the trust lien on Nos. 5 and 6 \$312.26, the contract lien on Nos. 69 and 70 and 17 to 28 \$212.82, and the contract lien on Nos. 3 in section A and 7 in section 3, with the costs, \$897.97. On these two there was another trust deed lien for \$600. Lots Nos. 5 and 6 were sold separately for \$1,450, considerably more than enough to pay the vendor's and trust deed liens on them and No. 1; Nos. 69 and 70 and 18 to 28 for \$888; and Nos. 3 and 7 for \$1,330. At the time of the purchase of lots Nos. 1 and 2 by the appellants, and the recordation of their contract of purchase, only one judgment had been docketed, that of Dowell, Helm & Co., for the sum of \$278.44. At that time the judgments recovered amounted, in the aggregate, to \$1,188.60, and, after that date, others, amounting to \$1,025.51, were recovered. All of them but one were rendered by justices of the peace, and the one rendered by the circuit court was subsequent to the recordation of the contract of purchase. Lot No. 1 had been conveyed to McComas Murphy and Annie L. Murphy, his wife. Lot No. 2 had been bought of Hyer and Stalnaker by McComas Murphy and H. H. Coberly. How Coberly's interest was acquired by Murphy does not appear, but the lot was conveyed by Murphy and his wife to the appellants. Only one of all the judgments was against Murphy and his wife, that of Burk and Garrett for \$86.44. The others were against Murphy alone. All the lots except Nos. 1 and 2 seem to have been sold. One group, 5 and 6, bringing \$1,450, another, 69, 70, and 17 to 28, \$888, and another, 3 and 7, \$1,330. The proceeds of the sale of the first group will almost pay all the liens on Nos. 1, 5, and 6 to and including the Dowell, Helm & Co. judgment. Those of the second group will apparently pay something on this judgment, even if none of those constituting liens on 5 and 6 prior to that of Dowell, Helm & Co. should be paid out of the proceeds of 5 and 6, and, if they should be large-

ly satisfied out of the proceeds of 5 and 6, the proceeds of 69, 70, and 17 to 28 will apparently pay the Dowell, Helm & Co. judgment; or, if the judgments having precedence over that of Dowell, Helm & Co. should be satisfied out of the proceeds of 69, 70, and 17 to 28, the surplus of proceeds of 5 and 6 seems to be amply sufficient to satisfy the Dowell, Helm & Co. judgment to the complete relief of both lot No. 1 and lot No. 2.

Finding this state of things in the consolidated suits, the court entered a decree confirming the commissioner's report, adjusting the liens, and ordering a sale of the unsold lots. By this decree the surplus arising from the sale of lots Nos. 5 and 6 was held liable for the debts therein provided for. It was further adjudged, ordered, and decreed that lots 1 and 2 should not be sold, if the entire proceeds of lots 5, 6, 69, 70 and 17 to 28 should be sufficient to discharge the liens thereon; but that, if a balance of such liens should remain unsatisfied out of such proceeds, the sale of said two lots, or such parts thereof as may be necessary, shall be restricted to such balance, or prevented by payment thereof, but in no event shall they be liable for an amount in excess of the judgment in favor of Dowell, Helm & Co. and lot No. 1 for the vendor's lien in favor of Haymond, administrator of Hyer, and S. Wise Stalnaker. The liens binding lots 5, 6, 69, 70, and 17 to 28 by virtue of the decree are, first, the vendor's and trust deed liens above mentioned, and then all the judgments in the order of their precedence over one another. The effect of this decree is to make lot No. 1 wholly satisfy the vendor's lien for \$410.06, though it constituted the first lien on it and two others, and the proceeds of sale of the other two were more than sufficient to satisfy it, and to make Nos. 1 and 2 pay the whole of the Dowell, Helm & Co. judgment, though it constitutes a lien on all of Murphy's real estate, and apparently could be satisfied out of the proceeds of lots 5, 6, 69, 70, and 17 to 28, without displacing any prior liens thereon. It also subjects Mrs. Murphy's one-half of lot No. 1 to this judgment against her husband alone. These are grounds of complaint against it.

The decree is in our opinion plainly violative of statutory provisions and also of well-settled principles of equity. The appellants are protected in their purchase from undocketed judgments rendered by justices of the peace prior to the date of the purchase. Their contract was recorded before any of the judgments other than that of Dowell, Helm & Co. were docketed, and there is no proof that the purchasers had any notice of them. Code 1899, c. 139, § 6 (Code 1906, § 4146). As purchasers of lots Nos. 1 and 2, they are entitled to protection from the sale of those lots, if the liens thereon acquired before they purchased and recorded their contract can be satisfied out of the proceeds of the other real estate of the vendor without

defeating liens thereon prior to those constituting burdens on the land purchased. Code 1899, c. 139, § 8 (Code 1906, § 4148). In no event could the lots purchased by them be made liable, directly or indirectly, by marshaling of assets or otherwise for judgments not constituting a lien on the lots purchased as against the purchasers thereof. The principle of marshaling assets cannot be invoked or applied so as to defeat statutory rights. Section 6 says "the judgment of a justice of the peace shall not be a lien on real estate" as against a purchaser thereof for valuable consideration without notice "until the same is docketed as aforesaid." Section 8 of said chapter provides as follows: "Where the real estate liable to the lien of a judgment is more than sufficient to satisfy the same, and it, or any part of it, has been aliened, as between alienees for value, that which was aliened last shall, in equity, be first liable, and so on with other successive alienations until the whole judgment is satisfied. * * * But any part of such real estate retained by the debtor himself shall be first liable to the satisfaction of the judgment." These provisions make it the duty of the court to exonerate lots Nos. 1 and 2 by satisfaction of the judgment liens thereon out of other property still owned by the grantor, the judgment debtor, if that can be done without defeating liens on such other property, having preference over the liens covering such other property and the lots sold. Independently of these statutory provisions, the same result would be accomplished by the application of equity principles. The equity of the purchaser is equal to that of the judgment lienors. The statute just quoted applies to judgments only, but general equity principles apply the same rule to the vendor's lien. Besides, there is no ground upon which judgments acquired subsequent to the purchase can be fastened upon these lots to the prejudice of the purchaser. The decree complained of is broad enough to do that to the extent of the amount of the vendor's lien and the judgment in favor of Dowell, Helm & Co. These views are fully sustained by principles declared in *McClaskey and Others v. O'Brien*, 16 W. Va. 791; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 470; *Whitehill v. Basnett*, 24 W. Va. 142; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. 591; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335; *Ball v. Setzer*, 33 W. Va. 446, 10 S. E. 798; *Linn v. Collins*, 47 W. Va. 250, 34 S. E. 916, 81 Am. St. Rep. 788.

The report of the commissioner ignored these rights of the appellants, and dealt with lots Nos. 1 and 2 as they have been dealt with in the decree complained of. The appellants, as well as Dowell, Helm & Co., excepted to this part of the report, and the court overruled their exceptions. They should have been sustained and a decree pronounced in accordance with the conclusions above stated directing a sale of lots Nos. 1 and 2 only in the event that the surplus proceeds of the

property already sold should be insufficient to satisfy the judgment in favor of Dowell, Helm & Co. and the others having priority over it on the property sold, namely, the judgments in favor of the Citizens' Bank of Weston for \$178.30, Burk and Garrett for \$86.44, Citizens' Bank of Weston for \$184.50, and the Collins Company for \$52.78. This is subject to one qualification. The Dowell, Helm & Co. judgment is against McComas Murphy only, binding only his interest in lot No. 1. That lot was conveyed to McComas Murphy and Annie L. Murphy. The judgment constituted no lien, therefore, on the one-half thereof which belonged at the rendition of it to Annie L. Murphy. Hence only an undivided half thereof should be sold to satisfy it. There was no exception to the commissioner's report in so far as it found that McComas Murphy had been the owner of lot No. 1. This, however, was an error apparent upon the face of the record. That lot had been proceeded against in the suit instituted by Haymond, administrator, as the property of both husband and wife, and conditionally decreed to be sold as such. Failure to except for an error apparent upon the record or the face of the report itself does not constitute a waiver thereof. *Gardner v. Gardner*, 47 W. Va. 368, 34 S. E. 792; *State v. King*, 47 W. Va. 437, 35 S. E. 30; *Gay v. Lockridge*, 43 W. Va. 267, 27 S. E. 306; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933.

It is said the legal title to lots Nos. 1 and 2 was outstanding, and no decree of sale should have been made for that reason. The commissioner reported that these lots had been conveyed to McComas Murphy and wife and McComas Murphy and Coberly, respectively, who were all parties, and there was no exception to that finding. The argument of outstanding title is based on the absence of deeds from the record showing the conveyance. We think failure to except on this ground constitutes a waiver of the finding or an acquiescence therein. In fact, the appellants themselves claim under Murphy and wife.

For the reasons stated the decree complained of, in so far as it makes lots Nos. 1 and 2 liable, by subrogation or otherwise, for judgments other than that of Dowell, Helm & Co., or for it, except in so far as it shall remain unsatisfied, after applying thereon the surplus proceeds of the sale of the unaliened property of the judgment debtor, after satisfaction of liens thereon prior to it, and more than an undivided half of said lot No. 1 liable for said judgment in any event, and said lot No. 1 liable, as aforesaid, for the amount due under the vendor's lien in favor of Hyer and Stalnaker, must be reversed, the exceptions of the appellants and Dowell, Helm & Co. to the commissioner's report sustained, and the cause remanded for further proceedings in accordance with the principles and conclusions herein stated and the rules and principles governing courts of equity.

(82 S. C. 573)

BARR et al. v. BARR.

(Supreme Court of South Carolina. May 25, 1909.)

EQUITY (§ 394*)—MASTERS—COMMISSIONS.

Civ. Code 1902, § 3113, allows masters the same commissions for moneys passing through their hands as are allowed by law to sheriffs. Section 3118 allows sheriffs 2 per cent. commissions on all moneys collected by them if under \$300, and, if over that sum, 2 per cent. of the first \$300 and "one-half of one per cent. on all sums paid to plaintiff" on execution lodged with the sheriff, and also allows them commissions of one-half of 1 per cent. for transferring money to a party. *Held*, that a master was not entitled to a commission of one-half of 1 per cent. on money passing through his hands and disbursed by him, in addition to the 2 per cent. allowed on the first \$300 under the part of section 3118 quoted, that applying to money which has not passed through the sheriff's hands, but which is paid directly to the plaintiff by the judgment debtor, but was entitled to such commissions thereon under the provision relating to transferring money.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 394.*]

Appeal from Common Pleas Circuit Court of Saluda County; J. W. De Vore, Judge.

Partition by Lula M. Barr; individually and as administratrix of Capers G. Barr, deceased, and others, against Capers G. Barr, Jr. From a decree allowing the master certain commissions on money disbursed, plaintiffs appeal. Affirmed.

R. T. Jaynes and Le Grand G. Walker, for appellants. C. J. Ramage, for respondent.

GARY, A. J. The following statement of facts is set out in the record: "The matter presented by the petition and answer in the above-entitled action relates to the commissions of the master on sales of real estate sold on sale day in January, 1908, under decree in partition of the real estate of Capers G. Barr, Sr., deceased. On such sale all the real estate was purchased by Lula M. Barr for the aggregate sum of \$11,570. The parties in interest contend that the commissions of the master on said sum of \$11,570 is 2 per cent. for the first \$300, and 1 per cent. on the excess of said sum, aggregating \$118.70. Before the commencement of this proceeding the said sum of \$118.70 had been paid to T. L. Edwards, master, out of the proceeds of the said real estate. T. L. Edwards, master, claimed that he was entitled to one-half of 1 per cent. on said proceeds of sale in addition to the 2 per cent. on the first \$300 and 1 per cent. on the balance, except on his own costs, fees, and commissions, which said one-half of 1 per cent. was claimed for disbursing said proceeds. In order to facilitate the execution and delivery of the deeds to Lula M. Barr, purchaser of said real estate, the sum of \$57.85, an amount slightly in excess of amount claimed by said master, was deposited with M. T. Pitts, clerk of court, to await the determination of the question as

to the commissions in dispute." It was admitted that the funds were to be considered as passing through the master's hands. His honor, the circuit judge, ruled that the master was entitled to one-half of 1 per cent. on the entire amount disbursed by him, except his own costs, fees, and commissions, in addition to the 2 per cent. on the first \$300, and 1 per cent. on the balance. The only question raised by the exceptions is whether said ruling was erroneous.

Section 3113 of the Code of Laws of 1902 provides that masters "shall be allowed the same commissions, for all moneys passing through their hands, as are now allowed by law to sheriffs." Section 3118 contains the provision that sheriffs shall be allowed "commissions on all moneys collected by them, if under three hundred dollars, two per cent., if over that sum, two per cent. for the first three hundred dollars, and one-half of one per cent. on all sums paid to plaintiff, his agent or attorney, on execution lodged with the sheriff." Our construction of this provision is that it refers in the first instance to commissions on moneys collected by the sheriff; and, secondly, to commissions on moneys which have not passed through the hands of the sheriff, but which have been paid to the plaintiff his agent or attorney by the judgment debtor. Previous statutes on this subject show that the Legislature has kept in view the distinction between commissions on moneys collected by the sheriff and commissions on moneys paid by the judgment debtor directly to the plaintiff. Commissions on moneys collected by the sheriff have always been larger than those upon moneys paid directly to the plaintiff by the judgment debtor. In the fee bill of 1791 (5 St. at Large, p. 157) we find the following under the head of "Sheriffs": "For levying an execution on the goods of the defendant, and selling the same, for all sums where the debt does not exceed one hundred pounds, two and a half per cent. commissions; and for all sums where the debt exceeds one hundred pounds, one per cent.; in all cases where the defendant, after the sheriff may have levied on the property, shall settle with the plaintiff before actual sale, the sheriff in such cases shall be entitled to one fourth per cent., besides all reasonable disbursements, and also fees for entering execution, but if the defendant shall pay the money to the sheriff, one per cent. in lieu of the one fourth." The following appears in Rev. St. 1873, p. 169, c. 20, § 61: "Commissions on all moneys collected by him (the sheriff), if under three hundred dollars two per cent.; if over that sum, two per cent. on the first three hundred dollars, and one per cent. on balance; one half of one per cent. on all moneys paid out of office, on all executions lodged." The word "out" means "outside," and the provision last mentioned is practical-

ly the same as that now appearing in section 3118 of the Code of Laws. There are other old statutes on this subject likewise tending to show that this is the proper construction of that provision; and that the words "one-half of one per cent. on all sums paid to plaintiff," etc., are not applicable to the facts of this case.

There is, however, another provision of section 3118 which allows to sheriffs commissions for "transferring money, bonds or other securities for money to party, one-half of one per cent." On funds passing through the hands of the sheriff he is not only allowed commissions for collection, but also for "transferring" money in his hands to the party entitled thereto. The parties to the action having agreed that the moneys are to be considered as having passed through the hands of the master, it necessarily follows that he is entitled to the additional commissions for which he contends.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(83 S. C. 13)

BERRY v. VIRGINIA STATE INS. CO.

(Supreme Court of South Carolina. June 1, 1909.)

1. VENUE (§ 26*)—RESIDENCE OF PARTIES—FOREIGN INSURANCE COMPANY.

Under Code Civ. Proc. 1902, § 146, providing that an action against a nonresident may be brought in any county which plaintiff may designate in his complaint, a common pleas court would have jurisdiction of an action against a foreign fire insurance company, though the company had no agent in that county, and the policy was issued in another county, where the insured property was located and in which plaintiff resided at the time of loss.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 26.*]

2. INSURANCE (§ 665*)—POLICY—WAIVER OF PROVISIONS—EVIDENCE.

A statement to a policy holder by an agent of the insurer, made when the policy was issued and premium received, that a condition of the policy would not be insisted on, is evidence of waiver or estoppel.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1716; Dec. Dig. § 665.*]

3. WITNESSES (§ 154*)—COMPETENCY—STATEMENTS BY DECEDENT.

Code Civ. Proc. 1902, § 400, providing that no party to an action shall be examined respecting a transaction or communication between him and a person at the time of examination deceased, etc., as a witness against a party prosecuting or defending the action as executor, administrator, heir at law, etc., does not apply to an examination of plaintiff in an action on a fire policy as to statements made to him by a deceased agent of the insurer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 661; Dec. Dig. § 154.*]

4. INSURANCE (§ 668*)—ACTION ON POLICY—QUESTION FOR JURY.

Whether the amount determined in the proof of loss, inserted by an adjuster, operated as a limit of recovery on the policy by virtue of an

agreement of insured, *held*, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1749, 1763; Dec. Dig. § 663.*]

5. INSURANCE (§ 666*)—ACTION ON POLICY—INTEREST.

Where a fire policy by its terms was payable 60 days after notice, ascertainment, estimate, and satisfactory proof of loss had been received by the company, the insurance was due and interest began to run 60 days after that date, and in an action on the policy it was error to allow interest from the date of the fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. § 666.*]

Appeal from Common Pleas Circuit Court of Saluda County; J. W. De Vore, Judge.

Action by M. W. Berry against the Virginia State Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition that remittitur be made.

Blease & Dominick, for appellant. Barnard B. Evans, for respondent.

WOODS, J. The defendant, Virginia State Insurance Company, appeals from a judgment of \$779.80 recovered by the plaintiff on a fire insurance policy.

The action was brought and the judgment entered in Saluda county, where the plaintiff now resides. The policy was issued by defendant's agent in Newberry county, in which county the insured property was situated and in which the plaintiff resided at the time of the fire. There was no evidence that the defendant had an agent in Saluda county. Under these facts the defendant, relying on the case of *Nixon v. Piedmont Ins. Co.*, 74 S. C. 438, 54 S. E. 657, submits that the court of common pleas of Saluda county was without jurisdiction of the action. The cases cited, and others like it, involved the question of the proper county for the trial of actions against domestic corporations, and they have no application to such question affecting foreign corporations. An action against a nonresident may be brought in any county which the plaintiff may designate. Code Civ. Proc. 1902, § 146. It is true the pleadings do not show by direct allegation that the defendant is a foreign corporation, nor is there any direct evidence on that point; but, from the allegations of the answer, it may be inferred the defendant is a foreign corporation. The name of the defendant, Virginia State Insurance Company, gives some indication that it is a corporation of the state of Virginia, and this fact is still shown by the allegation of the answer that in the courts of Virginia certain creditors of the plaintiff had attached the debt due to him by the defendant.

There is no doubt that the plaintiff violated the iron-safe clause of the policy, for he did not use a safe nor keep the books required by the policy, nor keep such books, as he had, in a place not exposed to the fire which destroyed the insured property. This

violation of the terms of the policy gave rise to the issue whether the defendant had waived these requirements. Mr. Tyree, the agent who issued the policy, died before the trial; but the plaintiff testified that when the policy was issued he told the agent that he had no iron safe, and the agent replied the iron-safe clause was not carried out by all the small stores. The plaintiff's store was a small one; the stock of goods being valued at about \$2,000. This was some evidence tending to show that the agent of the defendant threw the plaintiff off his guard and took his money for the premium, leading him to believe that compliance with the iron-safe clause would not be expected. A statement to the policy holder by an agent of the insurer, made at the time of the issuance of the policy and receipt of the premium, to the effect that a condition of the policy will not be insisted on, is evidence of waiver or estoppel. *Pearlstone v. Insurance Co.*, 74 S. C. 250, 54 S. E. 372; *Fludd v. Insurance Co.*, 75 S. C. 315, 55 S. E. 762. There was therefore no error in refusing a nonsuit because of the failure to comply with the iron-safe clause of the policy.

The objection, under section 400 of the Code of Civil Procedure of 1902, to the testimony of the plaintiff as to the statements made to him by Tyree, the deceased agent of defendant, is not well taken. The defendant is not defending the action as "executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor" of Tyree, and therefore section 400 of the Code of Civil Procedure of 1902 does not apply.

The next position taken by defendant is that the recovery could not in any event be greater than \$400, because the plaintiff had agreed to accept that sum, and that even from this sum should be deducted the amount of certain attachments sued out in Virginia. The evidence is clear to the effect that the plaintiff agreed that the demand inserted in the proof of loss by the adjuster should be \$400 on condition that immediate payment should be made. The defendant failed to pay any amount. It is therefore clear there was evidence warranting the circuit court in submitting to the jury the issue whether the plaintiff was bound by the amount set out and demanded in the proof of loss. The evidence that the defendant's agent said the payment was not made, because of attachments in Virginia, could not affect the question for the reason that no attachment proceedings were introduced in evidence, and the plaintiff denied that the defendant had ever offered to pay the \$400, less the amount of the attachments. The exceptions on this point are overruled.

The verdict, however, included interest from January 1, 1907, the date of the fire, and was excessive in this respect. By its

terms the policy is "payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by the company." The estimate and proof of loss was dated March 28, 1907, and the insurance became due by the terms of the policy 60 days thereafter. The verdict should therefore have included interest from May 25, 1907, and not from January 1, 1907.

The judgment of this court is that the judgment be affirmed on condition that within 10 days after the filing of the remittitur the plaintiff remit from the judgment, by proper indorsement thereon, the excess of interest amounting to \$19.73; and that, upon failure of the plaintiff to make such indorsement, the judgment be reversed, and that the defendant have a new trial.

(83 S. C. 8)

OGILVIE et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. May 27, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DELAYED MESSAGE—ADMISSIBILITY OF EVIDENCE—MENTAL SUFFERING.

In an action against a telegraph company for delay in the delivery of a message relating to an accident to plaintiff's son, plaintiff was allowed, after stating that she suffered great mental anguish, to state that her "suspense was terrible," and her husband was permitted to testify as to his wife's condition on receipt of the telegram that: "It was pretty bad. She was all to pieces. I never saw her like that before in my life." There was no attempt to show that her suspense and suffering were beyond what the average normal mother would feel in her situation, and the court carefully restricted recovery to an ordinary person under the circumstances. *Held*, that such testimony did not violate the rule excluding testimony as to the claimant's peculiar or abnormal fears and apprehensions.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 62; Dec. Dig. § 66.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTION FOR DELAYED MESSAGE—ADMISSIBILITY OF EVIDENCE.

In an action for delay in the delivery of a telegram, a witness for defendant testified that he attended to all the business of the railroad and express companies at the station to which it was sent, and that on the day it was sent he was very busy in the warehouse most of the time and had no help. On cross-examination he testified that the work was too much for one man, and that he ought to have had help, and was further allowed to testify as to the income of the railroad and express companies at that point as bearing on the question of the amount of work he had to do. On the same line, defendant was allowed to show that the income of the telegraph business did not exceed \$10 per month. *Held*, that the testimony as to the income of the railroad and express companies was not wholly irrelevant, as it had some relation to the question whether the agent's failure to receive and deliver the message on the day it was sent could be excused because of reasonable demands on his time and attention by his associated employments, and that it was not reasonable to suppose that the jury may have estimated the amount of damages by reference to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such income, and hence there was no error in admitting the evidence in relation thereto.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 62; Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 74*)—ACTION FOR DELAYED MESSAGE—INSTRUCTIONS.

In an action for a delayed telegram informing plaintiff of an accident to her son, defendant requested a charge that "a telegraph company, under the mental anguish act, is not liable for mental anguish merely incidental to its failure to deliver a message, and in such an action the defendant is charged with the suffering, if any, which the failure to deliver the message may reasonably be expected to produce, when its contents are considered, not with the suffering due to a peculiar temperament, but that of an ordinary human being," and in addition that "plaintiff should not recover under the act for any feeling of disappointment, annoyance, or vexation which she may have felt." The court refused to charge the additional sentence and instead charged as follows. "That means the failure to deliver must cause the suffering, and the test is what the jury think that a person of ordinary feeling, the usual ordinary feeling in this case—I charge you that feeling that you conclude a mother, the ordinary mother, that the ordinary mother should have under similar circumstances. You cannot take the way of a person of a very excitable temperament or impulsive disposition on the one hand, or one of a very callous disposition on the other. The test you go by is what, in your judgment, a person of ordinary feeling under similar circumstances, what feeling they had, or should have suffered, suffered under similar circumstances." *Held*, that plaintiff's regret or disappointment in being delayed in reaching and ministering to her son may have been so keen, bitter, or intense as to be properly classed as mental anguish, and the charge given sufficiently covered the issue.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.*]

4. TELEGRAPHS AND TELEPHONES (§ 74*)—ACTION FOR DELAYED MESSAGE—INSTRUCTIONS.

Conceding that, in an action for a delayed telegram, the reasonableness of office hours is a question of law for the court, when there is no dispute as to the facts, yet, where there was testimony that the regular office hours at a telegraph station were from 7 a. m. to 7 p. m., the court could not assume that the closing of the office at 6:30 p. m. Saturday and opening the next morning at 9:30 was reasonable office hours, and there was no error in modifying a requested charge to that effect so as to leave the question of the reasonableness of office hours to the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.*]

5. TELEGRAPHS AND TELEPHONES (§ 73*)—ACTION FOR DELAYED MESSAGE—PUNITIVE DAMAGES—QUESTION FOR JURY.

In an action for a delayed telegram informing plaintiff of an accident to her son, there was no error in submitting to the jury the question of punitive damages, where there was no explanation whatever as to the long delay at a relay office from 4 p. m. Saturday to 10:06 Sunday morning, though the agent made commendable effort to deliver the message on its receipt at the latter time.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.*]

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by Emma M. Ogilvie and another against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. H. Fearons, Nelson & Nelson, and Efrd & Dreher, for appellant. Graham & Sturkie, for respondents.

JONES, C. J. The defendant, appellant, seeks to reverse a judgment for \$500 in favor of plaintiff for alleged negligent and wanton failure to deliver the following message filed by Jeremiah Smith with defendant's agent at Conway, S. C., and addressed to the plaintiff at Lexington, S. C.: "Daggett badly cut with saw; flesh wound; not necessarily fatal. Both come." Daggett, referred to in the message, was plaintiff's son. The message, as alleged, was filed with the defendant for transmission about 4 o'clock p. m. on Saturday November 12, 1904, and was not delivered until about 10:30 o'clock a. m. on November 13, 1904, resulting in delaying plaintiff in reaching her son for about 26 hours, and thereby causing her to suffer great grief and mental anguish.

Appellant's first contention is that the court erred in allowing plaintiff, after stating that she suffered great mental anguish, to further state that her "suspense was terrible," and in permitting plaintiff's husband to testify as to his wife's condition, upon the receipt of the telegram: "It was pretty bad. She was all to pieces. I never saw her like that before in my life." It is objected that the testimony violated the rule stated in *Willis v. Tel. Co.*, 69 S. C. 537, 48 S. E. 538, 104 Am. St. Rep. 828, excluding testimony as to the claimant's peculiar or abnormal fears and apprehensions, but we do not so hold. There was no attempt to show that plaintiff's suspense and suffering were beyond what the average normal mother would feel in her situation, and in instructing the jury the court was careful to apply the rule in the *Willis Case* and restrict recovery to the suffering of an ordinary person under the circumstances.

Error is alleged in admitting evidence as to the income of the railroad and express companies at the Lexington station. Defendant's witness Hartley had testified that he attended to all the business at Lexington of the railroad, express, and telegraph companies, and that on Saturday, November 12th, he was very busy in the warehouse most of the time and had no help. On cross-examination he testified that the work was too much for one man to do, and that he ought to have had help, and was further allowed to testify as to the income of the railroad and express companies at that point as bearing upon the question of the amount of work the agent had to do. The testimony was not wholly irrelevant, as it had some relation to the question

whether the failure of defendant's agent at Lexington to receive and deliver the message on November 12th could be excused because of reasonable demands upon his time and attention by his associated employments. On this same line, defendant was allowed to show that the income of the telegraph business did not exceed \$10 per month. It is not reasonable to suppose that the jury may have estimated the amount of damages against the defendant by reference to the income of strangers to the suit.

It is alleged that the court erred in not giving the jury, without modification, defendant's sixth request, as follows: "A telegraph company, under the mental anguish act, is not liable for mental anguish which was merely incidental to its failure to deliver a message, and, in an action such as this, the defendant is charged with the suffering, if any, which the failure to deliver the message may reasonably be expected to produce, when its contents are considered, not with the suffering due to a peculiar temperament, but that of an ordinary human being; and under the mental anguish act the plaintiff in this case cannot recover for any feeling of disappointment, annoyance, or vexation which she may have felt by reason of the failure to promptly deliver the message in question." The court charged the first sentence of the request, but refused to charge the last sentence, and instead charged as follows: "That means the failure to deliver must cause the suffering, and the test is what the jury think that a person of ordinary feeling, the usual ordinary feeling in this case—I charge you that feeling that you conclude a mother, the ordinary mother, that the ordinary mother should have under similar circumstances. You cannot take the way of a person of a very excitable temperament or impulsive disposition on the one hand, or one of a very callous disposition on the other. The test you go by is what, in your judgment, a person of ordinary feeling under similar circumstances, what feeling they had, or should have suffered, suffered under similar circumstances." It is contended that the modification was not in harmony with the construction of the statute given in *Johnson v. Tel. Co.*, 81 S. O. 235, 62 S. E. 244, 17 L. R. A. (N. S.) 1002. The court in that case was considering the application of the statute with respect to the relatives not connected with the subject of the message by close family ties, and therefore not likely to sustain the mental anguish contemplated by the statute. The present case involved the mental suffering of a mother with respect to her son. Her regret or disappointment in being delayed in reaching and ministering to him may have been so keen or bitter or intense as to be properly charged as mental anguish. The charge given sufficiently covered the issue.

The appellant requested the court to charge

the jury: "That closing the telegraph office at Lexington on Saturday afternoon at 6:30 and opening next morning at 9:30 is reasonable office hours, and the company is not required by law to receive a message at Lexington between 6:30 p. m. Saturday and 9:30 a. m. Sunday." The court modified the request by charging "that it is for the jury to say whether the closing of the telegraph office at Lexington on Saturday afternoon at 6:30, if it was closed, and you are to say whether closed, and opening the next morning at 9:30, if opened at all, were unreasonable office hours or not, and, if you decide that they were reasonable office hours, then the telegraph company would not be required by law to receive a message at Lexington on Saturday afternoon between 6:30 p. m. and 9:30 a. m. Sunday. You are to be judges." Appellant contends that this was error on the ground that the reasonableness of office hours is a question of law for the court when there is no dispute as to the facts. Conceding this to be correct, the court committed no error, as there was testimony that the regular office hours at Lexington were from 7 a. m. to 7 p. m., and the court could not assume the facts to be as declared in the request.

It is finally contended that the court erred in submitting the question of punitive damages to the jury. While it appears that the message was promptly transmitted from Conway to Augusta, Ga., the relay office, there was no explanation whatever as to the long delay of the message at the Augusta office from 4 p. m. Saturday to 10:06 a. m. Sunday morning. By many decisions in this state it has been held that a long, unexplained delay in transmitting and delivering telegrams affords some evidence of a reckless or wanton disregard of duty. It is true that the agent at Lexington made commendable effort to deliver the message on its receipt by him at 10:06 Sunday morning, but this was unavailing in view of the long and unexplained delay in transmitting from the Augusta office.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(83 S. C. 68)

TALBERT v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. May 27, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 65*) — NONDELIVERY OF MESSAGES — ACTIONS — COMPLAINT.

The allegations in the complaint, in an action by a wife for delay in the delivery of a telegram announcing the serious illness of her husband, that the husband was suddenly taken with a relapse of typhoid fever, that plaintiff had nursed him until he became convalescent, that she had an invalid son who needed care, and to recuperate and to place the son where he could have attention she went to the home of her kinsman, that shortly thereafter the hus-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

band was taken with a relapse, etc., did not set forth any element of damages, but were merely of an explanatory nature, rendering the refusal to strike the allegations and the admission of evidence in support thereof, at most, harmless error, where the cause was tried on the merits.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 54; Dec. Dig. § 65.*]

2. APPEAL AND ERROR (§ 1057*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The refusal to permit a witness to state what a third person had said was not prejudicial, where the third person was afterwards examined as a witness and testified fully as to the facts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

3. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction, in an action against a telegraph company for delay in the delivery of a telegram, that where the sender of a message knows that the addressee is a visitor in a strange city, staying with a relative whose name is not the same as the addressee, and fails to give any further address than the name of the city, the sender is guilty of negligence precluding a recovery, provided such negligence is the proximate cause of the delay, is erroneous as invading the province of the jury and as a charge on the facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 439, 450, 465; Dec. Dig. § 194.*]

4. TELEGRAPHS AND TELEPHONES (§ 68*) — DELAY IN THE DELIVERY OF MESSAGES — DAMAGES — PRESUMPTIONS.

A delay of about 20 hours in the delivery of a message addressed to a wife requesting her to come at once, and stating that her husband was not expected to live through the night, presumptively causes the wife to suffer mental anguish.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 70; Dec. Dig. § 68.*]

Appeal from Common Pleas Circuit Court of Edgefield County; John S. Wilson, Judge. Action by Mrs. Lillie C. Talbert against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint alleged: That on October 18, 1906, Joe Talbert, the husband of plaintiff, had suddenly become ill with a relapse of typhoid fever; that Joe Talbert had come to the home of his mother at Parksville from his duty as baggagemaster in the employ of the Southern Railway Company, between Columbia, S. C., and Asheville, N. C., with a spell of typhoid fever; that plaintiff had been with him and nursed him for about five weeks, when he became convalescent; that plaintiff had an invalid son, who needed her care; that she was thoroughly exhausted; that, when her husband became better, she went to the home of her kinsman, in Laurens, to recuperate, etc., and that shortly thereafter her husband was taken with a relapse.

The following are the exceptions of defendant:

"Because the presiding judge erred:

"(1) In not sustaining defendant's motion to strike out in paragraph 3 of the complaint the following words, 'with a relapse of typhoid fever,' and the words: 'Between Columbia, S. C., and Asheville, N. C., with a spell of typhoid fever. That the plaintiff, his wife, had been with him and nursed him for about five weeks, when he became convalescent and seemed to be out of danger. That the plaintiff has an invalid son who needs her constant care and attention; and that she was thoroughly exhausted in mind and body by the double strain on her on account of the illness of her husband.' Also the words, 'in order to recuperate her strength and in order to place her invalid son where he could have attention that he needed.' The said matters being irrelevant, not stating any element of damage for which the defendant was liable, were not in contemplation of the parties at the time the message was filed for transmission, and there is no allegation in the complaint that such state of facts was made known to the defendant by the party filing the message, and the message does not on its face disclose such state of facts.

"(2) In permitting F. P. McGowan, a witness for plaintiff, to testify, over objection of defendant's counsel, as follows: 'Q. Do you recall what her condition was at the time she came there? (Referring to Mrs. Talbert's condition at the time she visited his house at least two weeks prior to October 18, 1906.) A. Mrs. Talbert's condition? Q. Yes. A. She seemed to be rather worn out and tired and exhausted, physically, was not strong. Q. Whom did she have with her? A. A little boy about eight years old. Q. What condition was he in? (Objected to as irrelevant and incompetent. The company had no notice of it.) The Court: I will let it in. Mr. Nelson: We would like objections to be noted to all this testimony. Q. (By Mr. Nicholson) What is the condition of the little boy? A. Paralytic; can't walk but can talk, but cannot feed himself without aid. Q. With reference to his mother's care, was he a care and a charge on her? A. Yes, sir; it was necessary for her to give him her personal time all the while. He will not allow any other person to attend to his wants, and she has to give him her constant attention.' Said testimony being irrelevant, not stating any element of damage for which the defendant was liable, and being in reference to circumstances not in contemplation of the parties at the time the message was filed for transmission, and the defendant was not then nor at any time advised of such state of facts, and the message itself on its face does not disclose any such state of facts.

"(3) In not permitting the said F. P. McGowan, on cross-examination, to answer the following question: 'Q. Did Mr. McLeese say anything when he delivered the telegram with

reference to the telegram? Did Mr. McLeese make a statement to you with reference to this telegram, the cause of its being delayed, the telegram in suit, at the time of its delivery? The error being that the declarations of McLeese, who was the agent of the company at Laurens, accompanied the act of delivery to McGowan and tended to explain it, and was a part of the *res gestæ*.

"(4) In refusing the motion of defendant's attorney to strike out the reasons given by the said F. P. McGowan why the plaintiff, Mrs. Talbert, did not go on the train on the night of the 18th of October. The reasons assigned by said witness were: 'I did not think that a lady with a paralytic child could safely go on that train which left at 10 o'clock at night at Laurens and getting to Greenwood in the night.' And in permitting the said witness, over objection of defendant's counsel, to testify as to Mrs. Talbert's being partially blind, near-sighted, wearing glasses, and its being difficult for her to see at night, and that with this child he did not think it advisable for her to undertake to go on a freight train at night and try to make the trip to Parksville. The error being that it was merely the opinion of the witness, and he and the plaintiff determining that she should not take the night train was a voluntary act on her part for which the defendant could not be held responsible, and her failure to take the train was not the result of any act of the defendant.

"(5) In permitting the plaintiff, Mrs. Lillie C. Talbert, over objection of defendant's counsel, to testify as follows: 'Q. Why did you leave your husband? Mr. Nelson: We object; irrelevant and incompetent. We are not charged with notice why she left for Mr. McGowan's. The Court: I will let that out to explain her conduct. Q. Why did you leave your husband and go back to Mr. McGowan's? A. I was weak and my baby was on my hands. He was nervous, could not stay in the house, and I had to keep him outdoors. Q. How old is that child? A. Eight years old. He is most like a baby. Q. He is a paralytic? A. Yes, sir. Q. What was your condition there? A. I was up, but not very strong, physically weak. Q. Why did you have to keep this child outdoors most of the time? A. Because he was nervous and made a noise. Mr. Nelson: We object. The Court: I do not think that is an allegation of the complaint. Mr. Nicholson: We don't insist on that. Q. You stated you had this child and your husband? A. Yes, sir. Q. Why did you go to Laurens? A. To rest, because my health was broken down. Q. You took the child with you? Now, after you got to Mr. McGowan's, how long was it before the second telegram came? A. It was about seven days, not quite a week.' Said testimony being irrelevant and incompetent, in that the defendant was not charged with notice of the condition of plaintiff or of her child or of the reasons why she left her husband, and said testimony failed

to establish any cause of action which might exist against the defendant for its failure to deliver the telegram; and said testimony was prejudicial to the defendant, in that it tended to show extraordinary damages, resulting from special circumstances, of which the defendant had no notice, for which it was not responsible, and of which the delay in the delivery of the telegram was not the proximate cause.

"(6) In that he refused to charge the following portion in italics of defendant's fourth request to charge: '(4) In an action such as this, the defendant is charged with the suffering, if any, which the failure to deliver the message may reasonably be expected to produce when its contents are considered, not with the suffering due to a peculiar temperament, but that of an ordinary human being, and under the mental anguish act, the plaintiff in this case cannot recover for the anxiety which she may have suffered on account of the illness of her husband, nor for any feeling of annoyance, disappointment, or vexation which she may have felt by reason of the failure to promptly transmit and deliver the telegram in question.' It being respectfully submitted that the portion of the request refused contained a sound proposition of law applicable to this case, in that plaintiff had been permitted to testify as to her condition and that of her child and her husband over defendant's objection.

"(7) In refusing defendant's twelfth request to charge: '(12) In a case where the sender of a message knows that the addressee is a visitor in a strange city, staying with a relative whose name is not the same as the addressee, and fails to give any further address than the name of the city, I charge you the sender is guilty of negligence, and if this negligence should contribute as a proximate cause to delay in delivery of the message, neither the sender nor the addressee could recover damages.' The error being that said request correctly stated hypothetically a correct proposition of law applicable to this case.

"(8) In charging plaintiff's third request to charge: '(3) From the words contained in the telegram set out in the complaint, the defendant company was charged with notice of the relationship between the plaintiff and her husband, Joe Talbert, and that mental suffering would result from the failure to deliver the telegram promptly, if the said telegram did refer to her husband, Joe Talbert.' The error being that it was for the jury to say, from the wording of the message and the testimony in the case, of what facts the defendant company had notice, and whether or not it should have inferred from such facts that mental anguish would result from a delay in the delivery of the said message, and in charging said request his honor invaded the province of the jury.

"(9) In refusing defendant's motion for a new trial: (1) Because of error in refusing to strike out certain allegations of paragraph 3 of the complaint, to wit, the words: 'With

a relapse of typhoid fever. * * * Between Columbia, S. C., and Asheville, N. C., with a spell of typhoid fever. That the plaintiff, his wife, had been with him and nursed him for about five weeks, when he became convalescent and seemed to be out of danger. That plaintiff has an invalid son, who needs her constant care and attention, and that she was thoroughly exhausted in mind and body by the double strain on her on account of the illness of her husband.' And the words, 'in order to recuperate her strength and in order to place her invalid son where he could have attention that he needed,' and in allowing plaintiff's witnesses, over objection of defendant's counsel, to give testimony in support of the allegations so sought to be stricken out of the complaint. (2) Because his honor failed to charge the jury that in awarding damages they should not consider the allegations and testimony set out in the preceding exception. (3) Because the verdict of the jury was against the preponderance of the evidence, in that there was a total failure on the part of the plaintiff to offer any testimony tending to show that the delay in the delivery of the telegram was the proximate cause of any damage she may have sustained. (4) Because the evidence shows that the negligence of the sender of the message, in failing to give a more definite address, contributed as a proximate cause to the damage alleged to have been sustained by the plaintiff. (5) Because his honor erred in refusing to charge defendant's twelfth request to charge, set out in exception 7."

Nelson & Nelson, for appellant. J. Wm. Thurmond, for respondent.

GARY, A. J. This is an action for damages for mental anguish, alleged to have been suffered by the plaintiff on account of the delay in the delivery of the following telegram: "Parksville, S. C. October 18, 1906. Mrs. J. L. Talbert, Laurens, S. C. Come at once; Joe not expected to live through night. J. B. Talbert." "Joe" was plaintiff's husband, who was ill at his home near Parksville, and Mrs. Talbert was at the time visiting her sister, Mrs. F. P. McGowan, at Laurens, S. C. The telegram was handed to the agent at Parksville about 7 o'clock p. m., but was not delivered to the addressee until about 3:40 o'clock p. m. on the 19th of October. The agent at Parksville knew the plaintiff, and that she was the wife of Joe Talbert. The complaint alleges negligence and willfulness, but the claim for punitive damages was withdrawn, at the close of plaintiff's testimony. The jury rendered a verdict in favor of the plaintiff for \$500. The defendant made a motion for a new trial, which was refused. The defendant appealed upon numerous exceptions, which will be set out in the report of the case. In considering the exceptions, we will adopt the arrangement followed by the appellant's attorneys in their written argument.

64 S.E.—55

Exceptions 1, 2, 4, 5, and subdivisions 1 and 2 of exception 9: The allegations of the complaint which the defendant's attorneys made a motion to strike out were not intended to set forth an additional element of damages, but were merely of an explanatory nature. There has been a trial upon the merits; and, conceding that in strictness of pleading they were objectionable, the appellant has failed to satisfy this court that they or the testimony mentioned in the exceptions were prejudicial to its rights.

Third exception: J. M. McLeese afterwards was examined as a witness, and testified fully as to the cause of delay. It cannot be successfully contended that testimony as to what McLeese said is higher in degree than his testimony, when examined as a witness. *Wallingford v. Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629. Therefore the refusal to allow the witness to answer the question was not prejudicial.

Sixth exception: When the words in the exception alleged to be objectionable are considered in connection with the entire charge, it will be seen that this exception cannot be sustained.

Seventh exception: This request was properly refused, as its submission would have invaded the province of the jury and would have been a charge upon the facts.

Eighth exception: As hereinbefore stated, the testimony showed that the agent at Parksville knew the plaintiff, and that she was the wife of Joe Talbert, and there was a presumption that delay in the delivery of the message would cause her mental anguish.

Subdivisions 3, 4, and 5, of exception 9: Subdivision 3 must be overruled, for the reason that it is only necessary to refer to the testimony to show that the plaintiff suffered mental anguish, for which the statute makes the defendant liable in damages. Subdivision 4 cannot be sustained in the light of the testimony. Subdivision 5 has already been disposed of.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. (concurring). I concur in the result. There are two main grounds of appeal. The first is that the circuit judge erred in refusing to strike out allegations respecting the plaintiff's physical condition at the time she suffered mental anguish on account of the failure to deliver the telegram announcing the extreme illness of her husband. It is true that defendant was not liable for suffering due to any peculiar physical or mental condition or idiosyncrasy of the plaintiff not known to the defendant. This was decided in *Willis v. Telegraph Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, and subsequent cases. But an order refusing to strike out a pleading or a portion of it as irrelevant is not appealable. *Harbert v. Railway Co.*, 74 S. C. 13, 53 S. E. 1001; *Bank v. Witcover*, 77 S. C. 441, 58 S. E. 146.

It is also true that evidence tending to support this allegation of the plaintiff's weak physical condition was not admissible to show increased suffering due to that cause. But there was another issue on which it was admissible. The defendant introduced evidence tending to show that the plaintiff, after receiving the telegram, might have reached her husband earlier than she did, by taking at Laurens a freight train with a passenger coach attached. The duty of the plaintiff was to use due diligence to mitigate her suffering and thus diminish her damages; and upon the issue whether reasonable diligence required her to take the mixed train, and undergo the fatigue of travel by that means, it was her right to show her weak physical condition as an excuse for not doing so.

Only one remark need be made as to the other of the two points mainly relied on. In *Johnson v. Telegraph Co.*, 81 S. C. 235, 62 S. E. 244, 17 L. R. A. (N. S.) 1002, it was held that the mental anguish statute does not contemplate recovery for any slight feeling of unpleasantness, such as mere annoyance or vexation. The request here was to charge that there could be no recovery for "annoyance, disappointment, or vexation." There was no error in refusing the request for two reasons. Disappointment may be significant of mere annoyance or vexation; but, on the other hand, it may be about a matter of such nature and importance as to produce great anguish. *Oglvie v. Telegraph Co.*, 64 S. E. 860. In the second place, a charge with respect to feelings of slight unpleasantness is irrelevant in the discussion of the law applicable to the feelings of a wife kept away from her dying husband, in the absence of evidence of lack of affection on her part.

(150 N. C. 646)

JONES et al. v. TOWN OF NORTH WILKESBORO.

(Supreme Court of North Carolina. May 19, 1909.)

1. APPEAL AND ERROR (§ 70*)—FINAL JUDGMENT.

The sustaining of a demurrer to the complaint praying for an injunction, the refusal to grant the injunction, and adjudging that plaintiff pay the costs, operate as a dismissal of the action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 367-372; Dec. Dig. § 70.*]

2 APPEAL AND ERROR (§ 927*)—PRESUMPTIONS.

The court in disposing of an appeal from a judgment of dismissal, on sustaining a demurrer to the complaint, must assume that the facts alleged in the complaint are true.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 927.*]

3. MUNICIPAL CORPORATIONS (§ 1000*)—MAINTENANCE OF PUBLIC NUISANCE.

A citizen and taxpayer of a town, who seeks to restrain the town from purchasing a

water power and pond for a water supply on the ground that the same will be a public nuisance and an injury to the health of the people, need not show that he had applied to the town to rescind the contract for the purchase of the property, where he shows that the establishment of the waterwork system as proposed will create a public nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1000.*]

4. MUNICIPAL CORPORATIONS (§ 63*)—JUDICIAL INTERFERENCE WITH MUNICIPAL AUTHORITIES.

The court will not interfere with the exercise of discretionary powers conferred on municipal corporations for the public welfare, unless their action is so clearly unreasonable as to amount to oppression and manifest abuse of their discretion, and the power of the court will be exercised with great caution and only in a clear case.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 155; Dec. Dig. § 63.*]

5. MUNICIPAL CORPORATIONS (§ 1000*)—INTERFERENCE WITH MUNICIPAL AUTHORITIES—COMPLAINT—SUFFICIENCY.

A complaint, in a suit by a citizen and taxpayer of a town to restrain it from purchasing property for a water supply for domestic purposes, which alleges the inability of the town to comply with Revisal 1905, §§ 3045, 3048, relating to the protection of watersheds, and which sets forth facts showing that it will be impossible to use the water, and that it will endanger the health of the inhabitants, is sufficient to require the town to answer and show that by proper precaution the proposed water supply is either not impure or can be purified, though the complaint does not allege corruption or moral turpitude.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1000.*]

6. MUNICIPAL CORPORATIONS (§ 736*)—CREATION OF PUBLIC NUISANCE.

A municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance per se, injuring the health and lives of the people.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1552; Dec. Dig. § 736.*]

Hoke and Brown, JJ., dissenting.

Appeal from Superior Court, Wilkes County; Justice, Judge.

Action by P. C. Jones and others against the Town of North Wilkesboro. From a judgment of dismissal, plaintiffs appeal. Reversed.

The plaintiffs allege:

"(1) That they are citizens and property owners of the town of North Wilkesboro, N. C., and as such are interested in the welfare of said town and its inhabitants, and have started a suit in the superior court of Wilkes county against the above-named defendant.

"(2) That an election was held by the voters of said town on the question of issuing bonds to put in a system of waterworks in said town at an election held on the _____ day of _____, 1908, in the sum of \$30,000 for said waterworks, which election was declared carried.

"(3) That a short time prior to said election the mayor and board of commissioners of North Wilkesboro, fearing that said bond issue would not carry, caused to be published and circulated among the voters the following circular: 'To the Voters of North Wilkesboro: As there seems to be quite a misunderstanding as to the position of mayor and commissioners on the waterworks question, we wish to state that each and every member of said board are in favor of the gravity system, with water brought from Brushy Mountain preferred, and are not in favor of taking water from Reddie's river. We wish to state further that there is not any proposition on foot to purchase the Hackett Bros. water power. J. E. Finley, J. R. Combs, R. W. Gwyn, H. O. Absher, J. D. Moore, Commissioners. Oscar C. Dancy, Mayor.'

"(4) That since such election, in utter violation of their pledge, three of the above-named commissioners are attempting to close a deal with Hackett Bros., or rather with the Gordon Manufacturing & Power Co., for the purchase of said mill tract of land with all its appurtenances for said town, and out of the mill pond are proposing to supply a system of waterworks by pumping water with an engine, which water is to be used for drinking purposes by the inhabitants of said town.

"(5) That Reddie's river, which flows into Hackett's millpond, passes through one of the most populous sections of Wilkes county, as well as many creeks and smaller tributaries that flow into said river, and it would be utterly impossible for the town authorities to comply with sections 3045 and 3048 of the Revisal of 1905 in protecting the watersheds.

"(6) That by reason of many families living upon the numerous watersheds for the first 15 miles, to say nothing of the many who lived beyond the 15-mile limit, but are upon the watersheds, it will be impossible to use this water for drinking purposes, and it will render the inhabitants of the town liable to the great scourge of typhoid fever, which frequently rages to considerable extent upon the watersheds of Reddie's river, as affiant believes.

"(7) That several years ago typhoid fever prevailed in the town to a very considerable extent, and your affiants have heard that the doctors attributed it to the use of ice taken from Hackett's millpond, and directed that the use of ice from said pond be stopped.

"(8) That not only are the watersheds on Reddie's river outside of the corporate limits of said town so thickly settled that it renders its water unfit for use, but the watersheds of said river within the corporate limits of said town, if there were no other objection, would render the use of said water dangerous to the life of the citizens.

"(9) That upon the watersheds within said town there are many dwelling houses, and the only drainage is into Reddie's river, and without enormous expense to said residents of the town or to the town itself can this drainage be brought into the river below the millpond.

"(10) That if permitted to buy this property and operate from said millpond a system of waterworks, irreparable damage and loss will be sustained not only by the plaintiffs, but the health and well-being of the citizens of the town will be greatly endangered."

It was further alleged that a supply of pure water could be had from the Brushy Mountains, etc.—all of which was duly verified. Plaintiffs ask that a restraining order issue, etc. Defendant demurred to the complaint and assigned as grounds for demurrer that: "(1) It does not appear that plaintiffs made application to the town or its authorities to rescind the contract for the purchase of the Hackett property. (2) That the petition, taken as a whole, does not set forth grounds sufficient to justify injunctive relief, in that: (a) It does not show that the commissioners of said town grossly abused their discretion in making a contract for the purchase of the Hackett property. (b) It does nothing more than question the ability of the town to maintain a waterworks system, using the water from Reddie's river, inspecting its watershed, and filtering said water, as to which the court cannot interfere."

His honor sustained the demurrer, refused the injunction, and adjudged that plaintiff pay the costs of the action. Plaintiffs appealed.

W. W. Barber, for appellants. Finley & Hendren, for appellee.

CONNOR, J. While the court does not in express terms dismiss the action, it is evident that such is the effect of the judgment. The only relief asked is that defendant be enjoined from installing the system of water supply for the people of the town as set out in the complaint. For the purpose of disposing of this appeal, the facts set out in the complaint must be taken as true. The defendant relies upon the principle announced in *Merrimon v. Paving Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574, to sustain its first ground of demurrer. That case is not in point. There, the corporate authorities had made a contract with the paving company to pave the streets, and, plaintiff thinking that the company was not performing its contract, and that the officers whose duty it was to compel it to do so in accordance with its terms were derelict in the discharge of their duty, without applying to the governing board of the municipality to do so, they brought the action. Upon a well-settled principle and uniform line of deci-

sions, we held that they could not maintain it without making the essential averments showing that the authorities refused to perform their duty, or such other averments as showed that a demand was useless and would be of no avail. Here, the allegation is that the municipal authorities are threatening to establish and maintain a public nuisance, endangering the health and lives of the people. The demurrer admits the truth of the allegation. The first cause of demurrer cannot be sustained.

The second cause assigned involves the proposition that, unless a gross abuse of the discretion vested in the authorities is alleged, the court has no power to interfere. The rule by which the courts have been governed in the exercise of the injunctive power is well stated by Mr. Justice Hoke in *Rosenthal v. Goldsboro*, 149 N. C. 128, 62 S. E. 905. There the authorities, deeming it conducive to the public health, directed the removal of shade trees on the street upon which plaintiff resided. It is said in the opinion: "The court will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare, unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion." This is sustained by a number of authorities cited in the opinion and, we think, correctly marks the limitation upon the exercise of discretionary municipal authority. It falls short of holding that the discretion is without any limitation. It is not consistent with our conceptions of a municipal government of granted powers, certainly in the method of exercising them, that there should be no limitation, or, at least, that, when called into question, in good faith, by those who are interested in the result, officers may admit such allegations as are made here and successfully maintain the position that the citizens are without remedy. Conceding that the rule is correctly stated in the decision cited, we think that plaintiffs' allegations bring their case within the power of the court to interpose. It is not necessary to allege corruption or moral turpitude. It is manifest that a municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance per se; that is, a condition which seriously endangers the health and lives of the people. *Harper v. Milwaukee*, 30 Wis. 365. The injunctive power of the court will be exercised with great caution and only in a clear case. We decide in this appeal that the defendant was called upon to answer the allegations in the complaint. We do not think it should be permitted to dismiss charges so serious in their character. It may be that, upon the filing of an answer, the authorities can show that the conditions are not correctly stated, and that by proper precaution the proposed water supply is either not impure, or that

by proper methods it can be purified. Of course, the court could not undertake to direct the method of supplying the town with water.

As the case is before us only upon demurrer, we forbear discussing the question further than is necessary to dispose of the exception to his honor's judgment. The defendant will file such answer as it may be advised, and upon notice the motion for an injunction will be heard before the judge having jurisdiction in the premises.

There is error.

HOKE, J. (dissenting). I differ from the court in the disposition made of the present case. While there are allegations in the complaint which seemingly tend to show that a public nuisance will be created if defendants are allowed to proceed, a perusal of the entire complaint will disclose that such allegations rest necessarily in surmise, and are not in reality stated as facts, but deductions made by plaintiff from certain recognized and admitted physical conditions, and that the real controversy presented is a difference between the governing authorities of the town and certain citizens therein, as to the most desirable plan or scheme for obtaining a good water supply for the municipality and the citizens thereof.

In passing upon the questions presented, we should not close our minds to recognized facts, and are allowed to take judicial notice of certain physical conditions which appear and are essential to a proper decision of the matter. We know that Reddie's river is a bold mountain stream, and at the point indicated not far from its source, and we know too, that there are methods very generally in use by which water far more unpromising than this is made available for domestic as well as general purposes, and there is no good reason to doubt that, by a simple and feasible way of treating the water of the stream in question, a copious, satisfactory, and healthful supply of water can be obtained.

One grave objection to adopting and acting on plaintiffs' statements, made apparently as facts, though it clearly appears that they amount to nothing more than apprehensions on their part from conditions and actual facts fully set out, is that, under our decisions, the same position which calls for a restraining order may, and likely will, require, if the complaint is reasonably supported by affidavits containing allegations of the same general character, that the question should be referred to a jury for ultimate decision; and thus the people, who have sanctioned the measure by their votes, will be indefinitely deprived of the water desired and necessary for their comfort, convenience, and safety. If this plan is checked, any other is liable to be arrested on just such indefinite allegations, and it will prove well-nigh im-

possible for the municipal authorities ever to carry into effect their lawful and beneficent purpose of securing for the inhabitants of the town a satisfactory and sufficient water supply.

It is well recognized, and chiefly for the reasons presented here, that these matters of local concern are, and should be, matters largely of local regulation, and only in rare and extreme cases are the courts allowed to interfere in any way, and should never undertake to direct and control local authorities as to how they should act on matters which rest in their judgment and discretion. While there are general allegations of serious injury threatened if the present plan of defendant is carried out, on considering the complaint as a whole, it is clear that such statements rest only in apprehension and surmise, and that, on the real and ultimate facts, this suit is but an effort to compel the municipal government of North Wilkesboro to adopt a different plan than that on which they have entered, and one which plaintiffs think will better promote the welfare of the town. This is clearly a matter which rests in the judgment and discretion of the town government, and, as heretofore stated, it is a principle fully established here and elsewhere that courts will never undertake to direct and control these municipal authorities as to how they shall act or what plan or method they should adopt on matters which the law has wisely referred to their judgment and discretion. *Board of Education v. Board of Commissioners* (present term) 63 S. E. 724; *City of Kinston v. Wooten* (present term) 63 S. E. 1061; *Ward v. Commissioners*, 146 N. C. 534, 60 S. E. 418; *Broadnax v. Groom*, 64 N. C. 244; *People v. Knickerbocker*, 114 Ill. 539, 2 N. E. 507, 55 Am. Rep. 879; *Clicotte v. County of Wayne*, 59 Mich. 509, 26 N. W. 686.

I am of opinion that the position of the defendants should prevail, and the judgment of the court below dissolving the restraining order should be affirmed.

BROWN, J. (dissenting). I concur in the dissent of Mr. Justice HOKE. It is true that a demurrer technically admits the truth of the facts alleged in the complaint, but it also raises the question of the power of the courts to grant the relief prayed for in the case, and that relief, broadly stated, is that the court take away from the municipal officers of the town the right to determine what is best for their municipality and to substitute in their places the judgment of a jury. The real question involved on this appeal is: Does the complaint state a good cause of action? This is raised as well by the demurrer as by the motion made by defendant in this court to dismiss the action, which motion it is conceded can be made at any time in the court below or in this court. Assuming that the defendants had filed an answer and denied every allegation in the complaint, they could then make the same motion. I see

nothing alleged in the complaint which, if denied by answer, can properly be submitted to a jury, or determined by a judge. The only issue which can be raised upon this complaint is as to whether the commissioners of the town of Wilkesboro have agreed upon and are about to install a water supply system which may be deleterious to the health of its inhabitants. There is no suggestion, much less allegation, that the commissioners or any of them are acting in bad faith, or have any personal or pecuniary interest in the lands comprising the watershed or in Hackett's pond, or are acting in any dishonest or fraudulent manner. Therefore I am of opinion that under our Constitution, laws, and form of government the courts are not vested with a supervision and control of the honest exercise of the powers of the commissioners of the town.

Under the law governing the town of Wilkesboro, the duty of providing a supply of wholesome water is left to the sound discretion of the town authorities, whom the electors have chosen to administer their affairs. It is hardly to be supposed that such authorities have adopted a system of water supply which will bring on an epidemic of typhoid fever, and we are bound to assume that they have given the matter a thorough investigation, with perhaps expert assistance, before deciding so important a matter. Are 12 jurors, or 5 judges, any better able to determine what is best for the welfare of the town than its chosen authorities, who reside there, drink the same water, breathe the same air, pay the same taxes, and are in all respects identified with the interests of all other citizens? The power to determine the matter is delegated under the Constitution and laws of the state to the board of commissioners of the town. What right has this court to substitute a jury of 12 men in their places? Or to enjoin the honest exercise of powers conferred exclusively upon the defendants? I know of no case to which the words of a great judge are more applicable than to this. "For the exercise of powers conferred by the Constitution," says Chief Justice Pearson, "the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. The court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government or upon the county authorities." *Broadnax v. Groom*, 64 N. C. 250. Again, the Chief Justice says: "In short, this court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly, as to the county authorities and erecting a despotism of five men—which is opposed to the fundamental principles of our government and the

usages of all times past." We have affirmed and acted upon these heretofore, well-settled principles at this term in *Hightower v. City of Raleigh*, 85 S. E. 279.

In the absence of any allegations impeaching the good faith of the commissioners in adopting a water supply system, I think the motion to dismiss the action should be granted.

(150 N. C. 729)

SNELL et al v. CHATHAM.

(Supreme Court of North Carolina. May 21, 1909.)

1. JUDGMENT (§ 257*)—TRIAL OF CAUSE—CONFORMITY TO FINDING OF REFEREE.

A complaint set out a cause of action for injury from the maintenance of a pond and sought only to enjoin the rebuilding of a dam which created such pond. The parties, by a consent order, submitted to arbitrators "to settle and decide upon the matters in controversy in this action, * * * including such plan or scheme as they shall deem and find proper to safeguard the public health in the premises," by which findings all parties agreed to be bound; such findings to be made the judgment of the court. The arbitrators found that the pond formed a breeding place for mosquitoes and recommended that it be drained. *Held*, that the court properly enjoined the erection of the dam.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 257.*]

2. REFERENCE (§ 86*)—SCOPE OF AWARD.

The arbitrators were within the scope of their powers in recommending the drainage of the pond.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 86.*]

3. REFERENCE (§ 33*)—RELIEF OF PLAINTIFF.

The relief of the plaintiff was not confined to that set up in the complaint, but was enlarged by the consent order.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 33.*]

4. JUDGMENT (§ 257*)—CONFORMITY TO FINDING OF ARBITRATORS.

Judgment requiring defendant to drain the area of land theretofore covered by the dam or pond was proper.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 257.*]

Appeal from Superior Court, Mecklenburg County; Justice, Judge.

Action by J. E. Snell and others against Paul Chatham. From a judgment for plaintiffs, defendant appeals. Affirmed.

This was an action brought upon the grounds: That the defendant, owner of a tract of land near Charlotte, had in 1907 erected a dam across a small branch on the said land and thereby created a pond or lake; that in August, 1908, by reason of heavy rainfall, the dam having been broken, the defendant was rebuilding the dam; that the effect of rebuilding the dam would be to create a pond of stagnant water which would produce mosquitoes and communicate malaria to the plaintiffs and other residents of their neighborhood, thereby injuring the public health and creating a nuisance; and the

plaintiffs prayed that the defendant be enjoined and restrained from the reconstruction of the dam. A temporary restraining order was issued, and an order to show cause why the temporary restraining order should not be made permanent was served upon the defendant. A hearing was had before Judge Justice upon affidavits filed by the plaintiffs and the defendant. At the hearing it was agreed between the parties that the matter in controversy should be submitted to Drs. Gibbon, Montgomery, and Misenheimer as arbitrators; the language of the agreement being as follows: "In the above-entitled action it is by consent of parties ordered and decreed that the temporary restraining order heretofore made in the cause be continued and in full force until the next civil term of this court. That the following experts, to wit, R. L. Gibbon, J. C. Montgomery, and C. A. Misenheimer, be and they are hereby appointed as arbitrators, and empowered to hear, at such times and places in this county as they may fix, the evidence that may be submitted to them by the parties, and they are hereby made arbitrators to settle and decide upon the matters in controversy in this action, and to submit to this court at the next civil term thereof their findings and awards, or that of any two of them, including such plan or scheme as they shall deem and find proper to safeguard the public health in the premises; and all parties to this action hereby agree to be bound by the findings and award of said arbitrators or of any two of them—their findings and award to be made the judgment of this court in this action." And this cause is retained for further direction.

The majority of the arbitrators filed their award as follows at December term, 1908, of Mecklenburg: "The undersigned arbitrators appointed by this honorable court at October term, 1908, to settle and decide upon the matters in controversy in this action, and to submit to this court their findings and awards, including such plan or scheme as they would deem and find proper to safeguard the public health in the premises, beg leave to report as follows: That after due notice to the parties litigant they met at the office of Dr. J. C. Montgomery, in the city of Charlotte, on December 2, 1908, having first by consent and at the instance of the parties inspected and carefully examined the premises whereon was formerly maintained the dam and pond, all of which are more particularly described in the complaint, and in the affidavits of the parties and their witnesses, which affidavits were by consent used as evidence before us at the hearing, the parties expressly waiving their rights to offer other evidence. From our inspection and examination of the said marshy tract upon the land of the defendant Chatham and from the evidence produced before us, we find as fol-

lows: First. That stagnant water, in the light of present day medical opinion, is obnoxious to health in this country, chiefly as it serves for a breeding place for a certain species of malaria-carrying mosquito; the only means at present known by which that disease is disseminated. The life and habitat of the mosquito has received the most careful investigation at the hands of the United States health authorities, and, as bearing upon the question before us, we beg to briefly quote a description of the natural breeding places of these insects, which appears in volume 23, July 17, 1908, of the Public Health Report of the United States Marine Hospital Service: "The domestic species may be found breeding in any collection of water in or about the houses in which they lodge. They have been found in discarded tin, bottles, and broken crockery on the garbage heap; in buckets, tubs, barrels, cisterns, and wells; in baptismal and other fonts; in flowerpots and sagging roof gutters; in street and roadside puddles, gutters, and ditches; and in cesspools and sewers. The semidomestic (which is the malaria-carrying mosquito) species may occasionally be found breeding in tins, barrels, hoof prints, post-holes and holes in trees or tree stumps, but they usually prefer grass-bordered pools, slowly flowing ditches, the margins of lakes and streams, even such as are stocked with fish, provided the margins are shallow or are more or less choked with reeds and water plants so that the fish cannot reach them." Accepting the above as authoritative, and applying the knowledge to the matter in hand, after a visit and examination of the locality in question, we reach the conclusion that the said marsh and bed of pond, now drained, furnishes an abundant breeding ground for the mosquito, but that it is not, in our opinion, worse in this respect than are numerous other low and badly drained areas in and about the suburbs of the city of Charlotte, and some of them are contiguous to the neighborhood in which it is alleged that sickness has developed as a result of the pond, formerly on the Chatham place. The sanitary method of handling the areas in dispute may be decided upon the general principles governing such matters, the dominant idea of which is the elimination of stagnant water. There can, of course, be no question that this can most thoroughly be done by simple drainage and filling in. The latter particularly is not always practical; the former so far as our knowledge goes, is much more available. The drainage must, however, be thorough, and the ditches large enough and sufficiently well laid out to avoid the dangers of stagnation, as 'slow flowing' ditches, as previously shown, do not accomplish the object aimed at. In the specific case before us, we would recommend thorough ditching, properly drained to suit existing conditions, as the ideal method of treating said area, and we

find and award accordingly. Second. We further adjudge and award that the drainage, ditching, and filling aforesaid shall be done by the defendant during the winter months and prior to spring and so as to completely prevent the accumulation of stagnant water upon said premises. R. L. Gibbon, C. A. Misenheimer, Arbitrators. December 3, 1908." The other arbitrator, Dr. J. C. Montgomery, filed a dissent, recommending, instead of drainage, a "free flowing sanitary lake," i. e., that the defendant be allowed to put back the dam.

There were no exceptions filed to the award by either party, and his honor entered the following judgment: "This cause came to be heard before me at chambers in the city of Charlotte, on the 20th day of October, 1908, upon an order to show cause why the restraining order heretofore granted in this cause should not be continued to the hearing. At said hearing both plaintiffs and defendant were represented by counsel and argument was heard by me. During the argument a certain proposition was made by the defendant's counsel, and certain other propositions were made by the plaintiffs' counsel, looking towards an amicable settlement of the matter in dispute. These propositions were rejected by the parties, and thereupon the court announced its conclusion that the restraining order should be continued till the hearing. Thereupon the defendant's counsel stated to the court that, rather than submit to such an order, the defendant would agree to accept one of the propositions made during the argument by the plaintiffs' counsel to the defendant's counsel in the presence of the court, and of the parties to the action. The plaintiffs' counsel thereupon signified their willingness, on the part of their clients, to still make with the defendant the agreement referred to, and thereupon the hearing was adjourned in order that the counsel of the respective parties might put in writing the agreement entered into orally by them in the presence of the court at the said hearing. Thereafter there was submitted to me by the counsel of the respective parties a consent order, which I signed, which order is on file in the papers in this action. The arbitrators appointed by that consent order having made their report, as will appear by reference thereto, now, to carry out the agreement of the parties to this action as expressed in the aforesaid consent order, it is now ordered and adjudged as follows: It is ordered and adjudged that the said report of the said arbitrators be in all respects approved and confirmed, and the findings of said arbitrators and their award as set out in their said report is made the judgment of this court in this action. It is therefore further considered and adjudged by the court that the restraining order heretofore granted in this cause be, and the same is hereby, made permanent, and the defendant is there-

fore perpetually restrained and enjoined from reconstructing and maintaining the pond or lake described in the complaint. And it is further considered and adjudged by the court that the defendant within four months from this date be required to drain the area of land heretofore covered by said dam or pond as in the report of said arbitrators prescribed for the safeguarding of the public health in its vicinity. And the cause is held for further direction." The defendant excepted and appealed.

Tillett & Guthrie, for appellant. Burwell & Canaler and Clarkson & Duls, for appellees.

CLARK, C. J. (after stating the facts as above). There was no exception to the award of the arbitrators. After his honor had entered judgment in conformity therewith, the defendant excepted, assigning four grounds: (1) That upon the award the court should not have signed judgment enjoining the erection of the dam. (2) That the arbitrators went beyond the scope of their powers in recommending the drainage of the pond. (3) That the plaintiffs have no right to any relief not set up in the complaint. (4) That the court had no power to require the defendant to drain an area of land which was in its natural condition.

The first three exceptions are based upon the proposition that the complaint sets out a cause of action for injury from the maintenance of the pond and sought only to enjoin the rebuilding of the dam; but the parties by their consent order voluntarily enlarged the scope of the controversy and unequivocally submitted to the arbitrators not only "to settle and decide upon the matters in controversy in this action" (which means the controversy upon the pleadings), but added, "including such plan or scheme as they shall deem and find proper to safeguard the public health in the premises; and all parties to this action agree to be bound by the findings and award of said arbitrators, or any two of them, their findings or award to be made the judgment of the court in this action." This was not an inadvertent or hasty agreement. His honor sets out in his judgment the care and deliberation with which the consent order was made, and the adjournment taken that the parties might have a full understanding and that the able and experienced counsel might have the assent of their clients and put their agreement in writing, which was done. That the consent order embraced an agreement to settle not merely the question of the re-erection of the dam, but was to include also "such plan or scheme as they shall deem and find proper to safeguard the public health in the premi-

ses," appears by the explicit language of the agreement. The arbitrators, all three, so understood and acted, for, while two recommended drainage, the other recommended a "free-flowing lake or pond" as the better scheme or plan. There is nothing to impeach the award, and by the previous consent of the parties it was properly entered as the judgment of the court.

Nor do we find any ground for the fourth exception, nor any difficulty in enforcing the order of the court as to drainage. If the defendant had made an agreement with the plaintiffs that upon certain consideration paid, or upon the ascertainment of certain facts, he would drain his pond, this would be enforceable by a decree for specific performance. Here the defendant agreed to execute such plan or scheme as the majority of the arbitrators should award as "proper to safeguard the public health in the premises." One arbitrator thought a "free-flowing lake or pond" the plan. This would have suited the defendant, as this would have enabled him to put back and keep up his dam, without fear of damages, and, if the majority had so awarded, the plaintiffs must have acquiesced in the infliction of mosquitoes and malaria (if the lake did not remove them) and the loss of all claim for damages. The majority of the arbitrators, however, said "drainage" was the remedy, and the defendant should know how to be "a good loser," for, after all, the majority of an impartial board of arbitrators are more likely to be right than either party to the litigation. It is an old saying that "fragments of all the sciences are taken up in ashes of the law." It is not long since that our progressive brethren of the medical profession have discovered that one kind of mosquito (anopheles) causes malaria, that another (stegomyia) carries yellow fever, that another still spreads asiatic cholera, that house flies spread typhoid fever, that fleas on rats communicate the dreaded Bubonic plague, and lesser germs as bacteria and bacilli are the agents of other diseases, for thus do "the weak things of the world confound the things which are mighty." 1 Cor. 27. Acting on these discoveries, under authority of law, the stegomyia and yellow fever have been extirpated in Cuba and the cholera stayed in San Francisco, because mosquitoes and rats were systematically destroyed by the officers of the law. There is no reason that the plaintiff's home shall not be freed of malaria, by authority of a judgment based upon medical advice—especially as the parties agreed that such remedy (whatever the majority of the medical arbitrators should find it to be) should be entered as the judgment of the court.

Affirmed.

(150 N. C. 708)

MURPHY HARDWARE CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May. 21, 1909.)

CARRIERS (§ 20*)—REGULATIONS—STATUTORY PENALTY—FAILURE TO RECEIVE FREIGHT—DEFENSES.

Revisal 1905, § 2631, requires every railroad to receive all articles for transportation whenever tendered, and imposes a penalty of \$50 for each day it refuses to receive freight. Section 2632 imposes a penalty for refusing to transport freight within a reasonable time and requires shipments to start from the initial point within two days after the freight is received. *Held*, that a carrier could plead any legal excuse to avoid the penalty for failure to receive freight, and, if a carrier was unable to transport cattle because its motive power was tied up by a strike, it would not be liable for the statutory penalty for its refusal to receive the stock.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.*]

Appeal from Superior Court, Cherokee County; Gulon, Judge.

Action by the Murphy Hardware Company against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Moore & Rollins, W. B. Rodman, and Dillard & Bell, for appellant. E. B. Norvell, for appellee.

BROWN, J. The facts as set out in the record present this case: On February 4, 1907, the plaintiff instituted eight separate actions against the defendant to recover the sum of \$2,000 penalties in each action (total \$16,000) under section 2631, Revisal N. C. 1905, for failure of defendant to receive a drove of 80 head of cattle, tendered to the defendant at Murphy, N. C., for shipment to Richmond, Va. The eight actions came on for hearing at the spring term, 1908, of the superior court of Cherokee county, and for convenience and by consent were consolidated by his honor, O. H. Gulon, Judge. Upon the admissions contained in the record, his honor signed judgment in the consolidated case in favor of the plaintiff and against the defendant for \$200; it being one penalty of \$50 for each day for the four days the defendant refused to receive the entire lot of cattle for shipment. The defendant demanded a trial by jury upon the issues raised by the pleadings and excepted to the refusal of the court to submit said issues and also to the action of the court in signing judgment for \$200, and further moved to dismiss said action for the reason that upon the face of said complaint it appeared that the court was without jurisdiction to try and determine said cause, for that the same was an interference with interstate commerce, and for that the statute providing such penalty upon interstate shipments was contrary to the Constitution of the United States. The court

rendered the judgment in the record from which the defendant appealed.

The statute which imposes the penalty sued for is section 2631 of the Revisal of 1905, and reads as follows: "Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at nearest regular station at which there is an agent that such car is loaded and ready for shipment." In its answer the defendant avers that it was prevented from furnishing cattle cars to the plaintiff on account of a strike of the machinists on its road, numbering some 2,000 or 3,000, which strike it could not control, in consequence of which a large per cent. of defendant's motive power got out of order and could not be used. The decision of the court is put upon the ground that the action is brought to recover a penalty for not receiving the cattle, and not for a failure to transport, and that therefore the defense pleaded cannot avail the defendant, even if true.

We are advertent to the general rule that the carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee. *Covington Stock Yard v. Keith*, 139 U. S. 133, 11 Sup. Ct. 469, 35 L. Ed. 73. But we think that general rules must sometimes give way to particular cases, and that, if the defense set up be true, the defendant could not be compelled to receive cattle and feed them indefinitely when it was impossible to foresee when they could be shipped. Otherwise, at a cattle shipping point like Murphy, the carrier might, in cases of a breakdown or burning of its bridges, or a long-continued strike of its employes, find itself in a short while with hundreds of cattle on hand which it must feed and care for. No reasonable foresight and judgment can provide against such contingencies. But that is not the only reason why this defense should be allowed. The penalty statutes must be taken together so as to ascertain the entire burden imposed on the carrier. In case the defendant had received these cattle in its then unavoidably crip-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pled condition, it would have incurred very shortly thereafter another penalty for delay in shipping, for section 2632, immediately following, imposes a penalty for failure to transport within a reasonable time, and fixes the limit of time within which to start the shipment from the initial point at two days. So it follows that, if defendant had received the cattle and penned them, its inability to ship them within two days would have brought upon it another and continuing penalty for 30 days. *Bagg v. Wilmington, C. & A. R. Co.*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569. As between these two statutes, and in the crippled condition it could not provide against, the defendant would be placed in a helpless condition. It seems unreasonable to require a carrier to continue to receive such a commodity as live stock, especially when conditions it cannot control or avoid will prevent their shipment within the time required by law. To hold that these penalty statutes admit of no defense whatever would render them amenable to the forcible criticism of the Supreme Court of the United States in *Railroad v. Mayes*, 201 U. S. 329, 26 Sup. Ct. 493, 50 L. Ed. 772: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other calamities, transcends the police power of the state and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather."

For these reasons we think that a statute which imposed such penalties, and which permitted no defense and no excuse however just, practically takes the property of the carrier without due process of law, because, while the carrier may be brought into court, it is denied the right to make defense or excuse, however reasonable; but we do not so construe the law. We have considered this question at length in the case of *Garrison v. Railway*, 64 S. E. 578, at this term, in a well-considered opinion by Mr. Justice Connor, and have held that these penalty statutes are enacted in aid of the common law and to

compel a discharge of those duties which the common law itself imposes upon the carrier, and that, where the carrier has a legal defense or excuse for failure to discharge such duty, it may be pleaded in an action to recover the penalty. Upon the principles laid down in that opinion, we think his honor erred in holding that the statute admitted of no defense.

In this view of the case, we deem it unnecessary now to consider the other question of interstate commerce presented on the record.

New trial.

(150 N. C. 753)

REID & BEAM v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 25, 1906.)

1. COMMERCE (§ 10*)—PENALTIES FOR REFUSAL TO RECEIVE FREIGHT—VALIDITY OF REGULATION.

Revisal 1905, § 2631, imposing a penalty upon any carrier of \$50 for each day it refuses to receive freight for shipment, is not invalid as a burden on interstate commerce; the statute permitting excuses in proper cases for failure to comply therewith, and the federal government not having acted directly on the subject.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 8; Dec. Dig. § 10.*]

2. COURTS (§ 97*)—RULE OF DECISION—FEDERAL SUPREME COURT.

The federal Supreme Court is the final authority upon the validity of regulations affecting interstate commerce.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 331; Dec. Dig. § 97.*]

3. COMMERCE (§ 10*) — POWERS OF STATES — NONEXERCISE BY CONGRESS.

The act of Congress, requiring the publication by carriers of freight rates for interstate shipments, and the orders of the Interstate Commerce Commission thereunder, do not constitute such action by the federal government as to prevent proper and reasonable state regulations imposing penalties upon interstate carriers for failure to receive shipments or promptly transport them.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 8; Dec. Dig. § 10.*]

4. CARRIERS (§ 20*)—REFUSAL TO RECEIVE FREIGHT—PENALTIES.

That a shipper presented goods for shipment to Scottsville, Tenn., when the real name of the town on defendant's line was Scottville, Tenn., would not relieve the carrier from the statutory penalties for refusal to receive goods for shipment thereto.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 37; Dec. Dig. § 20.*]

5. CARRIERS (§ 20*)—REFUSAL TO RECEIVE FREIGHT — PENALTIES — CARRIER'S IGNORANCE OF DESTINATION.

Goods were delivered for shipment to a station on a railroad, which, though it maintained a separate organization for local purposes, was operated by defendant company and its receipts paid over to defendant's treasurer and its operating reports made to defendant's auditor, and the salaries of its employees were paid by defendant. Defendant's agent, who refused to receive goods for shipment on the ground that he did not know the location of the station, was replaced by another agent

shortly thereafter, who received and shipped the goods to the point of consignment. *Held*, that defendant's agent in charge when the goods were first presented for shipment should have known the location of the shipping point on its line, or should have ascertained it by the exercise of reasonable care, and his ignorance of its location would not relieve defendant from the penalty imposed by Revisal 1905, § 2631, for failure to receive goods for shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 37, 46; Dec. Dig. § 20.*]

6. CARRIERS (§ 20*)—REFUSAL TO RECEIVE FREIGHT—PENALTIES—DEFENSES.

That a shipper suffered no pecuniary injury by reason of delay in shipment caused by a carrier's refusal to receive goods for shipment was not a defense to an action under Revisal 1905, § 2631, imposing a penalty for the carrier's failure to receive goods for shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 37, 46; Dec. Dig. § 20.*]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Rutherford County; Justice, Judge.

Action by Reid & Beam against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 63 S. E. 112.

There was evidence, on the part of plaintiffs, tending to show: That on or about June 25, 1906, the plaintiff firm, having received an order for a car load of shingles, from one James Haddox at Scottsville, Tenn., applied to P. B. Gunnels, who was then agent of defendant company at Rutherfordton, N. C., for a car. The same was furnished and loaded with the shingles by plaintiffs on July 2d, shipping instructions given, prepayment of freight tendered, and bill of lading demanded. That the agent of defendant refused to give bill of lading, or ship the goods, assigning for reason that he did not know where Scottsville, Tenn., was, nor the rate thereto. Plaintiffs demanded that the goods be shipped, and told the agent they would prepay any additional amount found to be due, and requested that when the agent got ready to ship to phone to plaintiffs and they would come over and pay the freight due. That defendant's agent failed and refused to ship the shingles till July 17th, when one Castle came to take over the agency, and being told, on inquiry of plaintiffs, about the car load of shingles and what the trouble was, he asked for shipping instructions, which were given, to James Haddox, Scottsville, Tennessee, and on July 19th the freight was paid, the bill of lading given, and shingles shipped as directed, arriving at their destination without further let or hindrance. Plaintiffs further testified that they had received no pecuniary injury by reason of the delay, that Gunnels still had charge of the depot when the shingles were shipped, and that he left about that time, and Castle took charge.

There was evidence, on the part of de-

fendant: That Scottsville, Tenn., was an industrial siding on the Knoxville & Augusta Road, 8 or 10 miles out of Knoxville, Tenn., established for the convenience of persons shipping brick from that point; that there was no depot or regular agent there, but goods were rebilled to that point at Rockford, a regular station on the same road, some two miles distant. One W. P. Hood, testifying for defendant, stated: That he was superintendent of the Knoxville & Augusta Road, and that this road was operated as an independent line; that there was no such place on that road as Scottsville, but an industrial siding called "Scottsville," at the point indicated, a flag station 8 or 10 miles out from Knoxville; and that bills of lading for goods to and from that point were made out at Rockford, a regular station some two miles distant. On cross-examination the witness stated that his remittances from the operation of the road were made to the treasurer of the defendant company, that his reports were made to the auditor of such company, and that, since the consolidation of the East Tennessee & Virginia Railroad with the Old Richmond & Danville, the defendant company had paid all the employes of the Knoxville and Augusta Road their salaries.

The court below charged the jury, in part, as follows: "The burden is on the plaintiffs to show, by the greater weight of the evidence, that the defendant is indebted to plaintiffs. This suit is brought to recover penalty for refusal on the part of the defendant, Southern Railway Company, to receive a car load of shingles for shipment to James Haddox, Scottsville, Tenn. In order to entitle plaintiffs to recover, it is necessary for the jury to find from the evidence, by the greater weight thereof: First, that the defendant is a common carrier—that is admitted. Second, that the plaintiffs tendered the car load of shingles for shipment. And, third, that defendant refused to receive the same for shipment. If the jury finds from the evidence, by the greater weight thereof, first, that the plaintiffs, Reid & Beam, tendered the car load of shingles to Gunnels, the defendant's agent at Rutherfordton, and furnished him with shipping directions and offered to prepay the freight and demanded a bill of lading, and that the plaintiffs demanded that the car be shipped, then the plaintiffs would be entitled to recover, unless you find from the evidence that the defendant failed and refused to ship by reason of facts intervening which defendant, by the exercise of reasonable care, could not have prevented or overcome. The defendant contends that the agent did not know where Scottsville was, and did not know the freight rate, and that therefore defendant is excused. If you find from the evidence, by the greater weight thereof, that Scottsville or Scottville was a flag station on a branch road under control of de-

fendant company, then it was the business of the agent of defendant company to know where it was, and to know the freight rate to that point, or if you so find that the plaintiffs told the agent that Scottsville was on a branch road running out from Knoxville, and on the Knoxville & Augusta Railroad and some seven or eight miles from Knoxville, and that statement was true, and further so find that by the exercise of reasonable care and diligence on the part of the agent he could have ascertained where the place was, and the rates, it was his duty to do so, and failure on his part to exercise such reasonable care would not excuse the defendant company. If you find from the evidence, by the greater weight thereof, that defendant refused on July 2d to receive the car simply on the ground that the agent did not know and could not, by the exercise of reasonable care, have ascertained the locality and rates, and you further find from the evidence, by the greater weight thereof, that the failure to ship up to the 19th was on the same ground and no other, then the plaintiffs would be entitled to recover \$50 a day as a penalty for such failure from 14 days, this would exclude the day of shipment and also exclude the Sundays included between the dates, which would be \$700."

The jury rendered a verdict as follows: "Is the defendant indebted to the plaintiffs for the unlawful failure to receive a car load of shingles to be transported to Scottsville, Tenn., as alleged, if so in what sum? Answer: \$350." There was judgment on the verdict for plaintiffs, and defendant excepted and appealed; and, having made 18 exceptions duly noted in the record, under different forms of statement, assigns for error: "(1) That the statute in question (Revisal 1905, § 2631) is unreasonable and oppressive, and in conflict with the fourteenth amendment to the federal Constitution. (2) That, as applied to interstate commerce, the same is in conflict with article 1, § 8, cl. 3, of said Constitution: (a) As an unlawful attempt to regulate commerce. (b) And on the facts presented here as amounting to distinct burden upon it."

W. B. Rodman and Jas. M. Carson, for appellant.

HOKE, J. (after stating the facts as above). The validity of these penalty statutes has been before the court for consideration in many recent cases, and in *Eftand v. Railroad*, 148 N. C. 138, 59 S. E. 355, this being a decision on a statute of kindred nature, the court, in speaking to the power of a government to enact regulations of this character, said: "The right of the state to establish regulations for these public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly establish-

ed to require or permit discussion"—citing: *Harrill's Case*, 144 N. C. 532, 57 S. E. 383; *Stone's Case*, 144 N. C. 220, 56 S. E. 932; *Walker's Case*, 137 N. C. 168, 49 S. E. 84; *McGowan's Case*, 95 N. C. 417; *Branch's Case*, 77 N. C. 347; *Railway v. State of Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175; *Railway v. Hums*, 115 U. S. 513, 6 Sup. Ct. 110, 29 L. Ed. 463; *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. The opinion then quotes from that of Associate Justice Fields, in *Hums' Case*, 115 U. S. 513, 6 Sup. Ct. 110, 29 L. Ed. 463, both on the right to enact such statutes and the necessity for their proper enforcement, as follows: "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life, and property, and make that increase in many cases double, and in some cases treble, and even quadruple, the actual damages." And proceeds further: "And the right to establish such regulations for certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, has been made to rest largely in the discretion of the Legislature. *Tullis v. Railway*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Insurance Co. v. Dagg*, 172 U. S. 562, 19 Sup. Ct. 281, 43 L. Ed. 552; *Magoun v. Savings Bank*, 170 U. S. 286, 18 Sup. Ct. 594, 42 L. Ed. 1037."

And the very statute in question here (Revisal 1905, § 2631) has been approved and upheld in several of these cases as a just and reasonable exercise of the power indicated, and both as to interstate and intrastate commerce. *Garrison v. Railroad* (present term) 64 S. E. 578; *Twitty v. Railway*, 141 N. C. 355, 53 S. E. 957; *Currie v. Railroad*, 135 N. C. 536, 47 S. E. 654; *Baggs v. Railroad*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569. In *Twitty's Case*, supra, we have held that a refusal to receive goods for "transportation," and to issue a bill of lading therefor, amounts to a violation of this section, though the goods were received for storage. In *Garrison's Case*, supra, it was held that the placing of goods for shipment in the car of the company, permitted by the agent, with a demand for shipment, and accompanied by a continuous offer of prepayment of freight, were facts from which a tender day by day should be inferred until the shipment was made. The case of *Cotton Mills v. Railway* (at the present term) 64 S. E. 586, in no way conflicts with this position. That case only holds that where goods were on a plat-

form, under circumstances leaving it doubtful whether they had been taken charge of by the company, with other facts which left the matter of a tender day by day in doubt, the question was properly referred to a jury to decide as to whether such tender had been made. And the opinion of the court on a former appeal in this cause (149 N. C. 423, 63 S. E. 112) is a direct decision on the validity of the statute to be enforced by orderly and proper procedure; the court holding, on facts substantially similar to those presented here, as follows: "(1) A refusal by the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by Revisal 1905, § 2631, when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on waybills made out to a regular station on the carrier's road some two miles distant therefrom. (2) When a shipment of freight and transportation charges are refused by carrier's agent because he did not know where its given destination was, and it appears that the name given was very slightly changed from that appearing on the 'Official Railway Guide and Shipping Guide' used by the carrier, the fact that another agent, who afterwards took the place of the first, promptly learned the location of the destination and the rate, and gave bill of lading and made shipment, is evidence that the rate and destination could have been ascertained by the first from the information given him, in an action for the penalty prescribed by Revisal 1905, § 2631. (3) The penalty arising under Revisal 1905, § 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight, bears no relation to the commerce clause of the federal Constitution, for the penalty accrues before the freight is accepted for transportation. (4) The shipper of the goods is the 'party aggrieved,' and is the one entitled to sue for the penalty prescribed in Revisal 1905, § 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation."

It was chiefly urged for error, on the part of the defendant company, that the statute in question was invalid, because an unlawful interference with interstate commerce, and we were referred by counsel to several decisions of the Supreme Court of the United States as tending to support their position, notably the case of *McNeill v. Southern Ry.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; *Houston & Texas Central Ry. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772; *Railroad v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444. It may be, as indicated in the former opinion in this cause, that the commerce clause of the federal Constitution is not involved in the case, on the ground there-

in stated, that the penalty accrues before the "freight is accepted for transportation," and on the principle applied in the case of *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; but conceding that the goods, when tendered for transportation to another state, as to matters involved in such transportation, and in reference to these penalty statutes, should be considered and dealt with as interstate commerce, we are of opinion that the position of the counsel cannot be sustained, and that they do not correctly interpret the cases cited and relied on by them.

In the case of *Morris-Scarboro-Moffitt Co. v. Express Co.*, 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983, the plaintiffs sued for penalty imposed by section 2634 of the Revisal, for unlawful failure on part of defendant company to adjust and pay a valid claim for loss or damages to goods shipped from another state, and it was held: "(2) Revisal 1905, § 2634, is not repugnant to or in contravention of article 1, § 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce between the states. The penalty is in direct enforcement of the duties incumbent on the carriers by law to adjust and pay for damages due to their negligence; is imposed for a local default arising after the transportation has terminated; is not a burden on interstate commerce, but in aid thereof, and, in the absence of inhibitive congressional legislation, the matter is the rightful subject of state legislation." And in the opinion (page 171 of 146 N. C., page 668 of 59 S. E. [15 L. R. A. (N. S.) 983]) the court said: "The decisions of the Supreme Court of the United States have uniformly held that under this clause of the Constitution commerce between the states shall be free and untrammelled by any regulations which place a burden upon it, and these decisions also hold that, in the absence of inhibitive congressional legislation, a state may enact and establish laws and regulations on matters local in their nature which tend to enforce the proper performance of duties arising within the state, and which do not impede, but aid and facilitate, intercourse and traffic, though such action may incidentally affect interstate commerce. *Calvert on Regulation of Commerce*, pp. 76, 152, 159"—citing in support of this position *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, *Smith v. Alabama*, 124 U. S. 465, 476, 8 Sup. Ct. 564, 31 L. Ed. 508, *Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, *Railway v. Solan*, 169 U. S. 133-137, 18 Sup. Ct. 289, 42 L. Ed. 688, and other authorities, and quoting from the opinion of Mr. Justice Matthews, in *Smith v. Alabama*, supra, as follows: "It is among these laws of the states therefore that we find provisions concerning the rights and duties of the common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either

prevented or redressed. A carrier, exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts; or, if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the state. This, indeed, was the very point decided in *Sherlock v. Alling* (93 U. S. 99, 23 L. Ed. 819), above cited." The court, then referred to the cases cited and relied upon by defendant, as follows: "We were referred by counsel to cases of *Railway v. Murphey*, 196 U. S. 195, 25 Sup. Ct. 218, 49 L. Ed. 444, *Railway v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, and *McNeill v. Railway*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; but we do not think that these decisions are in conflict with the views we have held to be controlling in the case before us. As we understand them, they all proceed upon the idea, not that the regulations in question were void because they affected in some way interstate commerce, but because they interfered directly with intercourse and traffic between states and were of a character that imposed and undoubted and distinct burden upon them."

As showing that this is a correct deduction from these authorities, in *McNeill's Case*, supra, Mr. Justice White, for the court, said: "Without at all questioning the right of the state of North Carolina in the exercise of its police authority to confer upon an administrative agency power to make reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subjects made by the state or under its authority, which directly burdens interstate commerce, is a regulation of such commerce and repugnant to the Constitution of the United States." In *Mayes' Case*, supra, Associate Justice Brown, among other things, said: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state and

amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather." And in *Railway v. Murphey*, supra, Mr. Justice Peckham, delivering the opinion, said: "The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce. It prevents a valid contract of exemption from taking effect, except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet, if the information is not obtained, the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it." In *Garrison v. Railway* (at the present term) 64 S. E. 578, the court has held, Associate Justice Connor delivering the opinion, that the statute in question here is not an arbitrary requirement permitting no defense, but that, "when the carrier shows the existence of conditions for which it is not responsible, preventing and rendering impossible the discharge of the duty, it will not be liable for the penalty," and quotes with approval from an opinion by Ashe, J., as follows: "When the facts show that by force and circumstances for which it is in no way responsible the carrier was disabled from performing the duty imposed by the statute, it would be unjust to punish it for failure to comply with its requirements." To like effect is *Whitehead v. Railroad*, 87 N. C. 255; *Keeter v. Railway*, 86 N. C. 346; *Branch's Case*, 77 N. C. 347.

The statute therefore does not come under the condemnation expressed in these decisions of the United States Supreme Court; but it is always open to defendant to offer satisfactory excuse and explanation for an apparent default, and this opportunity was given the defendant on the trial of the present case. Since the decision of *Morris-Scarboro-Moffitt Co. v. Express Co.* was rendered, the Supreme Court of the United States, the final authority of these matters, has held on a question relevant to this inquiry: "That,

notwithstanding the creation of the Interstate Commerce Commission and the delegation to it by Congress of the control of certain matters, a state may, in the absence of express action by Congress or by such commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce." This principle was announced and sustained in *Railway v. Flour Mills*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. —, a case which involved the right of the court to compel a railroad, or a common carrier, to place cars on a siding which had been prepared for the purpose and for the benefit and convenience of a flouring mill, engaged in making shipments of interstate commerce. So far as we have been enabled to discover, there has been no act of Congress or regulation of the Interstate Commerce Commission, which undertakes to deal directly with this question to the reception of freight for shipment—certainly none in reference to its safety and prompt dispatch—and, until this is done, we are of opinion that the matter comes within the principle of the numerous authorities referred to, and continues to be a subject for proper and reasonable state regulation.

It does not appear from the testimony that the defendant has not filed its schedule of rates with the Interstate Commerce Commission to Scottville, Tenn., for it can hardly be seriously contended that the difference between Scottville, Tenn., and Scottsville, Tenn., is of the substance. The presumption is that the company has complied with the law, and, if it were otherwise, we are of opinion that the act of Congress, and the orders of the commission made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and does not constitute such interfering action. See *Harrell v. Railway*, 144 N. C. 540, 541, 57 S. E. 383.

Nor do we think that the statute imposes any burden upon interstate commerce as applied to the facts of this particular case. While one of defendant's witnesses stated in his examination in chief that the Knoxville & Augusta Road was operated as an independent line, the witness evidently could have meant only that a separate organization was maintained for purposes of local management and control. This is no doubt required by its charter, or the general statutes of the state of Tennessee; but it is also conclusively established from the statement of the witness on his cross-examination that the Knoxville & Augusta Road is operated by defendant company, all the money being sent to its treasurer, the reports being made to its auditor, and all salaries of all employees being paid by the defendant. This being true, the agent of the defendant should have known of the placing of this siding and the rate thereto, or should have ascertained the same in the exercise of reasonable care, and this was the only burden which was

placed upon the defendant, and any fact or circumstance which might have tended to indicate hardship or oppression would seem to be effaced by the fact admitted that in two days after the coming of a new man, and while the former agent was still in charge, the goods were received and shipped, and reached their destination in due course without further annoyance or delay. Nor is there any merit in the suggestion that the plaintiffs suffered no pecuniary injury by reason of the delay. Speaking to this question, in *Summers v. Railroad*, 138 N. C. 298, 50 S. E. 715, this court said: "These penalties are not given solely on the idea of making pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment."

We are of opinion: That, in the absence of inhibitive congressional legislation, or of interfering action on the part of the Interstate Commerce Commission, the statute in question is a valid regulation in direct and reasonable enforcement of the duties incumbent on defendant as a common carrier; that on the trial the defendant was afforded full opportunity to make defenses, and the facts presented disclose no substantial excuse or explanation for its default; that no error appears in the record which gives the defendant any just ground of complaint. And the judgment against it is therefore affirmed.

No error.

BROWN, J. (dissenting). This is a civil action to recover a penalty under section 2631 of the Revisal of 1905 for failure to receive a car load of shingles to be shipped from Rutherfordton, N. C., to Scottsville, Tenn. The following issue was submitted: "Is the defendant indebted to the plaintiff for the unlawful failure to receive a car load of shingles to be transported to Scottsville, Tenn., as alleged? If so, in what sum?" Answer: "\$350."

1. I am of opinion that upon the entire evidence there was but one tender, and that in no event can a penalty for more than one day be recovered. When the agent of defendant refused to issue the bill of lading, and gave his reasons for it, then and there plaintiff told the agent that, when he found what the freight rate was, to let him know, and he would prepay it; agent replying that when he got instructions how to ship he would issue bill of lading and ship shingles. Plaintiff never had a further conversation with the defendant's agent from the 2d day of July, 1906, to the 17th of July, 1906, when one Castle came to plaintiff's place of business to inquire about the car. Plaintiff further testified that he never lost a cent by the shipment being delayed. On July 17th Castle came to relieve defendant's agent, Gunnels, and went in to see Reid about the

car of shingles. Reld showed him correspondence that he had received from James Haddock relative to the delay of the shipment of shingles, stating that Scottsville was on the Knoxville & Augusta Railroad. In the meantime the freight office at Columbia, S. C., was also trying to locate Scottsville, and received a wire from defendant's agent at Knoxville that Scottsville was a siding on the Knoxville & Augusta Railroad a few miles out from Knoxville. The information was forwarded to Gunnels on the 19th of July, and the bill of lading was issued and the car was moved that day. The standard railroad guides and directories do not show a Scottsville or a Scottville anywhere in Tennessee. These undisputed facts show that there was only one tender, and that the plaintiff made no further tender, but acquiesced in the delay incident to locating Scottsville, the place of destination, admitted to be not on defendant's lines of railway. This puts the case, in my opinion, squarely on "all fours" with the opinion of this court at this term in *Cotton Mills v. Railway*.

2. I think this transaction from its inception related solely to interstate commerce, and that the state statute cannot apply. The car was ordered for the purpose of shipping shingles to a point in Tennessee. The act of furnishing cars for such shipments was held to be interstate commerce by the Supreme Court of the United States in *Houston & Texas Pacific Railroad v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, because it was one of the steps necessary to the culmination of the transaction. The car in this case had been duly furnished and was loaded with the shingles or articles to be shipped. The next step to complete the transfer of the title and the exchange of commodities was for the shipper to give shipping instructions and receive from the railroad company a bill of lading. The shipper claims that he gave instructions to ship to James Haddock at Scottsville, Tenn. Thus making it an interstate transaction. The statute in question, and under which this action is brought, undertakes to regulate the terms and conditions upon which the bill of lading shall be issued by the carrier. The bill of lading demanded was not to a point in this state, but to a point in Tennessee. The contract which the defendant was required to enter into was a contract of carriage of freight from one state to another. Such contracts not only partake entirely of the character of interstate commerce, but they are actually regulated by the Interstate Commerce Commission under the authority of federal law. Congress has legislated on the subject and made regulations in reference to the publication of rates for interstate commerce and otherwise taken control through the commission of all matters relating to the shipment of freight from one state to another. Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1907, p. 897). This section

of the interstate commerce act provides: "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier, have been filed and published in accordance with this act; nor shall any carrier charge or demand or collect or receive, a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff, filed and in effect at the time." It is undisputed that the defendant company had never filed with the Interstate Commerce Commission and had never published a tariff to Scottsville or Scottville, Tenn., for the reason that its officials had never heard of any such place. This appears in the plaintiff's own testimony. It turns out upon investigation that Scottsville is not and never has been a shipping point upon any railway, but that it is only a flag station and siding on the Knoxville & Augusta Railroad and that all freight destined to it is billed to Rockford, Tenn. Thus it appears that, if defendant's agent had issued the bill of lading to Scottsville and fixed the freight rates thereto and received the money, he would have violated the act of Congress which I have referred to, and would have subjected the defendant to prosecution by the federal government. Surely the defendant cannot be penalized by a state for not issuing a bill of lading in violation of the act of Congress in a matter over which the latter has exclusive control.

3. It is admitted that the plaintiff, when he tendered the car, demanded a bill of lading to a point in Tennessee not on defendant's system. The evidence is undisputed that defendant's agent consulted Standard railway guides and endeavored to locate Scottsville and were delayed in finding it for the reason that all freight destined to Scottsville was waybilled or consigned to Rockford; all freight originating at Scottsville was waybilled or consigned from Rockford. There is a siding at Scottsville, put there for the accommodation of a brick plant, and up to the time of this shipment the Knoxville & Augusta Railroad, upon whose line Scottsville is situated, had never received any shipments for that siding. Upon these facts it is contended that defendant's agent was required to receive the car eo instanti, issue bill of lading to Scottsville (the first and only shipment from any point), enter into a contract for the carriage of the shingles to this point, and state the freight rate, when none had been established. The mere statement of the contention I think demonstrates its unreasonableness.

A common carrier may contract to deliver freight to a point beyond its own lines, but it cannot be compelled to do so. Hutchinson

on Carriers, § 145, and cases cited in notes. The liability of the carrier beyond the terminus of its own line must be based on contract, and no authority has been shown, and none exists so far as my researches have discovered, to the effect that a state can compel an interstate carrier to enter into such a contract and give a through bill of lading to points in another state beyond its own lines and penalize the carrier for its refusal.

The condition of the tender of the car was that the defendant should contract to deliver it to a point in another state beyond its own line. It necessarily follows that, if defendant cannot be compelled by the state to enter into such a contract against its will, it cannot be penalized for refusing to receive the car. A defense that may be interposed against the shipper for damages may be interposed in a suit for the penalty. *Garrison v. Railway* (at this term) 64 S. E. 578; *Hardware Co. v. Railway* (at this term) 64 S. E. 873; *Railroad v. Mayes*, supra; *McNeill v. Railroad*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142.

For the reasons given, I think the defendant's motion to nonsuit should have been allowed.

WALKER, J., concurs in dissenting opinion.

(150 N. C. 748)

METZ v. CITY OF ASHEVILLE.

(Supreme Court of North Carolina. May 25, 1909.)

1. MUNICIPAL CORPORATIONS (§ 745½*) — TORTS — EXERCISE OF CORPORATE POWERS — UNDERTAKINGS FOR PECUNIARY BENEFIT.

Cities are liable for damage caused by the torts of their officers while exercising their corporate powers for their own advantage.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.*]

2. MUNICIPAL CORPORATIONS (§ 745½*) — TORTS — EXERCISE OF GOVERNMENTAL POWERS.

Cities are not liable for damage caused by the torts of their officers while exercising judicial, discretionary, or legislative authority conferred by their charters, in the absence of statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1568; Dec. Dig. § 745½.*]

3. MUNICIPAL CORPORATIONS (§ 745½*) — TORTS — DUTIES IMPOSED FOR PUBLIC BENEFIT.

Cities are not liable for damage caused by the torts of their officers while discharging duties imposed upon them solely for the public benefit, in the absence of a statute imposing such liability.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.*]

4. MUNICIPAL CORPORATIONS (§ 745½*) — TORTS — DAMAGE TO PROPERTY — LIABILITY OF CITY.

While a municipality is not liable for personal injuries resulting from the exercise of its governmental powers, it is liable for damage to property caused by the torts of its officers in

discharging its governmental functions, under the doctrine of respondeat superior, as not even government can interfere with vested rights except for a public purpose and upon making compensation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1568; Dec. Dig. § 745½.*]

5. MUNICIPAL CORPORATIONS (§ 733*) — TORTS — SEWERS — PERSONAL INJURIES.

The maintenance of a free public sewer system by a city is an exercise of its police power for the public benefit, so that a city would not be liable for the death of a citizen from illness caused by the pollution of a stream by the sewer which emptied into it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

Appeal from Superior Court, Buncombe County; Peebles, Judge.

Action by J. H. Metz, administrator, against the City of Asheville. From a judgment of nonsuit, plaintiff appeals. Affirmed.

At the conclusion of the evidence, the court intimated an opinion that upon the entire evidence the defendant, as matter of law, was not liable, and that he would so instruct the jury. In deference to this intimation of opinion, the plaintiff submitted to nonsuit and appealed.

Chas. E. Jones, for appellant. H. B. Carter and Davidson, Bourne & Parker, for appellee.

BROWN, J. Plaintiff sues to recover damages for the death of his intestate, caused by typhoid fever communicated by the condition of Reed branch, a small stream emptying into the French Broad river, and which ran near the house where said intestate resided. The defendant under its charter maintained a free public sewerage system, the mouth of which emptied into Reed branch a short distance beyond the city limits above the house where intestate resided. It is admitted that, with full knowledge of the conditions necessarily caused by the constant discharge of the sewerage of the city into the branch, the intestate rented the house and moved into it in February, 1905, and died in August following, of typhoid fever, although his wife and children did not take it. There is evidence tending to show that the fever was caused by the sewerage in the branch. It is contended that the sewer system should have emptied into the French Broad river, and that emptying it into Reed branch created a nuisance for which defendant is liable.

Whatever may have been held by some other courts, it is plain that, under the previous decisions of this court, the opinion of his honor is well founded. The principle upon which our decisions have been based is clearly stated by the present Chief Justice, speaking for a unanimous court in *McIlhenny v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470: "The law may, on a review of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes.
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the authorities which are uniform, be thus stated: When cities are acting in their corporate capacity or in the exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents; but where they are exercising the judicial, discretionary, or legislative authority conferred by their charters, or are discharging the duty imposed solely for the public benefit, they are not liable for the torts or negligence of their officers, unless there is some statute which subjects them to liability therefor." *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; *Pritchard v. Commissioners*, 126 N. C. 908, 36 S. E. 353, 78 Am. St. Rep. 679; *Hill v. Commissioners*, 72 N. C. 55, 21 Am. Rep. 451; *Coley v. Statesville*, 121 N. C. 316, 28 S. E. 482. The same principles are recognized and set forth in an elaborate opinion by Mr. Justice Walker in *Hull v. Roxboro*, 142 N. C. 453, 55 S. E. 351, 12 L. R. A. (N. S.) 638. See, also, *Peterson v. Wilmington*, 130 N. C. 77, 40 S. E. 853, 56 L. R. A. 959. The theory upon which municipalities are exempted from liability in cases like this is that, in establishing a free sewerage system for the public benefit, it is exercising its police powers for the public good and is discharging a governmental function, and, as expressed by the Supreme Court of Illinois: "It is a familiar rule of law, supported by a long line of well-considered cases, that a city in the performance of its police regulations cannot commit a wrong through its officers in such a way as to render it liable for a tort." *Craig v. Charleston*, 180 Ill. 154, 54 N. E. 184; *Dillon, Mun. Corp.* (4th Ed.) § 975. The distinction between cases in which a power is conferred upon a municipality for private purposes and those where such power has relation to public purposes only, and of the liability or nonliability of the municipality therein, is thus aptly and clearly stated in 1 *Smith's Modern Law of Municipal Corp.* § 780: "When power conferred has relation to public purposes and for the public good, it is to be classified as governmental in its nature and appertains to the corporation in its political capacity. But when it relates to the accomplishment of private purposes in which the public is only indirectly concerned, it is private in its nature, and the municipality in respect to its exercise is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation."

Recognizing this well-defined distinction in the liability of municipal corporations, it is held that, where by statute it is made the duty of the city to remove garbage, it is a governmental function, and the city is not liable for the manner of its discharge. *Davidson v. Mayor, etc.*, 24 Misc. Rep. 560, 54 N. Y. Supp. 51. So a city is held not to be liable

for permitting its hydrants to become clogged, since the neglect is in the discharge of a public governmental function. *Miller v. Minneapolis*, 75 Minn. 181, 77 N. W. 788. Therefore a city is not liable for damages of any sort arising from the negligence of its fire department. *Irvine v. Chattanooga*, 101 Tenn. 291, 47 S. W. 419. Nor in the performance of governmental duties generally. *Bartlett v. Clarksburg*, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817; *Snyder v. Lexington (Ky.)* 49 S. W. 765; *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64. Applying this same principle, the town of Greenville was exempted from liability for damages for illness caused by a foul condition of its public sewer; this court holding that: "Where a drain constructed by a municipal corporation through its negligence becomes choked with refuse and overflows the premises of a landowner, the corporation is liable only for damages to the property, not for bills of physicians, increase in expenses of his family, loss of time or mental anguish, the result of illness caused by the condition of the drain." *Williams v. Greenville*, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207, 89 Am. St. Rep. 860. The reason of this distinction in regard to property seems to lie in the fact of ownership, vested rights, which no one can invade, not even the government, unless for public purposes, and then only by paying the owner for it. Where, in the discharge of its governmental functions and police powers, the officers of a municipality invade property rights, the doctrine of respondeat superior applies, and the corporation is liable for their acts.

The identical question presented on this appeal was decided by the Court of Appeals of New York in *Hughes v. City of Auburn*, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636, where it is held: "(1) A city is not liable in damages for disease suffered by an individual in consequence of the neglect of the city authorities to observe proper sanitary precautions in the construction and maintenance of a sewer system. * * * (3) The statutory right of action for damages by reason of death caused by wrongful act, neglect, or default does not extend to an action against a city by the representatives of one who dies from disease superinduced by the neglect of sanitary precautions on the part of the public authorities in the construction or maintenance of a sewer system." So it was held by the Massachusetts court that, where a private party sued a city for personal damages arising from the creation of a nuisance by the city upon his premises in constructing a sewer system with so narrow an outlet that the sewage was set back into plaintiff's cellar through a drain which he had constructed by permission of the city to connect with the public sewer, the action could not be maintained. *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201. See, also, *Markey v. Queens County*, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46;

Hughes v. Monroe, 147 N. Y. 49, 41 N. E. 407, 89 L. R. A. 33; *Kavanagh v. Barber*, 181 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. The village of Keeseville, as authorized by statute, maintained, by a public charge in the nature of taxation, a waterworks system which it used for the purpose of extinguishing fires. The Court of Appeals of New York held that the corporation was not liable for damages arising from the negligence of its agents in operating the waterworks at a fire. The court holds that it was an exercise of the police power of the village for the public benefit for the purpose of extinguishing fires, and remarks "that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained." *Insurance Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 80 L. R. A. 680, 51 Am. St. Rep. 667. The distinction between the exercise of municipal corporate functions for the public benefit and those undertaken by such corporations for pecuniary profit is clearly recognized by Mr. Justice Connors in *Fisher v. New Bern*, 140 N. C. 508, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857, a case relied upon by plaintiffs. In that case it appeared that the city of New Bern, through a commissioner created by law, operated an electric light plant for profit and furnished lights only to those who paid for them. From negligence in permitting a live wire to remain on the ground a person was killed. The court held that operating an electric light plant for profit for the benefit of those who paid for the service was not an exercise of police power, nor a governmental function, and that the city was liable for the negligence of its agents.

It must be admitted that the city of Asheville was exercising its police power when it established a free public sewer system for the use of which no charge is made, for the benefit of its citizens. Certainly nothing is more necessary to the health of a city than that its filth should be removed and its area well drained. That the establishment of a public sewer system is an exercise of a governmental function is recognized by all the authorities I have quoted. The serious consequences of holding a municipality liable for disease arising from nuisances of this kind is portrayed by the Court of Appeals of New York in an opinion of marked ability in the case of *Hughes v. Auburn*, supra: "The right of the plaintiff to maintain this action depends upon the right of the deceased herself to maintain it had she survived the sickness resulting in her death, and this suggests the inquiry whether an individual, who has suffered from disease, superinduced by the neglect of the authorities of a city or village, to observe sanitary laws in the construction or maintenance of a system of sewerage, can recover damages for the injury from the municipali-

ty. If one member of a family can, so can every member; and, if one family may, so may every family, and every person who can give proof enough to carry the case to the jury. It matters not what the disease may be or the cause, so long as it may be traced by proof to some act or neglect on the part of the municipal authorities. There are few communities where places or conditions may not be found that generate disease, and, if the municipality may be charged with the results traceable to these conditions, it is indeed subject to a liability more serious and far-reaching than has heretofore been recognized."

The judgment of the superior court is affirmed.

(150 N. C. 632)

MURCHISON NAT. BANK v. DUNN OIL MILLS CO. et al.

(Supreme Court of North Carolina. May 19, 1909.)

1. JURY (§ 88*)—COMPETENCY—INTEREST.

That a juror is a stockholder in plaintiff corporation, though not enumerated in the statute as ground for challenge, makes him incompetent because of interest.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 409, 410; Dec. Dig. § 88.*]

2. APPEAL AND ERROR (§ 877*)—REVIEW—JOINT OR SEPARATE ASSIGNMENTS.

Error in overruling the joint challenge of defendants to a jury may be availed of by the only defendant appealing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.*]

3. APPEAL AND ERROR (§ 1103*)—REVERSAL—NEW TRIAL.

Where, in an action on a note against a corporation and an officer thereof, the liability of one depended largely on the liability of the other, and vice versa, and plaintiff recovered against the corporation, but not against the officer, and plaintiff and the corporation appealed, the reversal of the judgment against defendant corporation requires a new trial against both defendants, without passing upon the errors assigned on plaintiff's appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1103.*]

Appeal from Superior Court, New Hanover County; Lyon, Judge.

Action by the Murchison National Bank against the Dunn Oil Mills Company and another. From the judgment defendant company and plaintiff appeal. Reversed, and new trial ordered.

E. K. Bryan and Rountree & Carr, for plaintiff. J. D. Bellamy & Son, J. C. Clifford, Woodus Keelum, and Godwin & Townsend, for defendants.

WALKER, J. This action was brought by the plaintiff to recover the amount alleged to be due upon a promissory note executed by the Dunn Cotton Oil Mills Company to the Merchants' & Farmers' Bank of Dunn, N. C., and by the latter bank deposited as collateral security for its note to the plaintiff.

The plaintiff sued the Dunn Oil Mills Company and J. D. Barnes jointly, Barnes having signed the note of the oil mills company in its name as its president; whereas, the by-laws of the oil mills company required that the note should also be signed by its secretary and treasurer, which was not done, and Barnes notified E. F. Young, president of the Merchants' & Farmers' Bank of Dunn, N. C., of such requirement, and that the note would not be valid without the signature of the secretary and treasurer. The plaintiff alleged that it acquired the note in good faith before maturity and without any notice of the provision of the by-law of the oil mills company. It therefore sues the oil mills company upon the ground that it is liable upon the note, as Barnes had apparent authority to execute it and joins Barnes as a defendant upon the ground that, if the oil mills company is not liable, he has falsely represented that he had authority to execute the note and is therefore liable to the plaintiff by reason of the fraud or as himself the maker of the note. This briefly states the facts, so far as is necessary for an understanding of the question presented for our decision. The court rendered judgment for the plaintiff against the oil mills company for \$5,000 and ordered a nonsuit as to the defendant J. D. Barnes. The oil mills company excepted and appealed, and the plaintiff excepted to the judgment of nonsuit in favor of J. D. Barnes and appealed.

The defendants, having exhausted their peremptory challenges, objected to a juror, Samuel Bear, who admitted that he is a stockholder in the plaintiff bank. The court, upon evidence, found that, notwithstanding the fact of his being a stockholder, he was "a fair and unbiased juror," and overruled the challenge. In this ruling we think there was error. It is very true the cause of challenge is not one of those specified in the statute, but they are merely cumulative, and it was not the intention of the Legislature to repeal the fundamental principle of the common law forbidding a person to sit in judgment when his own interests are involved. Whether there are any circumstances which will justify a departure from this elementary rule by reason of the necessity of the case we need not consider, as no such necessity arose in the trial of the present action. The only question presented is: Was the juror competent to sit in the case? He was a stockholder of the plaintiff bank and therefore had a direct pecuniary interest in the result of the trial. This cannot well be questioned. He was therefore made a judge in his own cause without any sufficient reason in law to sustain the ruling of the court. Whether he was actually biased or not is immaterial. Suppose a plaintiff in a case is called as a juror, could we hesitate to declare his incompetency? The difference between such a case and the one before us, where the juror is the holder of stock in the plaintiff bank,

is one that relates, not to the fact, but to the degree of interest. We cannot do better than quote the language of Judge Cooley, when discussing this question, but it must not be understood that we concur, for it is not necessary that we should do so, in all that he says. The strong language used by him but shows how closely the courts have adhered to the common-law rule and how far they have gone in its application. In Cooley on Const. Limitations (6th Ed.) pp. 506, 507, it is said: "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself, for *jura naturæ sunt immutabilia, and they are leges legum.*' This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercises. It is not left to the discretion of a judge to decide whether he shall act or not. All his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. Nor is it essential that the judge be a party named in the record. If the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damaged by the judgment, he is equally excluded as if he were the party named. Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice Chancellor had rendered a decree, the House of Lords reversed the decree on this ground; Lord Campbell observing: 'It is of the last importance that the maxim that "no man is to be a judge in his own cause" should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.' 'We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.'"

The cases cited by him, and others also in point, show that a corporator or stockholder is not a competent juror in a suit to which the corporation is a party. The principle as applicable to a stockholder is clearly and

strongly stated in *Page v. Railroad*, 21 N. H. 438, as follows: "The juror, who owned stock in the Concord & Claremont Road, was therefore, by virtue of this contract, directly interested in the result of the cause, which he assisted to try. His interest was probably very trifling in amount, and may not have influenced his judgment at all on the question of damages; but the principle is extremely well settled that any, even the smallest, degree of interest in the question pending, is a decisive objection to a juror"—citing *Hesketh v. Braiddock*, 3 Burrows, 1856; *Hawkes v. Kennebeck*, 7 Mass. 464; *Wood v. Stoddard*, 2 Johns. (N. Y.) 194. The authorities are quite uniform to the effect that a stockholder is not a competent juror, if the corporation, in which he is a stockholder, is a party to the action. *Railroad v. Howard*, 20 Mich. 18; *Fleeson v. Savage*, 3 Nev. 157; *Silvis v. Ely*, 8 Watts & S. (Pa.) 420; *Essex v. McPherson*, 64 Ill. 349; *Railroad v. Hart*, 60 Ga. 550. See, also, *Zimmerman v. State*, 115 Ind. 129, 17 N. E. 258; *Railway v. Barnes*, 40 Mich. 383; *Dimes v. Grand Junction Canal*, 3 H. L. Cases, 759. It was held that, by the common law, a stockholder, on account of his interest in the corporation, could not be a competent witness for it. *Porter v. Bank*, 19 Vt. 410; *McAuley v. York Co.*, 6 Cal. 80. In *Silvis v. Ely*, supra, *Rogers, J.*, said: "The first error (assigned) is in rejecting a person because he was a stockholder and director in the Farmers' Bank of Reading. Interest is a principal cause of challenge, and for that reason the juror was incompetent in a cause in which the bank had an interest." In this case the defendants joined in the challenge, as they had the right to do, and the oil company can avail itself, on this appeal, of the error of the court in overruling the challenge. It has been compelled to try the case with a juror in the box to whom it had objected and who was incompetent to serve. The erroneous ruling of the judge as to the competency of the juror compels us to order a new trial in the appeal of the oil company.

New trial.

BROWN, J., did not sit.

Plaintiff's Appeal.

PER CURIAM. While a nonsuit was ordered as to the defendant J. D. Barnes, we award a new trial in this appeal, without passing upon the errors assigned, because the liability of the oil company depends to a great extent upon the liability of Barnes, and vice versa. For this reason the case must be tried again as to both defendants, upon proper issues, and with correct instructions as to the liability of the defendants, or either of them, according as the facts may appear.

New trial.

BROWN, J., did not sit.

(150 N. C. 718)

MURCHISON NAT. BANK v. DUNN OIL MILLS CO.

(Supreme Court of North Carolina. May 21, 1909.)

1. BANKS AND BANKING (§§ 156, 159*)—DRAFTS—COLLECTIONS—STOPPING PAYMENT.

As against the payee of a draft, a bank which is merely the drawer's agent for collection, as shown by its uniform custom, while giving him credit for the amount of such drafts, and allowing him to draw against the same, to charge them back to him if they are not paid, he has the right to arrest payment of the draft.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. §§ 156, 159.*]

2. BILLS AND NOTES (§ 363*)—BONA FIDE PURCHASER.

Though the payee of a draft, a bank, is merely the drawer's agent for collection, yet, this not appearing on the face of the draft, the drawer may not arrest payment thereof as against one who in due course becomes purchaser thereof for value and without notice, and having done so is liable to such purchaser.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 363.*]

3. BILLS AND NOTES (§ 353*)—BONA FIDE PURCHASER—VALUE.

By express provision of Revisal 1905, § 2173, in regard to negotiable instruments, an existing indebtedness constitutes value, so that such a consideration makes a purchaser a holder for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 898-903½, 906, 907; Dec. Dig. § 353.*]

Appeal from Superior Court, New Hanover County; Lyon, Judge.

Action by the Murchison National Bank against the Dunn Oil Mills Company. Judgment for plaintiff. Defendant appeals. Affirmed.

There was evidence tending to show: That on February 4, 1904, defendant company drew a draft in words and figures as follows: "\$286.00. Dunn, N. C., February 4, 1904. Dunn Oil Mills Company. Three days sight pay to the order of Merchants' & Farmers' Bank, Dunn, N. C., two hundred and eighty-six and 00-100 dollars. Invoice No. 1072. January 13, 1904. Value received and charge the same to account of Dunn Oil Mills Company. McD. Holliday, Treasurer. To C. R. Adams & Co., Four Oaks, N. C. No. 576." Said draft contained the following added words and indorsement across the end of face: "No protest. Tear this off before presenting." Also on the face stamped thereon the following words: "Cash item. Do not hold. If not paid on presentation return at once." On the back thereof: "Pay to the order of any bank or banker. Merchants' & Farmers' Bank, Dunn, N. C. V. L. Stephens, Cashier." The added entries on the face of the paper were made by plaintiff bank after receipt of same from the Dunn Bank. That this paper was drawn pursuant to a custom and understanding between defendant company and the Merchants' & Farmers' Bank of Dunn that amount was to be entered subject to check,

and charged back in case same was not paid or collected. That this draft, indorsed as stated, was forwarded to plaintiff bank on February 4th, and entered as cash item to credit of Merchants' & Farmers' Bank, subject to check.

There was evidence, on the part of plaintiff, tending to show that, under this indorsement, the plaintiff bank became the owner outright of the draft, and the holder of same in due course. There was also evidence, on the part of defendant, tending to show that the draft was forwarded to plaintiff bank for collection, and under an arrangement that same was to be charged back against the Merchants' Bank in case same was paid or collected. The evidence further tends to show: That the Merchants' & Farmers' Bank, the original payee of the draft, failed on or about February 9, 1904, owing the defendant company a large balance, over \$6,000, and that at the time this indorsement to plaintiff bank was made, and during the entire period covered by this transaction, the Merchants' & Farmers' Bank was largely indebted to plaintiff bank, to the amount of some thousand dollars, and was so indebted at the time of the failure; that C. R. Adams & Co., the drawee, was indebted to the defendant to the amount of the draft, and payment of same was stopped by defendant after failure of Merchants' & Farmers' Bank, and amount was recharged to Adams on May 29, 1904.

On issues submitted, the jury rendered the following verdict: "(1) Is plaintiff the owner of the draft sued upon? Answer: Yes. (2) What amount, if any, is the defendant indebted to plaintiff on account of draft sued on? Answer: \$286." There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

J. C. Clifford, J. D. Bellamy & Son, Woodus Kellum, and Godwin & Townsend, for appellant. Rountree & Carr and E. K. Bryan, for appellee.

HOKE, J. (after stating the facts as above). Where a draft or bill is transferred to a bank by restrictive indorsement as "for deposit" or "for collection," the instrument is taken and held by the bank as agent for the indorser and for the purpose indicated and subject to the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for like purpose and affected by the restriction. *Boykin v. Bank*, 118 N. C. 586, 24 S. E. 357; *Bank v. Hubble*, 117 N. Y. 384, 22 N. E. 1081, 7 L. R. A. 852, 15 Am. St. Rep. 515; *Balback v. Frelinghuysen* (C. C.) 15 Fed. 875; *Tyson & Rawles v. Bank*, 77 Md. 412, 28 Atl. 520, 23 L. R. A. 161. And the drawer of a draft, who ordinarily stands towards subsequent parties as a general indorser, may by appropriate words appearing upon the paper, or by agreement

dehors the instrument, and as to persons affected with notice, likewise restrict his obligation, and retain the right to arrest payment. *Eaton & Gilbert on Commercial Paper*, p. 405, and note 7. And this right of the indorser, or drawer, is not affected by the fact that the amount of such drafts are usually entered subject to check, where it is shown to be the custom or agreement to charge back such amount against the depositor in case the paper is not paid on presentation, or deduct the same from the next deposit. This doctrine is illustrated and well sustained in the opinion of this court in *Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365, in which it was held as follows: "(1) A negotiable instrument deposited in a bank, indorsed 'for collection,' remains the property of the depositor, and the same rule holds when the written indorsement appears unrestricted; but, as a matter of fact (evidenced by express collateral agreement or a tacit understanding to be reasonably inferred from the course of dealing between the bank and its depositor), the instrument is taken by the bank, not as a purchase, but for collection simply. (2) The fact that a bank has given a depositor credit for the amount of a negotiable instrument, regularly indorsed, is not conclusive evidence that the bank had purchased the paper and was not a mere bailee thereof. (3) When a bank habitually credits a depositor's account with negotiable instruments indorsed to it by depositor, giving permission to the depositor to draw against such credits, but charges up to the depositor all such papers as are not paid on presentation, or deducts such items from the next deposit, such a course of dealing stamps the transaction, with reference to the title to instruments so indorsed, as being unmistakably a bailment for collection simply, and no greater title is vested in the bank."

Where the restrictive nature of the indorsement appears by proper entry upon the paper, this right of the drawer or indorser, so clearly stated in this opinion, can be made effective in the hands of any holder, and through any number of subsequent indorsements for, as said by Knowlton, J., in *Freemans Bank v. Natural Tube Works*, 151 Mass. 417, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; "An unbroken succession of such indorsements would indicate that each indorser was acting by direction of the next preceding indorser, who was himself an agent of the owner for whom the collection was to be made." And where it arises by reason of facts dehors the instrument, it can be made available as between the original parties and subsequent indorsees who take for collection only, or who take with notice of the original restrictive agreement, unless and until the instrument is acquired by a holder in due course. Where, however, the rights of a restrictive indorsee or drawee of a draft must rest in facts dehors the instrument, and the draft has been drawn in the usual form for

circulation as a negotiable instrument, and has been acquired by a "holder in due course," such drawee or indorsee may be held responsible to such holder, for though his agent for collection or deposit, as the case may be, has exceeded his power, he has acted within the apparent scope of his authority, and this on the recognized principle "that, when one of two persons must suffer by the fraud or misconduct of another, he first who reposes the confidence or by his negligent conduct makes it possible for the loss to occur must bear the loss." *Rollins v. Ebbs*, 138 N. C. 140, 50 S. E. 577; *Railroad v. Kitchin*, 91 N. C. 39; *Vass v. Riddick*, 89 N. C. 6. And see *Ditch v. Bank of Baltimore*, 79 Md. 192, 29 Atl. 72, 138, 23 L. R. A. 164, 47 Am. St. Rep. 375.

In the case before us, and under the principles stated, the right of defendant to arrest the payment of this draft as against the Merchants' & Farmers' Bank of Dunn is clear. There is also abundant testimony on the part of defendant tending to establish such right against the plaintiff bank, the Murchison National Bank of Wilmington. There was evidence, however, on the part of plaintiff, tending to show that plaintiff bank acquired and holds this draft as purchaser for value and without notice; the existing indebtedness constituting value by express provision of statute. *Revisal 1905*, § 2173; *Manufacturing Co. v. Summers*, 143 N. C. 103, 55 S. E. 522. See evidence of *J. V. Grainger*, *Record*, p. 18. The case then was properly made to depend on the question thus presented—whether plaintiff was the holder of the draft in due course—and this question the jury have resolved in plaintiff's favor. Under a full and comprehensive charge, every position available to defendant on the testimony, and under these authorities, was submitted for consideration, and we find no reversible error in the record.

No error.

BROWN, J., did not sit.

(150 N. C. 738)

ASHEVILLE SUPPLY & FOUNDRY CO. v.
MACHIN et al.

(Supreme Court of North Carolina. May 25,
1900.)

1. APPEAL AND ERROR (§ 263*)—EXCEPTIONS—INSTRUCTIONS — SUFFICIENCY OF EXCEPTIONS.

While it is the better practice to except to an instruction, the propriety of the charge is sufficiently presented by exceptions to the admission of evidence touching the matter to which the instruction relates and by motion for a judgment upon the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1516, 1517; Dec. Dig. § 263.*]

2. ESTOPPEL (§ 75*) — ESTOPPEL IN PAIS — OWNERSHIP OF PROPERTY.

The true owner of personal property may be estopped by his acts and declarations from

asserting his title as against a purchaser from one having no title.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 192-195; Dec. Dig. § 75.*]

3. ATTORNEY AND CLIENT (§ 86*)—AUTHORITY OF ATTORNEY — IMPLIED AUTHORITY — AD-MISSIONS.

Plaintiff's attorney, in an action to recover possession of property, was not authorized to disclaim plaintiff's title to the property at a bankruptcy sale of the property as belonging to one to whom defendant turned it over after plaintiff's judgment for possession was rendered, and hence his declarations were not admissible to affect plaintiff's title.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 156; Dec. Dig. § 86.*]

4. CORPORATIONS (§ 399*) — OFFICERS — AUTHORITY—GENERAL MANAGER.

The authority of the general manager of a corporation depends largely upon the particular facts of each case, considered in view of the general principle that his implied authority is limited to those things which are incidental to the usual corporate business, or to that branch of it intrusted to his management.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1602, 1603; Dec. Dig. § 399.*]

5. CORPORATIONS (§ 422*) — AUTHORITY OF CORPORATE OFFICERS—GENERAL MANAGER.

The general manager of a corporation was not authorized, by virtue of his position, in the absence of any showing of special authority, to disclaim the corporation's right and title to property at a bankruptcy sale of the property as belonging to one to whom defendant turned it over after judgment for possession was rendered for the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1690; Dec. Dig. § 422.*]

6. BANKRUPTCY (§ 268*) — SALES — DUTY OF PURCHASER — OWNERSHIP OF PROPERTY—KNOWLEDGE.

The purchaser at a bankrupt sale must take notice that nothing is sold except the bankrupt's interest.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 377; Dec. Dig. § 268.*]

7. EXECUTION (§ 272*)—NOTICE OF OWNERSHIP—KNOWLEDGE BY PURCHASER.

The purchaser at an execution sale must take notice that nothing is sold except the interest of defendant in execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 781; Dec. Dig. § 272.*]

8. JUDGMENT (§ 181*)—ON MOTION — SUFFICIENCY OF EVIDENCE.

Where, in an action to recover property, there was no evidence that plaintiff had estopped itself from claiming title if improper evidence offered for that purpose was excluded, a motion for a judgment for plaintiff should have been allowed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 343; Dec. Dig. § 181.*]

9. COSTS (§ 264*) — ON APPEAL — COST OF PLEADING.

Where the settlement of a case was necessarily delayed for two years after trial, and the trial judge stated in settling the case that, while he believed the record contained unnecessary evidence, it was impossible to eliminate such evidence in the time allowed to send up the record, and it was impossible for the Supreme Court to separate the unnecessary evidence, a motion to tax the cost of sending up and printing the testimony against appellant on reversal will be denied.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 1004, 1007; Dec. Dig. § 264.*]

10. COSTS (§ 256*) — ON APPEAL — UNNECESSARY MATTER IN RECORD.

Where evidence irrelevant to the exceptions is included in the record on appeal, costs may be awarded against appellant on reversal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by the Asheville Supply & Foundry Company against John Machin and others. From a judgment in part for defendants, plaintiff appeals. Reversed.

The record discloses the following facts, in regard to which there is no controversy: One D. S. Russell was, on and prior to September 21, 1900, the owner of one Junior Westinghouse Engine No. 629, two band wheels, and one 60 H. P. boiler, with the fixtures attached thereto. On or about said date he entered into a contract with the defendants Machin and others, trading under the firm name and style of the "Ottalay Novelty Company," to sell said company said engine, boiler, and machinery at the price of \$450 cash, which amount was to be paid to the plaintiff the Asheville Supply & Foundry Company for the benefit and an account of said Russell. Pursuant to the terms of the contract, the engine and boiler were turned over to the purchasing company to enable it to make certain tests of the boiler. The defendant company failed to comply with its contract or to return the property. The Asheville Supply & Foundry Company and Russell at the November term, 1900, brought this action for the purpose of recovering possession of the property. At the institution of the action, plaintiffs obtained an order for the immediate delivery of the property, and defendant company executed an undertaking with O. D. Revell as surety for its forthcoming, if the final judgment so directed. At the September term, 1901, the defendants having failed to file an answer, judgment was rendered by default against defendants and for plaintiffs adjudging them to be the owners of the property and entitled to the immediate possession thereof. The cause was retained for the purpose of assessing damages for the detention and deterioration. It was further adjudged that, if possession could not, for any reason, be had, the plaintiffs recover of the surety on the undertaking the sum of \$900 to be discharged by the payment of such amount as should be assessed by the jury as the value of the property and damages. The plaintiffs did not immediately take out execution for the delivery of the property. The defendants Machin and Atkins delivered it to the Asheville Woodworking Company, a corporation in which they and said O. D. Revell were stockholders. This corporation was adjudged bankrupt, and the property went into the possession of Mr. Whitson, trustee.

On September 1, 1902, the said trustee sold all of the property of the Asheville Woodworking Company, including the engine and boiler in controversy, at public auction, when it was purchased by W. H. Westall, who took immediate possession. On January 20, 1903, an execution was issued, at the suggestion of Revell, upon the judgment of the Asheville Supply & Foundry Company to the sheriff of Buncombe county, directing him to take possession of the property and deliver it to the plaintiffs. The sheriff, J. H. Reed, took the property into his possession, whereupon W. H. Westall brought an action against the said sheriff, claiming that he was the owner, and demanding possession, and took possession thereof. Defendant Reed filed an answer denying that the plaintiff Westall was the owner of the property. On September 28, 1904, the defendants in the original action, together with O. D. Revell, the surety on the undertaking, filed a supplemental answer, in which they alleged the facts herein set forth, and further alleged: "That the defendants are informed and believe that at said sale of the property of the Asheville Woodworking Company by said trustee in bankruptcy the plaintiffs in said action in person and by attorney appeared at said sale, and a question being raised as to whether or not the said sale by the said trustee in bankruptcy would pass a good title to the property described in the complaint herein, the said plaintiffs and their said attorney publicly, and in the hearing of those persons then and there assembled, announced and declared, in substance, that the plaintiffs in this case had no claim to the property described in the complaint herein, and did not own the same, and did not expect to contest the title thereto, and the purchaser at said bankrupt sale would acquire a good title to said property freed and discharged from all other claims of the plaintiffs in this action. And the defendants further say that they are advised and believe that the said Westall, relying upon the said statements of the plaintiffs and their attorney, bid off the said property of said bankrupt sale in good faith, believing that he would get a good title thereto, and that the said W. H. Westall now claims the title to said property by virtue of said conduct of the plaintiffs at said sale. And these defendants further say that they are advised, informed, and believe that the said plaintiffs, by the reason of their conduct hereinbefore set forth, are estopped to recover the possession of said property or the value thereof from these defendants, since they have, by their conduct, put it beyond the power of the defendants, or O. D. Revell, their surety, to deliver the possession of said property to said plaintiffs. And the defendants further say that they are advised, informed, and believe that said W. H. Westall

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is a necessary party to this action. The defendants further aver that by reason of the acts, conduct, and disclaim of title by the plaintiffs as recited in paragraph 8 above, and their refusal to take possession of said property, O. D. Revell, the surety on the defendants' replevin bond, is forever released and discharged from all liability on said bond."

An order was made making Westall a party to the original action. The two cases were consolidated and brought to trial. The jury found, upon issues submitted to them: "(1) That at the time of the sale of the property in controversy by Whitson, trustee in bankruptcy, it belonged to the plaintiffs Asheville Supply & Foundry Company and D. S. Russell. (2) That Whitson, trustee, at the time of the sale, had no title to the property. (3) That D. S. Russell had been paid for his interest in the property by the Asheville Supply & Foundry Company." The following additional issues in regard to which there was controversy were submitted to the jury: "(5) Were the acts and conduct of the plaintiffs in said original claim and delivery action, or either of them, on the day of the sale by Whitson, trustee, such as to estop him or it from claiming any further title or interest in the boiler and engine sold by Whitson, trustee, at said sale? (6) Did plaintiffs in said original claim and delivery action, or either of them, by his or its conduct or acts on the day of the sale by Whitson, trustee in bankruptcy, by his or its conduct or acts, release the surety, O. D. Revell, from further liability on the replevin bond, executed by said Revell on the 23d day of September, 1900? (7) Did W. H. Westall acquire good title to the said property by his purchase at the sale by Whitson, trustee in bankruptcy, by reason of the waiver or estoppel of said plaintiffs in said original claim and delivery action, or either of them, to thereafter claim said property, to wit, boiler and engine?" At the close of all of the evidence, "Mr. Bourne moves the court for judgment in behalf of the Asheville Supply & Foundry Company and D. S. Russell against Machin and Atkins, and the surety on their bond in claim and delivery, for the sum of \$450, with interest thereon from the date of the seizure of the property." Motion overruled, and exception allowed. This motion was based upon all of the evidence introduced in the case and the record of the consolidated cases. The court instructed the jury that, if they believed the evidence, they should answer the fifth issue, "Yes." The court answered the sixth and the seventh issues, "Yes," upon the coming in of the verdict—to all of which no exception was taken. The court rendered judgment upon the verdict against the plaintiffs, except as to a small amount for damage not material to this appeal. Plaintiff the Asheville Supply & Foundry Company excepted and appealed.

Davidson, Bourne & Parker, for appellant. J. D. Murphey, for appellee Revell. Moore & Rollins, for appellee Westall.

CONNOR, J. (after stating the facts as above). The trial of this case took quite a wide range, and the record comes to this court in a somewhat confused condition. Much of the testimony and a number of the exceptions are rendered immaterial by the elimination of Russell, one of the original plaintiffs, by the verdict of the jury in finding that his interest in the property passed to his coplaintiff, the Asheville Supply & Foundry Company. The jury having found that the title to the property was, prior to the sale by Whitson, trustee, in the Asheville Supply & Foundry Company, the sole question is whether this corporation has lost or been deprived of its title by what occurred at the time of the sale by Whitson, trustee. There is no suggestion that it has sold the property or, by any contract, parted with its title. It is, however, alleged in the supplemental answer and testimony introduced to sustain the contention, that it has lost its title by way of estoppel in pais. His honor, being of the opinion that, if the evidence bearing upon this issue was believed by the jury, they should answer it in the affirmative, so instructed them. The contention of the plaintiff corporation to the contrary, while not presented by an exception to the charge, is presented by exceptions to the admission of the evidence and by motion for judgment upon the whole of the evidence. It would have been better practice to have excepted to the instruction on the fifth issue, but we think its other exceptions fairly present its contentions. The answers to the sixth and seventh issues are, as his honor held, dependent upon the correctness of the instruction upon the fifth. Hence the question upon which the decision of the appeal must rest is whether his honor correctly admitted and interpreted the evidence relevant to the alleged estoppel. It is unquestionably true, and quite elementary, that title to property may pass or at least the true owner may be precluded from asserting his title, as against a purchaser from one having no title, by conduct which comes within the definition of an estoppel in pais. In *Mason v. Williams*, 53 N. C. 478, it appeared that the plaintiff was the owner of an engine, and that, at a sale made by Pescud, trustee, he was present, and, upon the statement being made in his hearing that Pescud's title was good, made no objection and bid on the property. It was purchased by defendant. Mason thereafter sued him for the property. The court, upon an agreed state of facts, held that plaintiff was estopped. Battle, J., thus states the contention of the defendant: "The argument is that it must be taken either that the plaintiff had waived his title and thereby authorized Pescud to sell the

engine, or that he cannot now be allowed to assert it, because it would be a fraud upon the defendant to permit him to do so." The judgment was reversed because the court did not submit the questions, upon which the estoppel depended, to the jury. The principle upon which the rights of the parties depended is thus stated by the learned justice: "When one purchases a chattel from one who is not the owner of it, and it is admitted by the parties, or found by the jury, as a fact, that the purchaser was induced to make the purchase by the declarations and acts of the true owner, the latter will be estopped from impeaching the transaction." This principle lies at the base of the doctrine of estoppel which, as said by Pearson, J., in *Armfield v. Moore*, 44 N. C. 159, "lies at the foundation of all fair dealing between man and man." The case of *Mason v. Williams* came before this court, upon a second appeal, and is reported in 66 N. C. 564. The court below (Barnes, Judge) charged the jury: "That if the evidence satisfied them that the defendant was induced to make the purchase by the declarations or acts of the plaintiff, the latter would be estopped from impeaching the transaction." The majority of the court sustained the charge and affirmed the judgment for the defendant. Pearson, C. J., and Dick, J., dissented, not from the language of the instruction, but from its application to the facts, and Justice Boyden "concurred in the principles set out in the dissent, but felt bound by the verdict of the jury."

Conceding, for the purpose of this discussion, that the language used by Mr. Bourne, the attorney for plaintiff, and of Mr. Woody, comes within the principle of *Mason v. Williams* and other cases, and that, if they or either of them had been the owners of the property, the jury would have been justified in finding that they were estopped, the question arises whether they bore such relation to the corporation as entitled them or either of them to authorize Whitson, trustee, to sell its property or to make it a fraud upon Westall to assert its title against him. Mr. Bourne was counsel at the time of the sale for plaintiff corporation and for Whitson, trustee. He says: "At the trustee's sale I attended as counsel for the trustee. My firm was general counsel for the Asheville Supply & Foundry Company." An inspection of the testimony does not disclose that Mr. Bourne had any other or further power to bind his clients in respect to the property than pertained to his employment as an attorney at law. We do not find that he was attorney in fact. Giving therefore the full legal import to his language at the time of the sale contended for by defendant, and conceding that it was sufficient, as a matter of law, to estop him, we do not think it could have such effect upon the rights of his client. He certainly had no authority to

sell the property or to authorize Whitson, trustee, to do so. "The powers of an attorney are to be determined, in a large measure, from the purpose of his employment. He has an implied authority to do anything necessarily incidental to the discharge of the purpose for which he was retained, but beyond this his power ceases." 3 Am. & Eng. Enc. 345. In *Moye v. Cogdell*, 69 N. C. 93, it was said: "An attorney cannot compromise his client's case without special authority to do so, nor can he receive in payment of a debt due his client anything except the legal currency of the country." It was held in that case that an attorney, employed to collect a debt by judgment, could not release the judgment by taking a draft at 60 days. We are of the opinion that the evidence of Mr. Bourne's declarations, at the time of the sale, were not admissible for the purpose of affecting plaintiff's title, nor, after being admitted, could they be given such effect. In regard to Mr. Woody's authority to bind the corporation, there is more doubt. Mr. Westall says: "He is the manager of the Asheville Supply & Foundry Company, and I think president, but I am not sure. * * * I know he claimed to be general manager, managing the business." Mr. Woody was dead at the time of the trial. It seems that Mr. Speed was president of the plaintiff corporation. In the affidavit to the complaint, Mr. Woody describes himself as the "general manager." It does not appear what his duties or powers are, or to what extent he was empowered to represent and act for the corporation in respect to the sale of this property, or compromise its rights in the litigation. The extent of the power of the general manager of a corporation to dispose of its property, out of the usual course of its business, depends largely upon the character of the business, the charter, by-law, etc. We could not say, as a matter of law, in the absence of any evidence upon these points, that he had such power. Judge Thompson says that "the general manager has power to bind the corporation by acts done in the ordinary course of its business." 10 Cyc. 924. In *Trent v. Sherlock*, 24 Mont. 255, 61 Pac. 650, it is held that a bill of sale of a portion of the mining company's property by the superintendent, which he has no authority to make, was not prima facie binding on the corporation and did not tend to show that he had an implied power to make it. "His implied power and authority are limited to do only those things which are incident to the usual business of the corporation, or to that branch of it intrusted to his management. Such general manager's authority is as broad as, and no broader than, the scope of his employment and agency and the nature of the corporate business." 2 Purdy's Beach, Private Corp. 1200. It is impossible to do more than lay down and apply this general principle. Each

case involves so many elements peculiar to itself that it must be decided in the light of the facts disclosed, guided by this general principle. Thus considered, we do not find any evidence of authority in Woody to attend the sale by Whitson, trustee, and, by his acts and declarations, estop the plaintiff corporation from asserting title to its property or release the surety from his liability on the judgment.

The plaintiff had successfully prosecuted its claim to the property, established its title in an action in which defendants made no defense. It filed no answer to the complaint. For reasons apparent on the face of the record, the cause was retained for final judgment against the bondsman. The amount of his liability could not be fixed otherwise than by a verdict of the jury. By the wrongful conduct of defendants Machin and Atkins, the property was put in the possession of a corporation of which they and Revell, the surety, were the principal stockholders, and in this way passed into the possession of Whitson, trustee in bankruptcy. He undertook to sell it, together with the other property of the bankrupt corporation. It seems that, some question having arisen between the attorneys present at the sale, Mr. Bourne stated that his clients did not claim the property but looked to the bond for its value. This was not a statement of any fact which bound the client, but rather an opinion of Mr. Bourne as its attorney. The fact that the property belonged to the plaintiff corporation was known and constituted the basis of the conversation. No fact was concealed or misrepresented. Every person buying at a bankrupt sale, as at one made by the sheriff, must take notice that nothing is proposed to be sold except the interest of the bankrupt or the defendant in the execution. We do not think that the plaintiff corporation has, by any officer empowered to act for it, either authorized Whitson, trustee, to sell its property, or done anything which makes it fraudulent to assert its title against Westall. This is the test of defendant's claim as laid down in *Mason v. Williams*, supra.

In the view of the record most favorable to defendants, the jury should have been permitted to pass not only upon the testimony, but make such reasonable inferences as should be drawn therefrom. In *Mason v. Williams*, supra, although there was an agreed state of facts, this court held that the ultimate decision of the existence of the constituent elements of an estoppel should have been submitted to the jury. This view of the case would work a new trial. It is evident, however, that with the testimony in regard to Mr. Bourne's and Mr. Woody's declarations excluded, as we think they should be, there would be nothing to go to the jury upon the fifth issue. The motion

for judgment, made by plaintiff should have been allowed. The cause will be remanded to the superior court of Buncombe, with direction to set aside the verdict on the fifth, sixth and seventh issues and render judgment upon the verdict on the other issues, fixing the value and damages in such way as the parties may agree or may be in accordance with the course and practice of the court.

Defendants moved in this court that appellant be not allowed to tax defendants with the cost of sending up and printing the testimony. It appears from the record that the case on appeal was not sent to his honor until April 28, 1909; the cause having been tried at the March term, 1907. His honor made the following statement at the end of the case settled by him: "This is the case on appeal settled by me at Greenville, N. C., on April 28, 1909. I am now inclined to the opinion that more of the evidence than is necessary is in the case, but the case was tried more than two years ago. The appellants have sent down the cases on appeal and the record to me to-day. While I am engaged in Pitt court, it is not possible for me now, in the time allowed on the appeal, to go up for the approaching term of the Supreme Court to eliminate what may be the unnecessary parts of the evidence which appears to be the only objection to this statement. It is better to send it up as it is, or to avail myself of the right to refuse to settle the case, because of laches in the appellant, and I elect to pursue the former course." It is manifest that his honor could not, after two years' delay, undertake to do more. It was unfortunate that the settlement of the case was delayed so long—there were valid reasons for the delay. It would be impossible for us to separate such part of the evidence as was unnecessary from that which was so. It may not be improper to suggest that, while the stenographer properly took notes of all that occurred upon the trial, such parts as have no relevancy to the exceptions should be eliminated from the record on appeal.

It will be certified to the superior court of Buncombe county that there is error.

(150 N. C. 781)

MERCANTILE NAT. BANK v. BENBOW
et al.

(Supreme Court of North Carolina. May 25, 1909.)

1. HUSBAND AND WIFE (§ 166*)—WIFE'S SEPARATE ESTATE—LIABILITIES ENFORCEABLE—CONSENT OF HUSBAND.

A married woman's contract, to be enforceable against her personal estate, must be executed with the written assent of the husband, and the contract must expressly or by clear intent and implication create a specific charge against her personality.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 652, 653; Dec. Dig. § 166.*]

2. HUSBAND AND WIFE (§ 166*)—CONTRACTS OF MARRIED WOMEN—VALIDITY.

A married woman, to bind her real property, must execute either a formal conveyance or some writing which in equity may be charged on her separate estate, accompanied by the written assent of her husband and her privy examination.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 652, 653; Dec. Dig. § 166.*]

3. HUSBAND AND WIFE (§ 79*)—CONTRACTS OF MARRIED WOMEN—VALIDITY.

A married woman is incapable of making a contract of any sort, and her attempted contracts, unless authorized by the statute, are void.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 317; Dec. Dig. § 79.*]

4. HUSBAND AND WIFE (§ 164*)—CONTRACTS OF MARRIED WOMEN—NECESSITY FOR EXPRESSION OF INTENT IN WRITTEN INSTRUMENT.

A married woman owned and conducted a store. Through her husband she purchased goods, and in payment thereof executed notes signed by her alone, but with the written consent of the husband, as shown by letters. The notes did not expressly or impliedly charge her personal estate. *Held*, that the notes were not enforceable against her, though she owned a separate personal estate at the time of the execution of the notes and at the time of the trial.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 643; Dec. Dig. § 164.*]

Clark, C. J., dissenting.

Appeal from Superior Court, Wilkes County; Murphy, Judge.

Action by the Mercantile National Bank against Mrs. L. J. Benbow and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Civil action tried at October term, 1908, of Wilkes superior court; his honor, Judge Murphy, presiding. These issues were submitted.

(1) Is the feme defendant indebted to the plaintiff? And, if so, in what sum? A. "Yes; indebted \$163.20, with interest from maturity."

(2) Were the acceptances sued on signed by the feme defendant by the written consent of her husband? A. "Yes."

(3) Did the feme defendant own a separate personal estate at the time the acceptances were signed and suit brought? And, if so, how much? A. "Yes; from \$600 to \$800."

(4) Did the feme defendant own a separate personal estate at the time of the trial? And, if so, how much? A. "Yes; \$13,000."

His honor rendered judgment against the feme defendant, Mrs. Benbow, upon the issues as found, directing that it be collected out of her personal estate only. The said defendant duly excepted and appealed.

C. G. Gilreath and H. C. Caviness, for appellants. L. M. Lyon and Manly & Hendren, for appellee.

BROWN, J. The feme defendant was the owner of, and conducting, a store in the town

of Wilkesboro. Through her husband she purchased certain jewelry from Bixler & Co., and, in payment therefor, executed six promissory notes, signed by herself alone, but with the written consent of her husband, which was found by the jury to have been given in certain letters appearing in the record. These notes or acceptances were assigned to the plaintiff for value, and before maturity. The complaint declares upon the notes, and asks for a judgment against the feme defendant only. The male defendant is a nominal party; no relief being asked against him. The form of all the notes is the same, to wit: "Cleveland, Ohio, June 19, 1903. Two months after date pay to the order of M. F. Bixler & Company, Limited, the sum of thirty-two dollars, without interest, at their office in Cleveland, Ohio. Mrs. L. J. Benbow." Appropriate prayers for instruction and exceptions present for our consideration the liability of the feme defendant upon the contract as herein set out.

There is no specific charge upon her personal estate contained in the evidence of debt or any other paper writing executed in connection therewith, and there is nothing in the writing from which an intent to charge her separate estate may be implied. That being so, we think the ruling of the court below contravenes the principles of law governing the executory contracts of married women as enunciated in numerous decisions of the court since 1875, when the subject was first considered in *Harris v. Jenkins*, 72 N. C. 183, and *Pippen v. Wesson*, 74 N. C. 437. From the adjudged cases covering a period of 30 years this rule of law may be deduced. In order that a married woman may make an executory contract enforceable against her personal estate, it must be done with the written assent of her husband, and the contract must expressly or by clear intendment and implication create a specific charge against her personal estate. In order that she may bind her real property, the feme covert must execute either a formal conveyance or some paper writing which in equity may be charged upon her separate estate, accompanied by the written assent of her husband and her privy examination. An example of the latter is to be found in *Ball v. Pequin*, 140 N. C. 85, 52 S. E. 410, 3 L. R. A. (N. S.) 307. In the *Pippen* Case this court held that neither the Constitution nor statute law of the state conferred upon a married woman any power to enter into an executory contract, except in the specific instances mentioned in the statute, now section 2094, Revision 1905. Since that case, in a long, unbroken line of decisions, this court has held that a married woman is incapable of making a contract of any sort, and that her attempted contracts, unless such as are authorized by the statute, are void. These decisions have been repeated and reaffirmed so

often by this court that in *Ball v. Pequin*, supra, they are regarded by Mr. Justice Connor as "controlling decisions," who refers to them in these words: "In the absence of controlling decisions to the contrary, we should unanimously hold that she could make all manner of contracts with the written assent of her husband, and that for a breach of them her property was liable as if she were a feme sole."

This subject has been so much discussed in decisions of this court that to review them again is unnecessary and unprofitable. Both sides of the controversy are presented fully in the opinion of the court by Mr. Justice Walker and in the dissenting opinion of the Chief Justice in the case of *Harvey v. Johnson*, 133 N. C. 353, 45 S. E. 644. There is no pretense of any express or implied charge in the contract sued on upon the personal estate of the feme defendant, which can be enforced by a court of equity. Because the jury have found that the feme defendant owns a separate personal estate affords no ground for charging it with the performance of such contract. Our laws provide in what manner married women may become free traders, so that their contracts may be enforced as readily as if they were unmarried. Their status is easily ascertained by reference to the register of deeds by those who deal with them in business. If they neglect to obtain such information, it is the loser's fault.

His honor erred in declining to give the defendants' prayer for instruction.

As there was no motion to nonsuit, there must be a new trial.

CLARK, C. J. (dissenting). The most diligent research shows no statute that forbids a married woman to make a contract "with the assent" of her husband. The statute which has been relied on is Code, § 1826, now Revisal 1905, § 2094, which forbids her to make any contract "without the assent" of her husband, except in three cases named (i. e., for necessities, for support of the family, and to pay antenuptial debts), for which she can contract without his assent. The prohibition to contract without the husband's assent in the other cases than the three cases named is certainly not a prohibition of the power to contract with his assent, but a recognition that she can contract with the husband's assent. The right to act as free trader (Revisal 1905, § 2112) is a dispensation with the prohibition to contract without the husband's assent in all cases. As this is conferred by the husband's assent once for all, certainly he can give his assent to each contract as it arises. The Constitution allows a woman to convey her land with the written assent of her husband, and the court has often held that, as the assent is only required as to land, she can draw checks and dispose of personal property

without his assent. It was so held in *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461. A fortiori she can contract with his assent. A married woman can draw checks and drafts without her husband's assent, and, of course, is liable on them if not paid. Revisal 1905, § 2095. She is liable upon her real estate for buildings or repairs put thereon by her verbal assent, or acquiescence without the assent of her husband. Revisal 1905, § 2016; *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890. Of course, she must be liable when the contract is made with his assent.

Ever since the statute of frauds (St. 29 Chas. II), it has been held that land can be conveyed only in writing, but it has never been held that in consequence one cannot make a contract verbally which could be enforced by a sale of land, but, if such were the law, as a married woman can convey her land with the assent of her husband, certainly she can contract with his assent. The courts have no right to enact a statute forbidding married women to contract with the assent of their husbands. The Legislature has not done so. The Constitution has emancipated married women by giving them full control of their property and earnings, with the right to dispose of it by will or otherwise, save that as to conveyances of real estate there must be the written assent of the husband—in analogy to the joinder of the wife in the conveyance of the husband's realty. That there is no prohibition of the wife to contract freely with the husband's assent is held in *Brinkley v. Ballance*, 126 N. C. 396, 35 S. E. 631, and *Bates v. Sultan*, 117 N. C. 100, 23 S. E. 261. There is no statute requiring "charging," and the court has no power to enact it. It is against the spirit of the Constitution and in violation of the enfranchised status of married women created by it. Every student of the history of the law knows that the doctrine of "charging" was created in England in an effort to confer upon married women of wealth the power to contract on the faith of their property, at a time when the law there did not, as now, give them unrestricted control of their property and freedom to contract even without the assent of their husbands. See *Century of Law Reform*; *Dacey, Law and Opinion in England*. Certainly the doctrine is obsolete and an anachronism here, when the wife has contracted with the assent of her husband, and she can convey her realty with his assent and all her other property without it. If there are any decisions of this or preceding courts which forbid a married woman to contract with the assent of her husband, they should be modified or overruled. A court should overrule its own errors (as this court has shown it is strong enough to do), as well as the errors of a court below. Indeed, errors of the higher court more imperiously demand correction,

for they are more injurious. Ten times zero is only zero, and an error ten times repeated acquires thereby no approximation to being correct. It is an error still, only more harmful by repetition. As we have as precedent *Brinkley v. Ballance*, supra, we can follow that if a precedent is essential.

The feme defendant bought the plaintiff's goods at the price of \$163.20, with the written assent of her husband, and indeed through his agency. She has kept the goods, and now refuses to pay for them, though the jury find that she is worth \$13,000 in personal property, besides realty. It is but common honesty that she be adjudged to pay the \$163.20. There is no sign or shred of a statute that provides that she is not liable for such contract when made with the assent of her husband. The decisions that a wife cannot contract with the assent of her husband (though she can convey realty with his assent, and can make many contracts and dispose of personalty without his assent) have not become a rule of property and to correct the error cannot affect any title. As the husband's assent is not required for her protection in disposing of her personalty, and such assent is sufficient protection in conveying her realty, there can be no reason why the husband's assent was not enough protection in purchasing these goods when there is no statute that requires more. In *Bank v. Howell*, 118 N. C. 273, 23 S. E. 1005, this court in effect recommended a statute permitting a wife to contract, as a feme sole, without the assent of her husband in all cases, as is the law in England, New York, and our adjoining states; but that would require amending Revisal 1905, § 2094, which forbids her to contract without her husband's consent except in certain cases. Here she contracted with the assent of her husband, and there is no statute making her incompetent to buy these articles. Her estate has benefited to the extent of the jewelry bought.

(150 N. C. 776)

SHEPPARD v. ROCKINGHAM POWER CO.

(Supreme Court of North Carolina. May 25, 1909.)

1. CONTRACTS (§ 121*)—VOTING TRUST AGREEMENTS—VALIDITY.

An agreement, which takes from the stockholders of a corporation all right to vote for three years after the happening of an event, and provides that the decision of the voting trustees as to any fact or condition of the stock deposit agreement shall be conclusive on the parties, not made to protect bondholders, but to enable the stockholders to pool all stock and to control the corporation by a voting trust, is contrary to public policy and void, and cannot be justified as a proxy authorized and regulated by Revisal 1905, § 1184, for a proxy is good only for three years and is always revocable, though by its terms it is made irrevocable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 504; Dec. Dig. § 121.*]

2. CONTRACTS (§ 121*)—CORPORATIONS—OWNERSHIP OF STOCK—AGREEMENTS—VALIDITY.

Any agreement, which separates the beneficial ownership of corporate stock from the legal title, is contrary to public policy and void, and restrictions on the right to vote stock are not favored by the courts.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 121.*]

3. CORPORATIONS (§ 118*) — OWNERSHIP OF STOCK—AGREEMENTS—VALIDITY.

The fact that the voting trustees, under an agreement depriving the stockholders of a corporation of the right to vote, and giving such right to voting trustees, deny that they have any intention of voting the stock or causing the same to be voted, and that they believe that they have no power to vote the stock to bring about the reorganization of the corporation without the assent of all the stockholders, does not justify their refusal to transfer and assign stock to a purchaser of pooled stock.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 118.*]

4. CORPORATIONS (§ 133*) — TRANSFER OF SHARES—REMEDIES FOR REFUSAL.

Mandamus or mandatory injunction lies to compel a corporation to transfer stock.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 133.*]

5. CORPORATIONS (§ 284*)—COMPELLING ELECTION OF OFFICERS—REMEDIES.

Mandamus or mandatory injunction lies to compel an election of officers of a corporation.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 284.*]

6. CORPORATIONS (§ 201*)—VOTING TRUSTS—ILLEGALITY.

Where the court properly determined that a voting trust was illegal, it properly enjoined the trustees from using or exercising any control over the common stock of the corporation and from voting same in any meeting, and adjudged that all bona fide owners of the stock should be entitled to vote at all meetings.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 201.*]

Appeal from Superior Court, New Hanover County; Lyon, Judge.

Action by R. M. Sheppard against the Rockingham Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Shepherd & Shepherd, for appellant. Davis & Davis, for appellee.

CLARK, C. J. This is a suit to declare illegal and void a stock deposit or voting trust agreement and restrain the voting trustees from using or exercising any power or control over the common stock of the defendant, Rockingham Power Company, and from voting the same in any meeting, and to declare the holders of the stock deposit certificates issued by the trustees to be the bona fide owners of the common stock of the Rockingham Power Company, and for the election of officers, and for the transfer and assignment of 10 shares of common stock to the plaintiff in lieu of a stock deposit receipt issued by the voting trustees calling for 10 shares of stock. The stock agreement takes away from the

stockholders all right to vote for a period of three years after the first installation of the power plant of the Rockingham Power Company, and provides that the decision of the voting committee as to any of the facts or conditions of the said stock deposit agreement shall be conclusive and bind all the parties in interest. The agreement is not made for the protection of bondholders but to enable the stockholders to pool the stock and to control the corporation by a voting trust. The plaintiff was not a party to said agreement, but is a purchaser of 10 shares of the stock thus pooled.

The agreement deprives the stockholders of the right to vote, and is therefore contrary to public policy and void. *Harvey v. Improvement Co.*, 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749; *Cone v. Russell*, 48 N. J. Eq. 209, 21 Atl. 847; *Shepaug Voting Trust Cases*, 60 Conn. 579, 24 Atl. 32; *Clarke v. Railroad (C. C.)* 50 Fed. 338, 15 L. R. A. 683; *Cook, Stockholders (4th Ed.)* § 622. *Harvey v. Imp. Co.*, supra, is "on all fours," except that the agreement here is, if anything, more objectionable. In *Harvey's Case* we said: "Every stockholder must be free to cast his vote for what he deems for the best interest of the corporation; the other stockholders being entitled to the benefit of such free exercise of his judgment by each. And hence any combination or device by which any number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy." In that case, as in this, the action was brought by the holders of a certificate issued by the voting committee. The voting trust agreement in *Harvey's Case* provided that, if a vacancy occurred among the trustees, it should be filled by the votes of the holders of the majority of the stock represented in the agreement, and that the holders of a majority of such stock should have the right, whenever they saw proper to do so, to instruct the trustees how to vote upon matters arising in the meetings, and also to remove the trustees and fill their places at any time. No such agreements or stipulations appear in this case. The power is absolute in the trustees to do as they see fit, and any instructions from the majority of the stockholders would be useless.

Chief Justice Baldwin of Connecticut, in a recent article (*Yale Law Journal* 1891), says: "It is obvious that a trust of this character virtually severs the ownership of the stock from the power to vote on it. The legal owner casts the vote, but at the dictation of a third party who is not the equitable owner; and not only is the third party not the equitable owner, but he may, in the progress of time, be directly opposed to his interests. He represents the interests of the original constituents of the trust, as they existed years before. Their interest in the stock meantime may have been sold to others, of different

views, but these can take no share in the management of the corporation, during the life of the trust. The legal theory of the relation between the state and those who receive from it a corporate franchise is that it is one resting on a personal confidence. The state issues, so to speak, its commission to the corporators, as its trusty and well-beloved servants, fit to do this special work, which it commits to them. They can therefore no more alienate the right to vote on their stock at corporate meetings, than the citizen can alienate his right to vote at public elections. Delegation is a temporary alienation, and therefore proxy voting is not recognized at common law, at meetings of corporations. As was said in *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33: "The obligation and duty of corporators to attend in person and execute the trust or franchise reposed in or granted to them is implied in and forms a part of the fundamental constitution of every charter in which the contrary is not expressed."

Any agreement which separates the beneficial ownership of the stock from the legal title is contrary to public policy and void. *Harvey v. Improvement Co.*, 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749; *White v. Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Shepaug Voting Cases*, 60 Conn. 576, 24 Atl. 32; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Beach on Corporations*, § 306; *Clarke v. Railroad (C. C.)* 50 Fed. 338, 15 L. R. A. 683; *Kreissl v. Distilling Co.*, 61 N. J. Eq. 5, 47 Atl. 471. "A sale by a stockholder of the power to vote upon his shares is illegal for very much the same reason that a sale of his vote by a citizen at the polls, or by a director of a corporation at a meeting of the board, is illegal. Each is a violation of duty, in effect, if not in purpose a betrayal of the trust." *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Fremont v. Stone*, 42 Barb. (N. Y.) 169; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162. This agreement cannot be justified as a proxy, for a proxy is good only for three years. *Revisal 1905*, § 1184. A proxy is always revocable, and, even when by its terms it is made irrevocable, the law allows the stockholder to revoke it. Frequently an attempt is made to permanently unite the voting power of several stockholders and thus control the corporation by giving irrevocable proxies to specified persons, but the law allows the stockholder to revoke this proxy at any time. *Cook on Corporations (4th Ed.)* § 611; *Woodruff v. Railroad (C. C.)* 30 Fed. 91; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Bridgers v. Staton*, 150 N. C. —, 63 S. E. 892.

It is true that the voting trustees deny that they have any intention of voting the said stock, or causing the same to be voted, to bring about a reorganization of the company, and are advised by counsel and believe that

they have absolutely no power whatever to vote said stock, or cause said stock to be voted, to bring about a reorganization of the company, without the assent of all the holders of all said deposit receipts. This is not a sufficient answer for their refusal to transfer and assign the stock and deliver it to the plaintiff upon his demand. Plaintiff demanded the stock of the voting trustees prior to the institution of this action. In Griffith v. Jewett, 15 Wkly. Law Bul. (Ohio) 419, the court said: "We are dealing with the rights of property, and it is no answer to one's demand for the possession and control of his own property to say that he withholds it and does not intend to use it for an illegal purpose. The law gives to every one, not under disability, the control of his own property, and imposes upon him the duty of making lawful use of it." Restrictions on the right to vote stock, like restrictions on the right to sell stock, are not favored by the courts, and the courts have held that any holder of trustee's certificates issued under similar contracts and agreements as this one might at any time demand back his part of the stock. 2 Cook, Corporations (4th Ed.) § 622; Fisher

v. Bush, 35 Hun (N. Y.) 641; Guernsey v. Cook, 120 Mass. 501. A mandamus or mandatory injunction lies to compel a corporation to transfer stock and to compel election of officers. Cook-on Corporations, § 309; Trust Co. v. Moran, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212; R. R. v. Pa. Co. (C. C.) 54 Fed. 741, 745, 750-752, 19 L. R. A. 387; High, Inj. § 2; R. R. v. Felton (C. C.) 69 Fed. 273.

The illegality of voting trusts having been held by this court in Harvey v. Imp. Co., 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749, and Bridgers v. Staton, 150 N. C. —, 63 S. E. 892, his honor properly enjoined the voting trust in this case from using or exercising any control over the common stock of the Rockingham Power Company, and from voting the same in any meeting whatsoever, and in adjudging that all bona fide owners of such stock and holders of receipts issued therefor by said voting committee shall be entitled to vote the number of shares to which they are entitled in all meetings of the stockholders of said company and enjoined the voting trust from carrying out any plan of reorganization.

Affirmed.

(132 Ga. 639)

GEORGIA COAST & P. R. CO. v. McFARLAND.**McFARLAND v. GEORGIA COAST & P. R. CO.**

(Supreme Court of Georgia. May 13, 1909.)

1. MASTER AND SERVANT (§ 39*)—ACTION FOR WRONGFUL DISCHARGE—PLEA.

In a suit by an employé to recover damages for an alleged wrongful discharge, where the employer pleaded justification because of the refusal of the employé to obey a specified order, given first in writing and afterwards repeated in parol, whether or not the plea was sustained would depend upon the duty of the employé to obey the order which was given, and upon whether or not a refusal to do so authorized his discharge. Other possible reasons not expressed in the plea, which might have authorized a discharge, cannot be invoked.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 46; Dec. Dig. § 39.*]

2. REQUESTED INSTRUCTIONS PROPERLY REFUSED.

Some of the requests to charge were not adjusted to the pleadings and evidence, and some were argumentative in form. In so far as any of them embodied principles proper to be given in charge, they were covered by the general charge of the court.

3. INSTRUCTIONS, CONSTRUED AS A WHOLE, NOT ERRONEOUS.

The portions of the charge to which exceptions were taken, when read in connection with the pleadings, the evidence, and the entire charge, are not subject to the criticisms made upon them.

4. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and no reason appears on any ground of the motion for a new trial why a reversal should be granted.

5. DAMAGES FOR DELAY DENIED.

Under the special facts of the case, the motion to award 10 per cent. damages on the ground that the case is brought to this court for delay is denied.

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; Paul E. Seabrook, Judge.

Action by F. H. McFarland against the Darien & Western Railroad Company, now the Georgia Coast & Piedmont Railroad Company. Judgment for plaintiff, and defendant brings error. Plaintiff assigns cross-error. Affirmed.

See, also, 127 Ga. 97, 56 S. E. 74.

Hitch & Denmark, for plaintiff in error. W. L. Clay, for defendant in error.

ATKINSON, J. McFarland brought suit against the Darien & Western Railroad Company (now the Georgia Coast & Piedmont Railroad Company) to recover damages, alleging that he had been wrongfully discharged from the position of auditor and superintendent during the term for which he was elected. The defendant denied the substantial allegations. On the trial the court directed a verdict for the defendant, and the case was brought to this court. The judgment was reversed. 127 Ga. 97, 56 S. E. 74. The defendant then amended its answer by

admitting the discharge and pleading justification therefor, by reason of an alleged refusal on the part of the plaintiff to obey an order which had first been given to him in writing by the vice president and general manager, and afterwards repeated orally. The jury found for the plaintiff \$1,125, with interest, being the full amount for which he sued. The defendant moved for a new trial, which was refused, and it excepted.

On the question of whether the order given to the plaintiff by the vice president and general manager of the defendant was a legitimate direction as to the conduct of the business, or whether it was only a subterfuge, and given as a step in carrying out the purpose to oust the plaintiff from his office, the evidence was conflicting. The defendant having in its plea set up certain specified conduct of the plaintiff as justifying his discharge, it was restricted to the ground of justification thus set up. In some of the grounds of the motion for a new trial error was alleged in the refusal of certain requests to charge. Some of these sought to have the jury instructed as to the right of an employer to discharge an employé, which went beyond the ground set up in the plea, and were too broadly worded. Some of them stated the principles announced in an argumentative manner. In so far as any of the requests embodied proper charges, they were covered by the general charge, which instructed the jury as to the substantial issues made by the pleadings and evidence in the case. Complaint was also made of two excerpts from the charge of the court; but, when they are read in connection with the pleadings and the entire charge, they are not subject to the criticisms made upon them. The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

As the judgment will be affirmed, it is unnecessary to pass upon the cross-bill of exceptions.

Counsel for the defendant in error moved this court to award 10 per cent. damages on the ground that the case was brought up for delay. While we have ruled that the judgment should be affirmed, we cannot say that it is so clearly a case brought here for delay as to authorize us to award damages, and we decline to do so.

Judgment affirmed. All the Justices concur.

(150 N. C. 699)

HOOD v. MERCER et al.

(Supreme Court of North Carolina. May 21, 1909.)

HUSBAND AND WIFE (§ 14*)—CONVEYANCES TO HUSBAND AND WIFE—ESTATE BY ENTIRETIES.

Under a conveyance of land in fee to husband and wife, they take by entireties with right of survivorship, and the interest of the husband

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexer—
64 S.E.—57

during their joint lives is not subject to the lien of a docketed judgment against him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 85; Dec. Dig. § 14.*]

Appeal from Superior Court, Jones County; W. R. Allen, Judge.

Controversy between J. T. Hood and Sherman Mercer and others, submitted. From the judgment, plaintiff appeals. Affirmed.

Thos. D. Warren, for appellant. Simmons, Ward & Allen, for appellees.

BROWN, J. The plaintiff is the owner of a judgment duly docketed on October 25, 1907, in the superior court of Jones county against the defendant Sherman Mercer. On February 14, 1908, certain tracts of land in said county were conveyed by deed executed to said Sherman Mercer and his wife as grantees in the premises as well as the habendum. The said Sherman Mercer and wife have subsequently conveyed certain of the lands by deed to the codefendants Jones and Bryant.

The question presented on this appeal is as to whether the judgment constitutes a lien upon the lands to the discharge of which they can be subjected by execution. We agree with his honor that the judgment is no lien on the lands, and that they therefore cannot be sold under execution. The estate of Sherman Mercer and wife is an anomalous one, but it still exists in this state. It would be well for the General Assembly to abolish it as to all future conveyance and let the grantees hold as tenants in common. While to some extent former decisions of this court in respect to this estate have been modified, we have held in recent years that under a conveyance of land in fee to husband and wife they take by entirety, with right of survivorship, and that the interest of neither during their joint lives becomes subject to the lien of a docketed judgment. During the wife's life the husband has no such interest as is subject to levy and sale to satisfy a judgment against him. *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; *West v. Railroad*, 140 N. C. 620, 53 S. E. 477. It is true that, where the husband had conveyed the land by deed with warranty without the joinder of the wife, and survived her, his grantee acquired title, but this was by way of estoppel.

The judgment is affirmed.

(150 N. C. 712)

EDWARDS v. SORRELL.

(Supreme Court of North Carolina. May 21, 1909.)

1. STATUTES (§ 231*)—CONSTRUCTION—REVISION AS ONE STATUTE.

The originally different statutes enacted into the Revisal become thereby one statute, and must be construed as one act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.*]

2. ARREST (§ 47*)—CIVIL ACTION—DISCHARGE FROM CUSTODY—REMEDIES.

A defendant who is arrested and in custody pursuant to Revisal 1905, § 727, subsec. 2, authorizing the arrest of defendant in enumerated actions, may obtain his discharge before judgment by pursuing the remedy given by sections 735 and 737, or by complying with the statute for the relief of insolvent debtors (section 1920 et seq.)

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 47.*]

3. FRAUDULENT CONVEYANCES (§ 263*)—EXISTENCE OF LIABILITY AGAINST GRANTOR—COMPLAINT—SUFFICIENCY.

The allegation that during March, 1909, and many months preceding, defendant was guilty of the wrongs constituting plaintiff's cause of action, does not show that defendant had incurred any liability in June, 1907, and a conveyance then made to defendant and wife was not necessarily fraudulent as against plaintiff because the consideration was paid by defendant himself.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 263.*]

4. ARREST (§ 48*)—CIVIL ACTION—DISCHARGE—GROUNDS.

The right of a defendant to a discharge from custody before judgment on complying with the statute for the relief of insolvent debtors (Revisal 1905, § 1920 et seq.), by presenting a petition containing the requisite averments, accompanied by a schedule setting forth his property, including real estate conveyed to himself and wife, and alleged to be exempt and by offering to surrender his nonexempt property, cannot be defeated under section 1934, authorizing a creditor opposing the discharge to suggest fraud setting forth the particulars by plaintiff alleging that the real estate is subject to execution, since the right of plaintiff, if existing as claimed by him, may be enforced by an action by the trustee appointed pursuant to the statute in which the wife will be a necessary party.

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 48.*]

Appeal from Superior Court, Durham County; Long, Judge.

Action by H. F. Edwards against A. V. Sorrell. From an order refusing to discharge defendant from custody, he appeals. Reversed.

This was an appeal from an order of his honor, Judge Long, refusing to discharge defendant from custody. The plaintiff sued for damages, charging that defendant had alienated the affection of his wife, and caused her to separate herself from him. At the time of instituting the action, he procured upon proper affidavit an order for the arrest of defendant holding him to bail. Defendant was arrested and placed in jail pursuant to the order of the clerk. On March 24, 1909, defendant filed his petition before the clerk pursuant to section 1920 et seq. of Revisal of 1905 for discharge. The petition contained the averments required by section 1922, and was accompanied by a schedule of his property. Among other properties set forth in the schedule were certain pieces of real estate, described by reference to the deeds under which they were held, conveyed to defendant and his wife, especially "one lot corner of Dowd and Cleveland streets,

which lot was conveyed by H. A. Foushee, commissioner, June 28, 1907, to Albert v. Sorrell and wife, Quinnette Sorrell, registered June 29, 1907, consideration \$1,111," giving book and page of registry. In reference to his real estate, defendant set forth in his petition "that your petitioner is advised by counsel learned in the law that, since the conveyance of the real estate described in Exhibit B are to your petitioner and his wife, they hold the same as tenants by entireties, and that he has no interest therein which he can convey or incumber without the assent of his wife, and that no interest of his can be sold under execution so as to pass any title during their joint lives or as against the survivors after the death of either one of them, and that all of the real estate described in Exhibit B is exempt from sale under execution; that his said wife, Quinnette Sorrell, refuses and declines to convey and incumber said estate in any manner whatsoever; that your petitioner herewith surrenders all property whatsoever in excess of \$50, which exemption of \$50 he desires to be allotted to him in his wearing apparel, and in the personal property described in Exhibit B."

Plaintiff, replying to the petition, denied that the real estate described in the schedule was exempt from execution by reason of the condition of the title as set out. He further says "that he denies that the petitioner has surrendered all property whatsoever in excess of \$50, and he is advised and believes that the petitioner is not entitled to any discharge from the order of arrest herein, or released from custody without making an actual surrender of all his property and all interest in the property." For a further answer plaintiff says as to each piece of real estate described in the schedule "that the deeds referred to in Exhibit B do convey to A. V. Sorrell an estate which he has not surrendered, and which he must surrender before he is entitled to any discharge herein, and plaintiff suggests a fraud on the part of defendant in withholding, or attempting to withhold, the same." He further says "that the plaintiff is informed and believes that the consideration for the real estate described in said deed was paid by the defendant himself, and that the improvements erected on some or all of said lots represent the property and accumulations of the defendant himself, and the defendant is guilty of fraud in withholding, or attempting to withhold, said property from the trustee, and to protect it from liability for his indebtedness and in attempting to secure his discharge without a full surrender of the same." Plaintiff moves the court to make up an issue of fraud and set it down for trial as provided by statute. Upon the hearing of the petition and answer before the clerk, he denied the prayer of defendant, and directed that an issue of fraud be made up and trans-

ferred to the civil issue docket of the superior court for trial. Upon appeal to his honor, Judge Long, holding the courts of the Ninth judicial district, judgment of the court was affirmed. The bond required of defendant was reduced from \$5,000 to \$2,500. The defendant excepted and appealed.

Manning & Foushee and D. W. Sorrell, for appellant. Bryant & Brogden and R. O. Everett, for appellee.

CONNOR, J. The petition for discharge complies in terms with the provisions of section 1930 of the Revisal 1905, subsection 2 of which provides that the petitioner must file with his petition "a full and true inventory of his estate, real and personal, with incumbrances existing thereon, and all books, vouchers and securities relating thereto." section 1934 provides that "every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing verified by his oath," etc. The statutes applicable to cases of this kind are not so clear as they should be. Defendant was arrested, and is in custody pursuant to the ancillary proceeding prescribed by subsection 2, § 727, Revisal 1905. The method by which he may be discharged before judgment is prescribed by sections 735 and 737, neither of which contemplate the procedure provided by section 1920 et seq. The language of section 1920 is sufficiently comprehensive to include defendant's case: "The following persons are entitled to the benefits of this chapter. (1) Every person taken or charged on any order of arrest or a surrender of bail." Subsection 2 provides that any person taken "on execution of arrest for any debt or damages rendered in any action whatever"; thus making a distinction between a person in custody on any order of arrest, which includes such order made before judgment and a person in custody under final process. Whatever contradiction may appear to exist between the several sections of the Revisal, originally different statutes, is met by construing them as one statute, as by their enactment as a part of the Revisal they become. The right to be discharged by complying with the last-named sections is in addition to the remedies given in sections 735 and 737. The Constitution prohibits imprisonment for debt except in cases of fraud. Without undertaking to discuss the question whether the cause of action set out in complaint comes within the exception, we are of the opinion that the defendant is entitled to the benefit of the provisions of the statute for the relief of insolvent debtors.

The sole question presented by the appeal therefore is whether the answer of plaintiff to the petition for discharge raises an issue of fact. Defendant having filed the schedule of his property, it was not only proper, but necessary, that he should set out

the facts showing what right, title, estate, and interest he held in the real estate. This he has done by making specific reference to the deeds showing the title conveyed by them. He simply says to the plaintiff: "Here is a schedule of my property. I surrender such right, title, and estate as the court may decide I have therein." The fact that he further says that he is advised by counsel that, by reason of the condition of the title, it is not subject to execution while not improper, is surplusage. What the law is in that respect will be for the ultimate decision of the court. It cannot be decided at this time nor in the present state of the record. The plaintiff, recognizing the fact that he must do something more than merely "suggest fraud"—that is, set out the particulars, etc.—has, in compliance with the statute, done so. The suggestion and particulars set out simply raise a question of law; that is, he differs from the opinion of defendant's counsel as to the legal effect of the deeds under which defendant holds title to the land. If he is correct in his opinion, the land will be subject to execution upon such judgment as he may recover in his action. The defendant has surrendered such title as he has. How can he do more?

We have discussed the question as to the liability of lands conveyed to husband and wife for the debts of either at this term—*Hood v. Mercer*, 64 S. E. 897, where the authorities are collected. It is suggested, however, that defendant paid the purchase money for the lot conveyed by Mr. Foushee, commissioner, and that, in having the title made to his wife and himself, he was guilty of fraud. If plaintiff's view of the law be correct, the land is liable to his debts. If the fact be that defendant furnished the purchase money for the land, the legal effect of it would depend upon the date when plaintiff's cause of action accrued. The allegation in the complaint is that "during the month of March, 1909, and during many months preceding," the defendant was guilty of the wrongs which constitute plaintiff's cause of action. The deed from Mr. Foushee, commissioner, was executed June 28, 1907. It does not appear with sufficient certainty that defendant then owed any debts or had incurred any liability to plaintiff to render his payment of the purchase money for the land fraudulent. If the fact be as suggested, the right of the plaintiff would be enforced by an action brought by the trustee, to be appointed pursuant to the statute, in which the wife would be a necessary party. We do not perceive how these questions can be passed upon in this proceeding. The case of *Adams v. Alexander*, 23 N. C. 501, is relied upon. There the debtor had executed a deed of assignment of his property for the payment of debts. In his schedule he surrendered only his interest after the payment of

the debts named in the assignment. The creditor in opposing his discharge alleged that the assignment was made with intent to defraud his creditors. This court held that, as the debtor had scheduled "only the resulting trusts, which affirms the other trusts, to be bona fide and good and is an assignment of the surplus only after all the other purposes of the deed have been answered, he had not complied with the statute." *Hutton v. Self*, 28 N. C. 285. Here the petitioner schedules the property or the muniments of his title. Whatever he has passes to and vests in the trustee to be applied to his debts. It would be a hardship on a debtor if because, with no fault on his part, the title to his property is involved in doubtful questions of law, he must remain in prison until, after litigation, they are settled by the courts. The purpose of the law is to compel him to make an honest surrender of his property to his creditors. If he does that, he is entitled to be discharged. He is not imprisoned as a punishment for his inability to pay his debts. That was the conception of a discarded past. This case is a striking illustration of the hardship which could be perpetrated if the law was different. The plaintiff sues in forma pauperis, claiming \$10,000 damages. He gives a bond in the ancillary proceeding in the sum of \$100 and holds defendant to bail in the sum of \$2,500. If he may, after defendant has surrendered his property to meet such judgment as may be rendered against him, hold him in custody until, after long litigation, the end is reached, the defendant, if he should successfully defend the action, would have suffered great wrong without any redress. If the plaintiff shall succeed in obtaining a judgment, he has all of defendant's property bound for it and a right to sue out execution against his person. We are of the opinion that the answer did not raise any issue to be submitted to the jury, and that petitioner is entitled to his discharge as prayed for. The court will proceed to secure the property to meet the final result of the action. This opinion and judgment will be certified to the clerk of the superior court of Durham county, to the end that further proceedings may be had in accordance herewith.

Reversed.

(150 N. C. 860)

STATE v. SPROUSE.

(Supreme Court of North Carolina. May 19, 1909.)

1. ARSON (§ 25*)—INDICTMENT—VARIANCE.

In an indictment charging accused with burning a building belonging to S., ownership is alleged only to identify the property, and the charge is sustained by showing that the building belonged to another, who had rented it to S., who was using it as a granary.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 52; Dec. Dig. § 25.*]

2. INDICTMENT AND INFORMATION (§ 203*)—AIDER BY VERDICT—GOOD AND BAD COUNTS.

Where the indictment contains two counts, and one is valid, a general verdict will be supported by such valid count, although the other count may be defective.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 651; Dec. Dig. § 203.*]

Appeal from Superior Court, Madison County; Ferguson, Judge.

Lawrence Sprouse was convicted of arson, and appeals. Affirmed.

C. C. Ramsey and Moore & Rollins, for appellant. The Attorney General, for the State.

CLARK, C. J. The defendant is indicted in two counts. In the first count it is alleged that the defendant "did unlawfully, wantonly, willfully, and feloniously set fire to a stable and granary then and there the property and in possession of William Sexton," and in the second count it is alleged that the defendant "did unlawfully, willfully, and feloniously attempt to burn the barn and stable of William Sexton by setting fire to a certain lot of flammable matter in said barn and stable, contrary to the statute," etc.

The defendant requested his honor to charge the jury as follows: "That if the jury believe the evidence the stable and granary was the property of E. L. Sprouse, and the jury could not find the defendant guilty under this bill of indictment, which charges that the defendant burned the stable and granary, the property of William Sexton." The court refused to give said instruction, and the defendant excepted. The evidence was that the title to the stable was in E. L. Sprouse, but that he had rented the building to William Sexton, who had stored 300 bushels of corn in the granary end of the building. This is not a civil action for possession. Ownership is alleged only to identify the property and is sufficiently proven by showing occupancy. State v. Daniel, 121 N. C. 576, 23 S. E. 255; State v. Thompson, 97 N. C. 496, 1 S. E. 921; State v. Jaynes, 78 N. C. 507; State v. Tallor, 88 N. C. 694.

The court charged the jury that if they "should be satisfied from the evidence beyond a reasonable doubt that William Sexton, the prosecutor, had rented the premises from E. L. Sprouse, and in pursuance of the contract of lease he went into possession of the barn or a part of it by storing his corn therein, then the bill properly charges the property burnt as the property of William Sexton, and if they shall further be satisfied beyond a reasonable doubt that the defendant willfully set fire to and burned said house with the corn of the prosecutor in it, it is their duty to return a verdict of guilty"—to which the defendant excepted, but without good ground.

The only other ground relied on in defend-

ant's brief is that the judgment should be arrested because the first count in the bill is defective. If this were true, there being a general verdict, it would be supported by the valid second count. State v. Toole, 106 N. C. 736, 11 S. E. 168. But the first count follows the words of Revisal 1905, § 3338, and the second count is based on Revisal 1905, § 3338.

No error.

(150 N. C. 640)

MITCHEM v. WALLACE et al.

(Supreme Court of North Carolina. May 19, 1909.)

1. TENANCY IN COMMON (§ 43*)—CONTRACT OF SALE—AGREEMENT BY ONE OF SEVERAL OWNERS.

Where but one of several owners of land agreed to convey, the others were not liable for breach of contract to convey.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 130-132, 136, 137; Dec. Dig. § 43.*]

2. VENDOR AND PURCHASER (§ 350*)—ACTION FOR BREACH—BURDEN OF PROOF.

In an action for breach of contract to convey land, the burden was upon complainant to show a breach.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1043; Dec. Dig. § 350.*]

3. VENDOR AND PURCHASER (§ 350*)—ACTION FOR BREACH—SUFFICIENCY OF EVIDENCE.

In an action for breach of a contract to convey land, evidence held not to sustain a finding that defendant refused to convey his interest as agreed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 350.*]

4. SPECIFIC PERFORMANCE (§ 97*)—CONDITIONS PRECEDENT—TENDER OF PURCHASE MONEY.

Where defendant did not refuse to convey his interest in land as agreed, plaintiff must tender the purchase money before she can demand specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

5. VENDOR AND PURCHASER (§ 344*)—ACTION FOR BREACH—CONDITIONS PRECEDENT—TENDER OF PERFORMANCE.

Where the owner did not refuse to convey his interest in land to plaintiff as agreed, plaintiff must show tender of the purchase money before she can sustain an action for breach of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1031; Dec. Dig. § 344.*]

Appeal from Superior Court, Rutherford County; Justice, Judge.

Action by S. A. Mitchem against A. D. K. Wallace and others. From a judgment for plaintiff, defendants appeal. Reversed, and motion for nonsuit allowed.

The defendants moved to nonsuit. Motion overruled, defendants except. His honor submitted these issues.

"(1) Did defendant contract and agree with plaintiff to sell her his interest in the

land mentioned in the complaint as therein alleged? Answer. Yes.

"(2) Did defendant fail and refuse to convey to the plaintiff his interest in said land in violation of his contract as alleged? Answer. Yes.

"(3) What damage, if any, is plaintiff entitled to recover? Answer. \$50."

From the judgment rendered defendants appealed.

McBrayer, McBrayer & McRorie, for appellants. D. F. Morrow and R. S. Eaves, for appellee.

BROWN, J. The evidence taken in its most favorable light for plaintiff tends to prove that the land, the subject-matter of the contract, belonged to the defendant A. D. K. Wallace and to the other codefendants. A contract for the sale of the land was drawn up and signed by said Wallace and the plaintiff, and deposited with C. W. Goode, to be held by him until released by mutual agreement of plaintiff and A. D. K. Wallace. It was evidently deposited to await the consent of the other owners who refused to sell as claimed by Wallace, but we will assume, as contended by plaintiff, that it was held by Goode to await the payment of the purchase money, and was then to be delivered to plaintiff. This contract was never delivered to plaintiff, but according to Goode, her own witness, it was taken from his granddaughter by William Mitchem, plaintiff's brother-in-law, without either Goode's or defendant's knowledge or consent. It is manifest from plaintiff's own evidence that Wallace informed her fully and particularly as to the ownership of the land, and did not undertake to bind the other "sixteen heirs." We are not furnished with the charge of the judge, but we infer from the issues that the action was finally tried as one against A. D. K. Wallace alone for damages for refusal to convey his individual fourth interest, although the complaint charged the breach against all the owners. Certainly no cause of action is made out upon plaintiff's own evidence against the other defendants, and we think upon consideration that none is made out against A. D. K. Wallace himself. There is an entire failure of evidence upon the second issue, and it was incumbent upon plaintiff to establish the affirmative of that issue by a preponderance of the evidence.

The only evidence bearing thereon is that of plaintiff herself and defendant Wallace. Upon direct examination plaintiff stated that, after the others refused to sell, she asked Wallace to give her a chance at his part, and that he refused to consent. On cross-examination, however, the plaintiff seems to have retracted that statement, for she expressly admits that Wallace agreed

"that he would let me have his part, which was one-fourth interest." The defendant Wallace testifies: "Mrs. Mitchem came to see me in October, 1905, and I told her that the other heirs had repudiated the contract. I told her that I would let her have my part, and she said that she did not want my part or interest unless she could get it all. J. C. Hampton and H. B. Morgan were present." These two witnesses corroborate the statement of Wallace. Although plaintiff admitted that Wallace offered her his share of the land, and although Wallace testified to same fact, yet plaintiff admits that she never offered to pay Wallace a penny of the purchase money, and never tendered a penny to Goode the depository of the contract. It seems quite plain to us that there is nothing in the evidence to sustain the finding upon the second issue, and that upon her own showing the plaintiff is not entitled to recover damages for breach of a contract which she made no attempt to perform on her part. If Wallace had refused to sell his part of the land, after contracting to do so, plaintiff might have been relieved of the necessity of tendering to him or to Goode Wallace's portion of the purchase money, which was one-fourth. But Wallace did not refuse according to plaintiff's own admission as well as his own testimony, and it therefore was incumbent on her to tender his part of the purchase money before she could call for specific performance or sustain an action for damages for a breach of the contract.

The motion for nonsuit is allowed.

Reversed.

(150 N. C. 770)

**FARMERS' & MERCHANTS' BANK OF
WILLIAMSTON v. GERMANIA
LIFE INS. CO.**

(Supreme Court of North Carolina. May 25, 1909.)

**1. BILLS AND NOTES (§ 537*) — ACTIONS —
QUESTION FOR JURY — NOTICE — "KITING"
CHECKS.**

In an action by a bank for money paid on a dishonored check drawn in defendant's name on another bank in favor of defendant's agent by defendant's cashier, whether plaintiff had notice that the agent and cashier were "kiting" checks on their own account in their dealings with plaintiff, or could have known it by the exercise of reasonable care, held to be for the jury under the evidence.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.*]

**2. PRINCIPAL AND AGENT (§ 100*)—SCOPE OF
AUTHORITY — USING PRINCIPAL'S FUNDS
FOR PERSONAL BENEFIT—"KITING."**

An agent has no authority to use the principal's bank deposit as a basis for a "kiting" business with another person, consisting of an exchange of checks to temporarily raise money or credit, for the agent's private benefit.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 100.*]

For other definitions, see Words and Phrases, vol. 5, p. 3935.]

3. PRINCIPAL AND AGENT (§ 119*)—SCOPE OF AUTHORITY—NOTICE—PRESUMPTION.

A bank holding a principal's deposit will be presumed to have notice of the lack of authority of an agent to use the deposit as a basis for "kiting" checks for his own benefit.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 119.*]

4. BILLS AND NOTES (§ 335*) — BONA FIDE PURCHASERS.

If a bank paying a check drawn by a depositor's cashier in the depositor's name and payable to the depositor's agent knew, or ought to have known in the exercise of reasonable care, that the check was one of a series of "kiting" checks which the agent and cashier were issuing for their own benefit, it could not recover from the depositor for the amount paid thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 817; Dec. Dig. § 335.*]

5. NOTICE (§ 6*) — FACTS PUTTING ON INQUIRY.

Knowledge of any facts and circumstances reasonably calculated to put one on inquiry makes it his duty to make inquiry, and he will be charged with notice of all facts which such inquiry would have elicited.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 4-7; Dec. Dig. § 6.*]

6. BILLS AND NOTES (§ 492*) — PAYMENT OF CHECKS — ACTION TO RECOVER MONEY PAID — BURDEN OF PROOF.

In an action by a bank to recover money paid on a check drawn by the maker's cashier on another bank, the burden is upon the bank to show that the cashier had authority to draw the check.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1649; Dec. Dig. § 492.*]

7. PRINCIPAL AND AGENT (§ 92*)—LIABILITY FOR ACTS OF AGENT.

A principal is bound by such acts of its agents as it expressly authorizes or such acts as are committed by them within the apparent scope of their authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 245; Dec. Dig. § 92.*]

8. APPEAL AND ERROR (§ 1005*)—REVIEW—DISCRETION OF COURT.

The refusal of the trial judge to set aside a verdict on conflicting evidence as against the weight of evidence cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]

9. TRIAL (§ 351*)—REFUSAL OF ISSUES.

Where the issues were sufficient to present all the controverted matters in the case, there was no error in rejecting other issues tendered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834; Dec. Dig. § 351.*]

Connor and Hoke, JJ., dissenting.

Appeal from Superior Court, Martin County; Biggs, Judge.

Action by the Farmers' & Merchants' Bank of Williamston against the Germania Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Hinsdale and Shepherd & Shepherd, for appellant. H. W. Stubbs, Wheeler Martin, H. A. Gilliam, and W. W. Clark, for appellee.

WALKER, J. This action was brought to recover \$1,250, the amount of a check alleged to have been drawn by Lula Parham, cashier of the defendant, on the Mercantile Bank of Memphis, Tenn., to the order of R. B. Hall, manager of the defendant, and indorsed by him for value to the plaintiff, and also the protest fee, \$2.50, making in all \$1,252.50. The check was presented to the bank on which it had been drawn and payment refused, whereupon it was protested for nonpayment. The defendant denied its liability upon the ground that Lula Parham had no authority to draw the check, and that it had received no benefit therefrom. It further alleged that R. B. Hall, as manager, in August, 1905, opened an account with the plaintiff, in the defendant's name, but really for his own benefit, and for many months did a "kiting" business with the plaintiff, depositing with it checks and drafts on other parties, who owed him nothing, and making the same good by checks upon the plaintiff and others; the principal transactions in the way of "kiting" checks having been carried on between the said R. B. Hall, as manager, and the said Lula Parham, as cashier, of the defendant. The court submitted to the jury two issues, which, with the answers thereto, were as follows: (1) Is the defendant indebted to the plaintiff? If so, in what amount? Ans. \$276.48, with interest from January 17, 1907. (2) Upon what item of debit appearing in the account of the defendant company with the plaintiff bank was the credit balance of \$978.02, dated January 16, 1907, applied? Ans. The \$1,250 check in controversy. The answer to the first issue was arrived at by deducting the "credit balance" of \$978.02 from the amount of the check, with the protest fee added; the plaintiff having charged the amount of the check to the defendant when payment of it was refused.

There was much evidence introduced tending to show that R. B. Hall, as manager, and Miss Parham, as cashier, of the defendant, were "kiting" checks in their dealings with the plaintiff bank, and, while this evidence may be very strong and convincing, we do not think it was of such a conclusive nature as to require the court to instruct the jury, as requested to do by the defendant, that, as matter of law, it charged the defendant with notice of the fact, so as to defeat the plaintiff's recovery. Frank F. Fagan, cashier of the plaintiff bank, testified that he did not know Hall was "kiting" checks, nor did he know that there was anything wrong in his transactions with the bank. On December 18, 1906, he wrote the following letter to the defendant: "Mr. R. B. Hall, manager of your company at Raleigh, N. C., carries an account at this bank as R. B. Hall, manager Germania Life Insurance

Company of New York. We desire to know if his signature to checks meets with your approval, and if the same is authorized by you. We also would like to know if the signature of Lula Parham, cashier Germania Life Insurance Company, to checks drawn on the Mercantile Bank of Memphis, Tenn., is authorized by you. As Mr. Hall is manager of your company for North Carolina and Tennessee, we presume that he has authority to sign your checks, but we desire this information for the files and records of our bank, and will very much appreciate a prompt reply. Yours truly, Frank F. Fagan, Cashier." To this letter he received, December 22, 1906, the following answer: "Gentlemen: We reply to yours of the 18th inst. in the affirmative. Mr. Hall and Miss Parham being authorized to draw checks, as indicated by you. Respectfully yours, N. S. Wesendonck, Second Vice President."

The judge charged the jury fully as to the extent of the authority of R. B. Hall and Lula Parham to draw checks in the name of the defendant, and that they had no authority, as agents, to do a "kiting business," and that the plaintiff is presumed to have had notice of such lack of authority. He then charged the jury as follows: "Checks are always supposed to be drawn upon a previous deposit of funds. If you find from the evidence that the check in controversy was one of a series of kiting checks, and that the plaintiff knew, or ought to have known, this fact in the exercise of reasonable care as prudent bankers, you will answer the first issue, 'No.' Knowledge of any facts and circumstances reasonably calculated to put a man on inquiry makes it his duty to make inquiry, and he will be charged with notice of all facts, which such inquiry would have elicited. If you find from the evidence that the plaintiff did not have actual notice of such kiting, or constructive notice—that is, knowledge of such facts and circumstances as would put it upon notice by proper inquiry and investigation—in other words, if you find that the plaintiff neither knew, nor had reasonable ground to believe, that Hall was engaged in kiting checks, but, on the contrary, plaintiff reasonably believed that the account with plaintiff was being used by Hall as the company's account and not his own private account for his own benefit, then you will proceed to consider whether the defendant authorized the check in controversy. If the plaintiff has not satisfied you that it neither knew nor had reasonable ground to believe that Hall was engaged in kiting checks, and using the deposit for his own personal benefit, you will answer the first issue, 'No.' Now, as to the authority to draw the check in controversy: The burden is upon the plaintiff to satisfy you by the greater weight of evidence that Lula Parham had authority to draw the check in controversy. Unless the plaintiff

has so satisfied you, you will answer the first issue, 'No.' The court then directed the attention of the jury to the facts and circumstances tending to show whether Lula Parham had authority to draw the check in controversy and whether the defendant had notice that R. B. Hall and Lula Parham were "kiting" checks, and that the check for \$1,250 was drawn without the authority of the defendant. The court further instructed the jury as follows: "The defendant is bound by such acts of its agents as it expressly authorized, or such acts as are committed by its agents within the apparent scope of their authority; that is, such acts as it reasonably led the plaintiff to believe the agent possessed." The charge was exceedingly favorable to the defendant and presented its contentions with reference to the issues and evidence in the case as strongly as the law permitted with a due regard to the rights of the plaintiff.

The law in regard to the duty and authority of an agent in the transaction of the business of his principal and the liability of the principal for the acts of his agent was fully explained to the jury with reference to the special facts and circumstances of this case, and the charge in this respect was in accordance with the authorities upon the subject. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811, and cases cited therein. The real and vital questions in the case were whether R. B. Hall and Lula Parham had been engaged in a "kiting business," and, if so, whether the fact was known to the plaintiff, or could have been known by the exercise of reasonable care and diligence. It was conceded that if they had been "kiting" checks, and the check in controversy was one of the series of such checks, and further that the plaintiff knew, or should have known, such to be the case, then there was no liability on the part of the defendant. Upon the evidence, as we view it, these were facts for the jury to find, and the court properly left the matter to the jury as one of fact, instead of instructing them, as matter of law, to answer the first issue in favor of the defendant, upon the assumption that the dealings of R. B. Hall with the plaintiff were not within the scope of his authority as manager of the defendant company, and that, in law, the plaintiff had notice thereof. The court properly placed the burden upon the plaintiff of showing the authority of Lula Parham to draw the check, and correctly instructed the jury to ascertain whether such authority existed under the facts and circumstances of the case as they might find them to be; in other words, whether she had the actual or apparent authority to draw the check, under the evidence and the principles of law concerning the liability of a principal for the act of his agent, as already explained to them.

As we have stated, there was very strong

evidence to show that R. B. Hall and Lula Parham were engaged in kiting transactions—that is, they were interchanging commercial paper for the purpose of temporarily raising money or sustaining credit—but, on the contrary, the defendant had informed the plaintiff about 10 days before the check for \$1,250 was deposited with the plaintiff bank that R. B. Hall and Lula Parham had authority to draw checks in the name of the defendant as its agents, and Frank F. Fagan, cashier of the plaintiff bank, testified that he did not know that the checks drawn by them, respectively, were not authorized, nor did he know that there was anything wrong in their transactions with his bank or the bank in Memphis. There was testimony sustaining the contention of each of the parties, and, under the circumstances, it was proper to submit the case to the jury with proper instructions as to the law bearing upon it. The court instructed the jury fully and correctly as to what would constitute notice that R. B. Hall and Lula Parham were not acting within the scope of their authority as agents of the defendant. While the preponderance of the evidence may have been on the defendant's side, we do not think, if this be so, it authorized peremptory directions to the jury to find in favor of the defendant in answering the issues. If the verdict was against the weight of the evidence, the judge could have set it aside, and, if he failed to do so upon proper application, we cannot review his decision here and correct the error. There are few, if any, controverted questions of law in the case, and we have not deemed it necessary therefore to cite the authorities which sustain the charge of the court, and have confined our discussion to the pivotal question, whether the case should have been submitted to the jury to find the facts under proper instructions as to the law, as was done by the court, or whether the court should have charged, substantially as requested by the defendant's counsel, that, upon the evidence, they should answer the first issue in the negative. The issues were sufficient to present all the controverted matters in the case, and there was no error in rejecting those tendered by the defendant. *Deaver v. Deaver*, 137 N. C. 240, 49 S. E. 113.

Upon a review of the whole case, we find no error in the rulings and judgment of the court.

No error.

CONNOR, J. (dissenting). An examination of the record in this case, containing all of the evidence, forces me to the conclusion that, taking the whole evidence as true, the plaintiff bank was put upon notice that Hall and Miss Parham were "kiting" checks, that there was no fund upon which these

checks were drawn, and this must have been known to the officers of the bank. If the check sued upon in this action was the only one drawn by Hall, I should concur in the opinion of the court; but it is only one of a series of checks, all of which, when considered together with other admitted circumstances, show to my mind conclusively that the account is made up of a number of checks, all of which were drawn in accordance with the system of "kiting" carried on by the parties. The authorities cited in defendant's brief establish its contention that the checks were not drawn against any fund in bank, but upon other checks crossing each other in the mail for the purpose of maintaining an apparent balance. I am therefore compelled to dissent from the conclusion reached by the majority of the court.

In consequence of the late day of the term, upon which the opinion is filed, I am unable to set out in full and discuss the evidence. I can therefore only express, with all possible deference, my dissent.

HOKE, J., concurs.

(65 W. Va. 683)

CRISS v. CRISS.

(Supreme Court of Appeals of West Virginia.
May 11, 1909.)

FRAUDULENT CONVEYANCES (§ 172*)—WHAT CONSTITUTES—IMAGINARY LIABILITY.

A conveyance of land to be held in trust for a third person, the grantee and beneficiary intending by putting it in the hands of the grantee to shield it from imaginary liability which the beneficiary feared might be attempted to be asserted, based on forged papers which the parties feared were in existence, when in fact there were no such papers, and no such liability, and the beneficiary owed no debts, will not be held void under the statute avoiding deeds made with intent to defraud creditors, and the trust will be enforced in equity.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 523-529, 542; Dec. Dig. § 172.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County.

Bill by Anna Criss against Michael Criss. Decree for defendant, and complainant appeals. Reversed.

John Bassel and Haze Morgan, for appellant. L. C. Crile and Dabney C. Lee, for appellee.

BRANNON, J. Anna Criss filed her bill in equity in the circuit court of Harrison county against Michael Criss, and her bill was dismissed on demurrer, and she appeals.

The bill states that Anna Criss was owner of a lot on Main street, in the city of Clarksburg, and that she conveyed it to Hezekiah F. Criss, and that later, in consideration of some of the purchase money which he had

not paid her and of further indebtedness of him to her, Hezekiah F. Criss conveyed to Howard P. Criss, a son of Anna Criss, a certain lot on Monticello avenue and Maude street, in Clarksburg, on which was a dwelling house, which was occupied by the said Anna Criss and her family; that the conveyance by Hezekiah F. Criss of said lot to Howard P. Criss was in trust for the use and benefit of his mother, Anna Criss, and that Howard P. Criss accepted the said conveyance in trust for his mother, she having paid the whole consideration therefor; that later, as Howard P. Criss was about to leave home and settle in another state, by agreement of the parties said lot was conveyed by Howard P. Criss to another son of Anna Criss, Michael Criss, then a single man living on the said lot with his mother and other members of the family; that Michael Criss paid nothing whatever for the conveyance to him of said lot, and that it was a distinct agreement between Anna Criss and Howard Criss and Michael Criss that Michael Criss should hold the said lot in trust for the sole use and benefit of his mother, Anna Criss, and that the family should continue to reside in the house on said lot. The bill further states that Anna Criss in 1905, through the instrumentality of Michael Criss, was incarcerated in the West Virginia Hospital for the Insane at Weston, but remained therein a short time only until she was taken out of the hospital upon a bond given by one of her sons, the said Michael Criss refusing to bail her out and using every means at his command to keep her in the said hospital, even employing counsel to appear before the board of directors of said hospital to advocate her return to it, but that the plaintiff was soon discharged from said institution as cured, having, in fact, never been unsound in mind, although the action of the defendant was such shortly preceding her commitment to the hospital, when she demanded of him a deed for the lot, as almost to drive her to distraction. The bill further states that Michael Criss never set up any claim to the Monticello avenue property, and does not yet, except by way of a baseless, trumped-up, and untrue alleged set-off of \$4,000 for keeping the family, until the plaintiff was committed to the insane asylum, when, assuming that the plaintiff had become civilly dead for the remainder of her life, and that defendant's brothers and sisters would not litigate with him the right to the property, he, Michael Criss, then married, gave up the property which he had rented in another part of the county and took possession, with his family, of the residence in controversy, and of the plaintiff's personal property, and broke up the plaintiff's home, driving her sons, one then 15 years of age, another 20 years of age, and a daughter then 17 years of age, out of their lifelong home, and compelling them to go upon the streets among strangers, after giving the daughter written no-

tice to vacate the property, and that since then the defendant has occupied the property for a period of about one year before the bringing of this suit. The bill further states that defendant, Michael Criss, has refused to convey the said property to the plaintiff, though often requested to do so, and that she has been forced to live upon the charity of other children, when her own property, if she could have it, would afford her a home and support. The bill further states that the husband of Anna Criss had been engaged in the saloon business and broke up, and that she had engaged in business herself and prospered therein, and did not owe a dollar at the time she purchased the Monticello avenue property from Hezekiah F. Criss, but that she was informed and believed until a little while before the institution of this suit that her name had been forged to securities, orders, and other paper, the payment of which might be attempted to be enforced against any property she might acquire in her own name, and to avoid the expense and annoyance of being obliged to defend her property from supposed liabilities which she had never incurred, and for that reason alone, she had taken the conveyance of said property in the name of her son, Howard P. Criss, and afterwards for the same reason, and for that reason alone, had the property conveyed to her son Michael Criss, the defendant, her purpose being only to let the legal title remain outstanding until any judgments against her or any securities with her name forged might expire by limitation when it was her purpose to take the legal title to herself, of which purpose the defendant well knew. The bill further states that at the time of the conveyance by Hezekiah F. Criss to Howard P. Criss, and at the time of the conveyance by Howard P. Criss to Michael Criss, the plaintiff, Anna Criss, had no creditor or outstanding obligation owing by her, and that she was innocent of any intent to hinder, delay, or defraud creditors; and that, about the time of the institution of this suit, she for the first time caused investigation to be made of said supposed forgeries, with the result that she was informed that none such ever existed that would have been enforceable against said property, even had she taken the conveyance directly in her own name instead of that of her son. The bill prayed that the defendant be compelled to convey the said Monticello avenue property to the plaintiff, and that the defendant be required to account to her for rents, issues, and profits from the time when he moved into the property in July, 1906.

The defense claims that the statute of limitation bars relief to the plaintiff, and that the statute began to run from the date of the deed from Hezekiah Criss December 11, 1893. This trust is an express trust, and the statute of limitations does not commence to run against such a trust until it is disavowed and repudiated by the trustee with

notice of such repudiation by the beneficiary. *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309. The bill does not mention any repudiation of the trust by Howard P. Criss, or any disavowal of it by Michael Criss until very lately, in 1905, when his mother was taken to the hospital for the insane, and this suit was brought as early as August, 1903. Moreover, the plaintiff was in possession of the property, living in it with her family, until 1905, when she was taken to the hospital, and, of course, neither the statute nor laches would have run against her while she occupied the property for a residence for herself and family. *Mullins v. Shrewsbury*, 60 W. Va. 694, 55 S. E. 736. It is strange doctrine that the statute or laches runs against a person in possession. Moreover, I thought that one to plead the statute must be in possession for the period prescribed by it, and in exclusive possession, shutting out the other claimant. The bill says that this defendant has been in exclusive possession only one year. The plaintiff had possession until 1905. So neither statute nor laches bars the plaintiff.

The main question in this case, that on which the defense really rests, is on the theory based on the statement of the bill that the conveyance from Hezekiah F. Criss to Howard P. Criss, as also that from Howard P. Criss to Michael Criss, were made to hinder and defraud creditors, and that equity will not enforce a trust created for such illegal purpose; that a grantor in a deed made with intent to defraud by covering up the property in another name will not be allowed to regain the property in a court of equity; that the deed is good and binding at law between its grantor and grantee, passing legal title; and that equity, though the grantee paid nothing, and agreed to hold for the use of the grantor, will not compel the grantee to reconvey to the grantor, and thus countenance fraudulent conveyances. This court has discussed this subject in many cases. *Poling v. Williams*, 55 W. Va. 69, 48 S. E. 704; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402. I refer to that excellent late work, *American & English Annotated Cases*. In volume 3, p. 942, is an elaborate collection of cases. But does this case fall under that principle of equity law? To say so would carry the principle very far. Anna Criss owed no debts. The property was not, in fact, liable for any debts in her hands, if it had been in her hands. I have carefully examined the law upon this subject, and I conclude that this case does not fall under the rule just stated. Let us see if the law will sustain this position. "A conveyance made with intent to defraud creditors is not fraudulent if there were no creditors." *Moore on Fraud. Convey.* § 9, p. 85. "There must be creditors who may be delayed, hindered, or defrauded, and the necessary consequences of the act must be to produce such delay, hindrance, or fraud." 2 Bump, *Fraud. Con-*

vey. § 25. In *Kervick v. Mitchell*, 68 Iowa, 273, 24 N. W. 151, 28 N. W. 434, we find it held that "where there is no creditor in fact, but only an imaginary one, through fear of whom the grantor, encouraged by the grantee, makes the conveyance, the fraudulent intent will not be imputed to the grantor, and, where the conveyance of the property has been without consideration, he may recover the same or its value." In *Day v. Lown*, 51 Iowa, 364, 1 N. W. 783, the court said: "The sole object of the statute (the statute against fraudulent conveyances) is to prevent conveyances of property with intent to defraud creditors, purchasers, or other persons. If there were no creditors or purchasers, the conveyance could not be fraudulent as to them. * * * His intention in so doing was wholly immaterial, provided no one but himself was injured or had cause to complain. It was not the intent the statute should be regarded in the light of a moral code and operate on the conscience of the party making the conveyance. Its purpose is to protect the legal or equitable rights of others." In 14 Am. & Eng. Ency. L. 251, it is laid down as law that: "To constitute a disposition of property fraudulent within the terms of the statute, there must be a debtor intending to defraud, a creditor to be defrauded, and a conveyance of property which would have been appropriated by law to the payment of a debt due, and out of which the creditor could have realized all or a portion of his claim. * * * The second essential of a fraudulent conveyance which follows necessarily from the first is that there should be a creditor to be defrauded." In *Dearman v. Dearman*, 4 Ala. 521, was a conveyance of slaves made from apprehension that creditors of the father, who once owned the property, would seize it for his debts, and it was held that, as the slaves were not liable for the debts, the agreement would not render the transfer fraudulent, and the property could be reclaimed. In *Pope v. Wilson*, 7 Ala. 690, the court said: "It is self-evident that, where there are no creditors, there can be no intention to defraud them." *Vandever v. Freeman*, 20 Tex. 333, 338, 70 Am. Dec. 391, is to the same effect. In *Baker v. Gilman*, 52 Barb. (N. Y.) 36, a man conveyed property to prevent its being subjected to a recovery in a slander suit; the grantee agreeing to reconvey. There were no other debts. The slander suit was defeated. It was held that there was no lawful debt binding the property, and a recovery was decreed.

It is argued that, this trust being by oral agreement, it is void under the statute of frauds for want of a writing declaring it. It is well established in this state that such a trust need not be declared or created in writing. *Hogg's Eq. Princ.* p. 740. It is useless to multiply authorities for a proposition so well established in this state. Counsel for the defense cite us to *Cain v. Cox*, 23 W. Va. 594, and *Troll v. Carter*, 15 W. Va. 567, to

show that a writing is required. In those cases the conveyance was to hold in trust for the grantor himself, not the case where one conveys to hold in trust for a third person. To say that where one conveys to another to hold for the benefit of the grantor would be flat contradiction of the deed; and hence would not be good as a trust. *Troll v. Carter* expressly says, however, that, if the conveyance be made without consideration upon trust that the grantee will hold for a third person, such trust will be enforced. In this case the deeds were not from Anna Criss as grantor in trust for herself, but the conveyance was made between other parties to hold in trust for her.

If the facts stated in the bill are true, law and justice combine to sustain the plaintiff's cause. Therefore we hold that the bill presents the case of an enforceable trust, and we reverse the decree of the circuit court, and overrule the demurrer and remand the cause.

(65 W. Va. 641)

McCASKEY v. POTTS et al.

(Supreme Court of Appeals of West Virginia.
May 4, 1909.)

1. FRAUDULENT CONVEYANCES (§ 74*)—VOLUNTARY TRANSFER—EXISTING CREDITORS.

The rules and principles of *Lockhard & Ireland v. Beckley*, 10 W. Va. 87, *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74, *Enslow v. Sliger*, 51 W. Va. 405, 41 S. E. 173, and *Laidley v. Reynolds*, 58 W. Va. 418, 52 S. E. 405, respecting voluntary and fraudulent gifts or transfers of property, considered and applied.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 186-188; Dec. Dig. § 74.*]

2. FRAUDULENT CONVEYANCES (§ 95*)—HUSBAND AND WIFE—TRANSACTIONS BETWEEN.

Where a husband becomes indebted to his wife before becoming indebted to other creditors, or while he has ample property to pay, and who, while he still has ample property to pay all other creditors, pays off and discharges his indebtedness to his wife by paying the same directly into a copartnership, of which she is a member, as cash capital to be provided for by her under the partnership agreement, such payment in suit brought by or on behalf of his other creditors more than three years after such payment will not be treated as a voluntary or fraudulent transfer to his wife, and her interest in such partnership property charged with his debts.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 268-282; Dec. Dig. § 95.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by J. F. McCaskey, trustee in bankruptcy of W. T. Potts, against M. L. Potts and others. Decree for defendants, and complainant appeals. Affirmed.

Hall & Hall, for appellant. E. B. Snodgrass and E. L. Robinson, for appellees.

MILLER, P. In a suit in equity and upon attachment begun in the circuit court in

April, 1903, by Foster Leap against W. T. Potts, and John F. Loehr and Mary Louise Potts, partners as John F. Loehr & Co., and others, Leap sought among other property attached to subject to the payment of the indebtedness of said W. T. Potts to him on certain notes indorsed and paid by said Leap, aggregating about \$3,200, the undivided interest of Mary Louise Potts, as partner, in a stock of goods and merchandise of said John F. Loehr & Co. at New Martinsville. This suit was shortly afterwards superseded by the bankruptcy proceedings of said W. T. Potts, adjudging him a bankrupt, and in which he was subsequently discharged, and in which the complainant in the present suit was appointed trustee of the bankrupt's estate, and who by an order entered therein was authorized to intervene in the Leap suit or bring a new suit against defendants for the protection of the estate of said bankrupt. The present suit was begun in June, 1903. The bill filed swallows as a whole, and attempts to digest and assimilate to its own purposes, the entire bill in the Leap suit. It adopts the charges therein as its own, and what material averments are added thereto relate, as did the averments in the Leap bill, to alleged transactions of the defendants respecting said property as affecting the rights and interests of the said Leap. The answers of defendants put in issue all the material averments of the bill, and upon final hearing thereon, and on the depositions and proofs taken and filed, the circuit court on April 15, 1907, pronounced the final decree appealed from, adjudging, among other things, the interest of said Mary Louise Potts in said partnership property to be her property, and not liable for the indebtedness of her husband to said Leap, or to his other creditors. The decree also disposed of the issues made with respect to the other property, but the only questions presented for our decision relate to the decree respecting the said stock of goods.

The substantial averments of the bill are, that in March, 1900, John F. Loehr and W. T. Potts, in the name of his wife, Mary Louise Potts, formed a copartnership at which time the said Leap had become the accommodation indorser for said Potts to the extent of at least \$2,000 of said \$3,200, and that, although the partnership agreement purported to be between said Loehr and said M. L. Potts, it was, in fact, between the said W. T. Potts and said Loehr, and that the terms of the agreement were that Potts was to furnish the capital, and that Loehr, who was experienced in the business to be undertaken, was to give his time and attention to the business, and have a half interest therein; that, pursuant to this agreement, W. T. Potts did furnish the capital, aggregating \$1,500, and no part of which was furnished by said Loehr or by said M. L. Potts; that the busi-

ness had been prosperous; and that at the time of the suit the firm had accumulated a stock of goods valued at from \$6,000 to \$7,000. And it is specifically averred that this action of W. T. Potts in thus furnishing the capital for said partnership and so engaging in the business in the name of his wife was a fraud, and done to wrong, cheat, and defraud his creditors, and especially said Leap. These averments of the bill, in effect, charge, not only a voluntary gift or transfer by W. T. Potts of his money and property to his wife, and void as against existing creditors because voluntary, but also that such gift or transfer was without consideration, and was made with fraudulent intent to cheat and defraud the said Leap, not only as an existing creditor, but as a subsequent creditor of said Potts, and void as against him upon either ground. But we do not find that it is alleged that defendant M. L. Potts had any notice of such alleged fraudulent intent.

One of the averments of the present bill charged not as a basis for any relief, but as evidential matter bearing on the question of fraud, is that at the time said W. T. Potts first solicited said Leap to become his indorser, he represented to him that he owned a house and lot in Titusville, Pa., the title to which Leap afterwards learned, but not until he had become such indorser, was in the name of said M. L. Potts, and that the said Potts had designedly had title thereto so placed in the name of his wife about the time or just before he had sought credit from said Leap, with the object in view, in the event he became involved, of having said property beyond the reach of his creditors. The facts respecting the said house and lot in Titusville disclosed by the evidence are that the same was purchased and paid for in part by the said W. T. Potts in 1894, some three years before said Leap had even become acquainted with him, and, so far as the record shows, before any of his present existing indebtedness had been contracted. So that the allegations respecting this transaction, not being made the basis of any relief, have very little, if any, evidential force or effect on the issue involved here with respect to said partnership property. In the final decree appealed from the court below, upon the papers and evidence in the cause, found as a fact that the said stock of goods of John F. Loehr & Co. was not as charged in the bill the property of said W. T. Potts, and that he had no interest therein subject to the payment of his debts.

The first question presented is: Did Potts invest his own money and capital in the business of said copartnership in the name of his wife, as a voluntary gift or transfer thereof to her, and void as against Leap or his other existing creditors? And the second is whether, if not voluntary and void on that ground, was such investment of capital furnished by Potts fraudulent in fact and

void for that reason as against said Leap and his other existing or subsequent creditors, and of which Mrs. Potts had notice? In answer to the first question, this court construing sections 3099, 3100, Code 1906, has held in numerous cases that a voluntary gift or transfer of property which means a gift, sale, or transfer upon consideration not deemed valuable in law is void as against existing creditors because voluntary, and not because it is fraudulent, regardless of the "amount of the debts, the extent of the property so conveyed, the motives which prompted the settlement, or the conditions or circumstances of the party at the time"; and, as to the second question, that fraud and fraudulent intent charged as against either existing or subsequent creditors must be alleged, and proven substantially as alleged. *Lockhard & Ireland v. Beckley*, 10 W. Va. 87; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Enslow v. Sliger*, 51 W. Va. 405, 41 S. E. 173; *Laidley v. Reynolds*, 58 W. Va. 418, 52 S. E. 405. And, where actual fraud is charged, it is said in *Greer v. O'Brien*, supra, respecting the question of proof, that "the rule is that he who alleges fraud must prove it, and the supposed exceptions to this rule are more apparent than real. There may be prima facie fraud, or fraud may be proved by a number of concurrent circumstances. Nevertheless, so long as the scales are evenly balanced, the defendant against whom fraud is alleged must prevail."

The law respecting transactions of this character has been so frequently declared and applied in the decisions of this court as to render it unnecessary to enter into any new discussion thereof in the case in hand. The facts with respect to the formation of the copartnership of John F. Loehr & Co., practically uncontradicted, are that the partnership agreement was made between John F. Loehr and Mrs. M. L. Potts, and not between said Loehr and W. T. Potts. Loehr and Mrs. Potts are brother and sister. Of the \$1,500 cash capital provided by Mrs. Potts at the time \$1,000 was obtained by her upon a draft of J. A. Bandl, cashier of the New Martinsville Bank on the Hanover National Bank of New York City, dated March 17, 1900, payable to the order of W. T. Potts, and indorsed by him and John F. Loehr & Co., and \$500, the residue thereof, was provided by Mrs. Potts out of \$100 paid her by W. T. Potts in cash, and \$400 of other cash money furnished by her out of other private funds belonging to her. The evidence of Mr. and Mrs. Potts shows that at the time Potts paid Mrs. Potts this money she held his two notes for money actually loaned him long prior to the incurrence of any of the indebtedness now claimed by said Leap, and, so far as the record shows prior to the incurrence of any of his present indebtedness, the first dated December 15, 1896, the second dated May 7, 1897, the first calling for \$600 and the second for \$500. These notes were offered in evi-

dence, and both testify in substantial agreement as to the time, places, and sources from which Mrs. Potts got this money, and where she had the money on deposit, some of it in the banks at Titusville, Pittsburg, and New Martinsville, and some of it she had kept in her possession. The evidence shows her to have been a careful, close, saving, thrifty, and industrious German woman, and a woman of considerable business ability, jealous of her personal interests, and always keeping her own property separate and distinct from that of her husband. She distinctly testifies that some \$400 or \$500 of her own money had been derived from the sale of horses and a buggy at Titusville, derived by her from her mother and cash money given her by her mother. Both Mr. and Mrs. Potts testify that at the time he paid for her the \$1,100 she surrendered to him his notes, and he produced and filed the notes with his testimony. Moreover, it is abundantly proven not only by W. T. Potts, but by other witnesses, including cashiers of the banks, that in March, 1900, after Potts paid this money to said firm and to his wife, and took up his notes, he had a balance of some \$2,000 left to his credit in the banks at New Martinsville, where he drew the money and purchased the draft, and that for months thereafter, with occasional exceptions, he continued to have large daily balances to his credit in said bank, and, besides, was the owner of three strings of oil well tools, horses and wagons, and other property, aggregating in value from \$8,000 to \$10,000. He was actively engaged in the work of contracting and drilling oil wells, and was apparently very prosperous, and the evidence shows that his financial misfortunes came afterwards in the purchases of oil production, and in losses upon contracts for drilling wells, due to accidents pertaining thereto, and with which Mrs. Potts, his wife, had nothing whatever to do, and was in no way responsible. This with other evidence, we think wholly fails to show a voluntary gift or transfer by Potts of his property to his wife. He simply paid her his indebtedness to her, and at a time when he was justified in doing so out of his estate, and that her interest in said copartnership property cannot be made assets of said bankrupt to be administered in a court of bankruptcy.

On the second question—Was actual fraud proven?—It is admitted by Leap, though otherwise charged in his bill, and as proven by Mr. and Mrs. Potts, that Leap had notice on the very day the copartnership was formed that Mrs. Potts, and not W. T. Potts, was the partner, or at least that she claimed to be, and the testimony of Loehr, the other partner, shows that his contract of copartnership was with his sister, Mrs. Potts, and not with

Mr. Potts; so that no fraud was practiced upon Leap or on any other creditor so far as the record shows. Nothing was concealed from Leap by Potts or either of the copartners. Leap assisted in procuring the room in which this firm began business, and with this knowledge, openly communicated to him, he continued to indorse for Potts for large amounts with his eyes wide open to the rights and claims of Mrs. Potts with respect to the partnership property. By his own admissions he knew from Potts that Potts had paid the money into this firm, and he knew from Potts from the beginning, as he admits, that the money Potts proposed to pay into the firm was to be as much in the interest of Loehr the other partner, as in that of Mrs. Potts; yet there was no attempt either in the bill of Leap or in the bill in this cause to charge the interest of Loehr in the partnership property with the payment of the bankrupt's debts. If the partnership property was liable at all for the debts of the bankrupt for anything alleged in the bill, the interest of Loehr was as much liable therefor as the interest of Mrs. Potts and more so, for Mrs. Potts had not only contributed the money paid for her by her husband on his notes, but other money, and had given practically all her time to the business, and, in addition to the \$1,500 original capital, had actually paid in afterwards some \$370 additional money. This evidence, with other evidence in the cause, we think sufficient to repel all charges of fraud or fraudulent intent as against Leap or any other creditor of said Potts.

Besides all this, the rule of practice announced by this court in former decisions is "that, although the conclusion reached by the circuit court may be subject to grave doubts, this court will not reverse its action unless plainly erroneous," and that "a decree of the circuit court determining questions of fact, unless plainly wrong, will not be disturbed." *Shaffer v. Shaffer*, 51 W. Va. 126, 41 S. E. 166; *Wolfe v. Bank*, 54 W. Va. 689, 47 S. E. 243. See, also, the many other cases cited in 1 Ency. Dig. of Va. and W. Va. Rep. pp. 619-621-623.

Moreover, we think that, with knowledge of all the facts communicated to Leap by both Mr. and Mrs. Potts in regard to the beginning and continuance of the copartnership, Leap upon whose rights as creditor this suit is practically made to depend is upon the principles announced in *Williams v. Maxwell*, 45 W. Va. 297, 307, 31 S. E. 909, and other cases there cited, estopped from asserting that said W. T. Potts has any interest in said partnership property liable for his debts.

In our judgment the decree below was clearly right, and should be affirmed.

(65 W. Va. 611)

SQUIRES v. SQUIRES et al.

(Supreme Court of Appeals of West Virginia.
May 4, 1909. Rehearing Denied
June 9, 1909.)

1. DESCENT AND DISTRIBUTION (§ 70*) — RELEASE OF CLAIM.

If a child, in consideration of money or property advanced to him by the parent, execute a writing releasing his right as prospective heir and distributee of the estate of such parent, he is thereby estopped from asserting any claim to the estate against the other heirs and distributees.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 213; Dec. Dig. § 70.*]

2. RELEASE OF INTEREST.

Query: Suppose such child, at the date of such writing, was one of a number of children, all of whom should die without issue before the death of the parent except himself, thus leaving him sole heir, where would the estate go?

(Syllabus by the Court.)

Appeal from Circuit Court, Braxton County. Bill by Addison Squires against Asa Squires and others. Decree for plaintiff Addison Squires, and Asa Squires appeals. Affirmed.

Haymond & Fox and Morrison & Rider, for appellant. C. C. Higginbotham and Hall Bros., for appellees.

WILLIAMS, J. D. S. Squires died intestate on the 11th day of November, 1905, seised of about 1,200 acres of land, leaving a widow and six children and one grandchild as his only heirs at law. In April, 1906, this suit was brought in the circuit court of Braxton county for the assignment of dower, and the partition of the land among all of the heirs. Byrd C. Dunn and Otis Squires, two of the defendants, answered the original bill, and set up, by way of cross relief, the fact that Asa Squires, one of the sons, had before his father's death released all claim, as heir and distributee, to his father's estate in consideration of money advanced to him by his father, and was therefore not entitled to participate in the benefits of said estate. At July rules, 1906, plaintiff filed his amended bill, alleging practically the same matter contained in said answer and cross-bill. Asa Squires answered, admitting the execution of the release set up against him, but denying that it had the effect to deprive him of the right to share with the other heirs in his father's estate, claiming that such release should be treated only as proof of an advancement to him by his father, and that he should be allowed to bring this advancement into hotchpot and share with the other heirs. Exceptions to this answer were sustained. The depositions of Elizabeth Squires, the widow, and of others, were taken; and on the 4th day of March, 1907, the cause, being regularly matured, was heard. A decree was made

appointing commissioners to assign dower and partition the land among all the heirs except Asa Squires, and holding that he was not entitled to participate in either the real or personal property of which his father died seised and possessed. Assignment of dower and partition was made pursuant to said decree, and on the 17th day of July, 1907, the cause was further heard upon the commissioner's report, and it was decreed that each of the six heirs should take and hold in severalty and in fee simple the several parts assigned to them. This excluded the son Asa. From these two decrees he obtained this appeal.

Whether or not there is error in the decree appealed from depends upon the legal effect of the release given by Asa Squires to his father at the time the advancement was made to him. It reads as follows: "Salt Lick Bridge, W. Va., Decb. 1st, 1890. At my own request, know all persons by these presents, that I, Asa Squires, have this day accepted and received at the hand of D. S. Squires (my Father) Twelve Hundred and Thirty-five dollars (\$1235.00) as a legacy or a sum in full for any and all claims of money or property, that may be vested in me, by reason of heirship or otherwise, in the estate of D. S. Squires now & forever, as witness my hand & affix my seal this the day & date above written. Asa Squires [Seal]." It is shown by the testimony of the widow that some time after the execution of this release D. S. Squires had expressed to her the wish that his three sons should have his lands, and that he intended the home place for her and his son Asa; but this is rendered ambiguous by the fact that he had four sons, one son by a previous marriage, a half brother to the others, who lived in the far West. Another witness, G. T. Herndon, says that D. S. Squires two or three years before his death stated to him that "he had offered the three boys to go out and divide up the place to suit themselves, and that he would make the writing to correspond to their division." It is further shown by witness John M. Squires, a nephew of deceased, that deceased kept a memoranda of advancements made to his children, one item thereof reading as follows: "J. H. Dunn, September 10, 1903, 600—given to Mrs. Byrd C. Dunn as a balance due to her from my estate as a bequest." But it is not shown that he made any memorandum of the amount paid to his son Asa Squires. This omission, together with the fact that the release was still in the possession of the father at the time of his death, would go to negative the idea that he had intended the money paid to Asa to be treated simply as an advancement, as he evidently did in the case of his daughter, Mrs. Dunn. This witness also says that he heard D. S. Squires say in March, 1901,

"that he intended the land for the three boys." But, if this was the father's intention, there is no evidence that he ever made any effort by deed or will to execute it. That both father and son intended that the release should operate to bar the son from any right to participate as heir or distributee in the distribution of the father's estate is too clearly expressed in the writing to admit of any doubt, and that the son regarded it as having this effect is clearly shown by a letter written by him to his brother Olen more than a month after his father's death. This letter reads as follows: "Salt Lick Bridge, W. Va. 12/20/05. Dear Bro. Oly: I will try and write you a few lines hope this may find you all enjoying good health. Well Oly we have not found any will, don't suppose pa made any. He often talked of making one, but put it off too late. Now it is left to be divided amonth the children equal except me. I am cut out by a receipt I gave him in 1889. That's when I went in the store, he gave me \$1235 00/100 in all & wrote the Recpt for my full amt. from his estate, but as it is I am satisfied. Now Oley the trouble is the amount of real estate he has been paying taxes on is 800: there is from 1000 ac to 1200 ac now if this land can't be divided up by the children & it has to go to law to be divided, you won't know when they will get done paying back tax. I think you will see the point when you study it over. I think it a good plan for you to write each of the heirs a letter & give them your views on the matter. Ma will be the admrx for the personal property. I will assist her. Want to fix it up as soon after Jan. as we can & will send you a statement the appraisement bill. Oly write to me at once & give us your views on the matter. We are all well. As ever, Asa." This letter is conclusive to show that there was never any understanding or agreement between the father and son that this release should be canceled, or that the money paid by the father to the son at the time the release was executed was to be treated simply as an advancement, and the son restored to his rights as an heir. The release was found among the papers of D. S. Squires which came to the hands of his wife as administratrix. That an heir by the execution of such a writing in consideration of money or property received by him from his father in his father's lifetime does release all his rights as heir or distributee of the father's estate has been expressly decided by this court in

the case of *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482. That decision was later approved in the case of *Coffman v. Coffman*, 41 W. Va. 8, 23 S. E. 523. We think those decisions settled the law in this state on the point, and determine the present case.

The Supreme Court of Appeals of Virginia, however, has taken a different view of the law in the case of *Headrick v. McDowell*, 102 Va. 124, 45 S. E. 804, 85 L. R. A. 578, 102 Am. St. Rep. 843, in which the point seems to have arisen for the first time in that court; and the reasons expressed in the opinion of the court in that case, delivered by Keith, P., are certainly cogent in support of the other view. The decisions are not uniform on the subject, and there are other high authorities in support of the view that such a writing shall only be taken as evidence of an advancement, and does not estop the heir from afterwards claiming as such. But our court in the case of *Roberts v. Coleman*, supra, when the question first arose in this state, found plenty of authority of equal respectability for the opposite view following the courts of Illinois and Massachusetts; and we regard the question as settled in this state, at least where there is more than one heir. But, suppose a case where there was but one heir, and he should execute such a release, and the ancestor should die intestate, seised and possessed of property, where would it go? Would not such a writing be as binding upon a sole heir as it would be upon one of many heirs? We do not now undertake to answer this question.

It is insisted that the fact that appellant, after executing the release, became a cripple for life by the loss of a leg, is a potent circumstance to show that the father did not intend to disinherit him. But we cannot see that this fact could have any weight in determining the effect to be given the writing. It was a voluntary act on the part of the son, and he has no right to complain of the apparent hardship. The execution of the writing had its possible advantages as well as disadvantages. If the father's estate had been worth much less than it really was, so that the money received by him would have amounted to more than the share of any one of the other children as heir or distributee, he could not have been compelled by them to refund any portion of it. He assumed the risk of losing for the present use of the money.

We find no error in the decrees, and affirm them.

**VLASSERVITCH v. AUGUSTA & A.
RY. CO.**

(Supreme Court of South Carolina. June 10, 1909.)

APPEAL AND ERROR (§ 832*)—REHEARING.

Where only three members of the Supreme Court who heard an appeal were on the bench at the time it was to be decided, and they were not agreed, a reargument would be ordered at the next term under the rule requiring the concurrence of three justices to reverse a judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 832.*]

Appeal from Common Pleas Circuit Court of Aiken County; Geo. E. Prince, Judge.

Action by Nicholas Vlasservitch against the Augusta & Aiken Railway Company. Judgment for plaintiff, and defendant appeals. Reargument ordered.

Boykin Wright, Geo. T. Jackson, and J. B. Salley, for appellant. Davis, Gunter & Gyles, for respondent.

PER CURIAM. Only three of the members of this court, who heard the appeal herein, are now on the bench, one of whom is of the opinion that the judgment should be affirmed, but the other two entertain a contrary view. As it requires a concurrence of three justices to reverse a judgment, it is necessary for a reargument of the case before the entire court.

It is therefore ordered that the case be set for a rehearing at the next term of this court, during the time assigned for the hearing of appeals from the second circuit. It is further ordered that the opinion herein be delivered to the reporter of this court for inspection solely by the respective counsel in the case.

(83 S. C. 22)

**STRAUSS v. POSTAL TELEGRAPH-
CABLE CO.**

(Supreme Court of South Carolina. June 8, 1909.)

**TELEGRAPHS AND TELEPHONES (§ 69*)—DELAY
IN MESSAGE—PUNITIVE DAMAGES.**

The mere fact that the words "726 Pine St." were omitted from the address of the sendee in a telegram for some unaccountable reason, which resulted in delay in delivery, did not show intentional wrong or reckless disregard of the sender's rights warranting punitive damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. Dig. § 69.*]

Appeal from Common Pleas Circuit Court of Sumter County; C. G. Dantzler, Judge.

Action by Isaac Strauss against the Postal Telegraph-Cable Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

R. O. Purdy, for appellant. Lee & Moise, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence and intentional wrong on the part of the defendant in failing to deliver a telegram. The allegations of the complaint, material to the questions under consideration, are as follows: "That on the 31st day of March, 1907, the plaintiff delivered to the defendant in the city of Sumter, in the county and state aforesaid, the following message: 'To Mr. Leon Clark, 726 Pine St., Wilmington, Del., Elma dangerously ill, not expected to live. Suggest come at once.' And the defendant received said message, and agreed to transport and deliver the same for its usual charges, to wit, 53 cents, which was paid by the plaintiff. That the said Leon Clark would have come to Sumter at once had said message been delivered to him, but although the said Leon Clark lived at 726 Pine St., in the city of Wilmington, Del., no effort was made to deliver said message, as plaintiff was informed and believes. That the defendant had notice, of the importance of said message by its terms, but the said defendant so negligently performed its duty in regard to the delivery of said telegram that it failed entirely to deliver the same. That Elma referred to was the son of the said Leon Clark, and was paying the plaintiff a visit, and died in his residence in the city of Sumter a few hours after the said message was sent." At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of the plaintiff, for \$200.53, and the defendant appealed.

The practical question presented by the exceptions is whether there is any testimony tending to show that the plaintiff is entitled to punitive damages. There was testimony to the effect that the message was sent promptly to Wilmington, Del., and it was properly transmitted to Augusta, Ga., a relay station, but that when it reached Wilmington, it did not contain the words "726 Pine St."; that when the message was received in this shape, the office at Wilmington made diligent efforts to deliver it; that the directory at Wilmington was not published for the year 1907 at that time; that the operator at that office consulted the directory then in print, and found that a Leon Clark lived at 902 Orange street, and at 8:30 o'clock that night tried to deliver the message at that place, and found that it was not for any one there, and then at 9:45 o'clock, after again consulting the directory, attempted to deliver it at 838 Kirkwood street; that Leon Clark had removed from that place to 726 Pine street, about the 20th of February, 1907; that, being unable to locate Leon Clark that Sunday night, the Wil-

mington operator telegraphed to Sumter for a better address; that the Sumter office closed at 8 o'clock, and this message was not received until the next morning, and then the office at Wilmington was advised that the message had been transmitted from Sumter in proper form; that about 3 o'clock that night Elma died, and next morning the plaintiff telegraphed Leon Clark at 726 Pine St., Wilmington, Del., as follows: "Elma died three a. m. Should we hold body for your arrival or bring it to-night?" that this telegram was not received by plaintiff until 4 o'clock in the afternoon of the 1st of April; and that the first telegram had not been delivered to Leon Clark when the plaintiff arrived in Wilmington with the body next day; that the defendant, not being able to find Leon Clark at 726 Pine street, and having been informed that he was working for the railroad company, it undertook to deliver the messages, and did finally do so, and practically at the same time. In response to the last-mentioned telegram the plaintiff received the following message from Leon Clark: "Come on to-night. Bring body with you." When the motion was made for a nonsuit, his honor, the presiding judge, stated that he would have granted it but for the fact that the words "726 Pine St." being absent from the telegram, were sufficient to carry the case to the jury on the question of punitive damages. The foregoing statement of the testimony explains satisfactorily the delay on the part of the operator at Wilmington. In the absence of other circumstances the fact that the words were omitted, for some unaccountable reason, is not sufficient to show intentional wrong or reckless disregard of the plaintiff's rights.

In the case of Lathan v. Tel. Co., 75 S. C. 129, 55 S. E. 134, the entire name of the addressee was changed, and the message was delivered to his competitor in business. This court held that this afforded at least some evidence, of a reckless disregard of the plaintiff's rights. Not only was there a change in the entire name of the addressee, but, coupled with the delivery to his competitor in business, tended to show an intention to injure. And, in the case of Walker v. Tel. Co., 75 S. C. 512, 56 S. E. 38, there was not only an entire change in the meaning of the message, but when the telegraph company was requested to repeat the telegram, it was not properly corrected. In that case the plaintiff was in New Orleans, La., and his wife was in Edgefield, S. C. She first sent him this message: "Wire your address after to-day. Baby had convulsions this morning. Resting now." To which he replied: "Be here to-morrow and Monday. Wire again to-night child's condition. Will come if needed." The following telegram

was afterwards sent: "Toots desperately ill, convulsions. Better come." The message when received read: "Ties displayed, all convulsions better now." The repeated message was as follows: "Toots desperately, all convulsions better now." It will thus be seen that the facts of those cases are quite different from the facts of the case under consideration. The mere absence from the message of the words "726 Pine St." is not a sufficient basis for punitive damages, and his honor the circuit judge erred in not so ruling.

It is the judgment of this court, that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(83 S. C. 17)

ALEXANDER v. CAROLINA MILLS.

(Supreme Court of South Carolina. June 8, 1909.)

1. MASTER AND SERVANT (§ 295*) — ASSUMPTION OF RISK—INFANT EMPLOYEES.

In an action for injuries to a mill employé 13 years of age, it was error to charge that the doctrine of assumption of risk did not apply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1173; Dec. Dig. § 295.*]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUING CHARGE AS A WHOLE.

No error can be predicated on parts of a charge which, considered in connection with the entire charge, are free from error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

Appeal from Common Pleas Circuit Court of Greenville County; J. C. Klugh, Judge.

Action by Harley Alexander by S. M. Alexander, his guardian ad litem, against the Carolina Mills. From a judgment for plaintiff, defendant appeals. Reversed.

Haynsworth, Patterson & Blythe, for appellant. J. R. Martin, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by Harley Alexander, an infant, for injuries while in the employment of the defendant by reason of its negligence. The complaint alleges that the plaintiff, an infant then 13 years of age, was employed by defendant as a sweeper in its spinning room; that on the day of November, 1902, he was ordered by defendant to adjust a cap on the head gear of a spinning frame, which cap was defective, in that it had no handle; and that in the attempt to adjust it his hand was caught in the spinning gear and injured. The negligence alleged was (1) failing to furnish plaintiff with a safe place in which to work; (2) ordering him to place cap on the head gear of spinning frame; (3) in not requiring plaintiff to stay away from uncased and unprotected spinning frame; (4) in not warning plaintiff of the danger; (5) in failing to provide a safe and suitable

cap. The defendant by its answer denied the allegations of the complaint, and interposed the defenses of assumption of risk and contributory negligence. The jury rendered a verdict in favor of the plaintiff for \$350. There was a motion for a new trial, which was refused, and the plaintiff has appealed.

His honor, the presiding judge, charged the jury that the doctrine of assumption of risk had no application to the case. The appellant assigns error in this ruling. The cases of *Goodwin v. Columbia Mills Co.*, 80 S. C. 349, 61 S. E. 390, and *Shirley v. Furniture Co.*, 76 S. C. 452, 57 S. E. 178, 121 Am. St. Rep. 952, show that the ruling of his honor, the presiding judge, was erroneous.

The other exceptions assigning error in the portions of the charge therein set out cannot be sustained for the reason that, when said extracts from the charge are considered in connection with the entire charge, it will be seen that they are free from error.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

(83 S. C. 33)

C. L. PACE & CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. June 9, 1909.)

APPEAL AND ERROR (§ 84*)—DECISIONS REVIEWABLE—ORDER GRANTING NEW TRIAL.

An order of the circuit court, made on appeal from a judgment of a magistrate, that the judgment of the magistrate be reversed and a new trial granted, is not appealable, as it does not determine any of the rights of the parties.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 533; Dec. Dig. § 84.*]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

Action by C. L. Pace & Co. against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs on trial before a magistrate, and defendant appealed to the circuit court, where the judgment of the magistrate was reversed, and a new trial granted, and plaintiffs appeal. Appeal dismissed.

Jas. W. Johnson, for appellants. Montgomery & Lide, for respondent.

GARY, A. J. This is an action for damages to a china closet and for \$50 penalty. The case was tried before a magistrate, who (a jury trial being waived) rendered judgment for the amount claimed and costs, to wit, \$66. The defendant appealed to the circuit court. On hearing the appeal, his honor, the circuit judge, ordered that the judgment of the magistrate be reversed, and that a new trial be granted, on the ground that there was no testimony that the goods alleged to have been damaged were injured while in the possession of the defendant. The plaintiff has appealed from said order.

The case of *Lamplsey v. Railway Co.*, 77 S. C. 319, 57 S. E. 1104, shows that said order is not appealable. The order does not determine any of the rights of the parties.

It is the judgment of this court that the appeal herein be dismissed.

(83 S. C. 10)

OWENS v. LAURENS COTTON MILLS.
(Supreme Court of South Carolina. June 8, 1909.)

1. APPEAL AND ERROR (§ 172*) — REVIEW — SCOPE.

In determining whether there was error in refusing a nonsuit, the only grounds which can be considered are those relied upon when the motion was heard.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 172.*]

2. MASTER AND SERVANT (§ 265*) — ASSUMPTION OF RISK—INFANT EMPLOYÉ.

The presumption is that an infant employé under 14 years is incapable of assuming risks of danger.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 265*) — ASSUMPTION OF RISK—INFANT EMPLOYÉ.

The presumption is that an infant employé under 14 years cannot assume the risk arising from the negligence of a fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 265.*]

4. TRIAL (§ 139*)—NONSUIT.

A nonsuit was properly denied where there was testimony to support plaintiff's case.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 338-340; Dec. Dig. § 139.*]

5. APPEAL AND ERROR (§ 1078*) — ASSIGNMENTS OF ERROR—FAILURE TO ARGUE.

An assignment of error not argued will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Common Pleas Circuit Court of Laurens County; G. W. Gage, Judge.

Action by Lidia Owens, by her guardian ad litem, G. W. Owens, against the Laurens Cotton Mills. Judgment for plaintiff, and defendant appeals. Affirmed.

Dial & Todd, for appellant. Cannon & Blackwell, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff while in the employment of the defendant. The complaint contains the following allegations: "That Lidia Owens is a child of tender years, being about 11 years of age, and was employed by the defendant, the Laurens Cotton Mills, to work in said mill, and while employed as aforesaid, on or about the 18th day of February, 1907, being inexperienced in millwork and not aware of the danger of the machinery, and not being warned of the same, she was ordered by the defendant to oil the gearing cogs or wheel of one of the defendant's spinning

frames, and while thus employed, and under the defendant's direction and supervision, and without any fault of her own, but on account of the willfulness and wantonness of this defendant, and by reason of its carelessness and negligence in not furnishing the said Lidia Owens a safe place to work and suitable appliances, her hand was caught in and between the cogs or cogwheels of one of defendant's spinning frames, or those connected thereto, and the index finger on the right hand was so badly crushed and lacerated that it was necessary to have the same amputated." There was testimony to the effect that the plaintiff was at the time of the injury about 10 years of age; that she was inexperienced in millwork, having worked only about three weeks; that she was not warned of the danger incident to her work; that it was her duty to oil the rollers, and that she was not furnished with a brush or other appliance for getting the oil; that the defendant, not only knew that she got oil from the gear cap of the spinning frame, but the section boss under whom she worked had ordered her to get oil from a gear cap about 10 minutes before the injury occurred, and told her in what position to place her finger in order to get it. At the close of the plaintiff's testimony the defendant made a motion for nonsuit on two grounds: First, because the testimony showed assumption of risk on the part of the plaintiff; and, second, because the testimony showed that the injury was caused by the negligence of a fellow servant.

In refusing the motion his honor, the presiding judge, said: "Mr. Featherstone, if this was a grown girl or a grown man, I would have no hesitation about granting your nonsuit under the case of Wofford. But she was of tender years, nine years old, and had been in the mill but three weeks. She was not entitled under the law to be there at all. I have no hesitation about my duty to refuse the motion."

The question as to punitive damages was eliminated from the consideration of the jury, which rendered a verdict in favor of the plaintiff for \$500.

The defendant appealed upon exceptions, assigning error in the refusal to grant the nonsuit, and in allowing a witness to testify that some of the boss men allowed other children to get oil out of the cups. The only grounds which can be considered in determining whether there was error in refusing the nonsuit are those that were relied upon when the motion was heard.

The first question that will be considered is whether there was error in refusing the motion for nonsuit made on the ground that the testimony showed assumption of risk on the part of the plaintiff. Not only was the testimony conflicting, but the presumption is that an infant under 14 years of age is incapable of assuming risks of danger. Therefore his honor, the presiding judge,

could not have granted the nonsuit without invading the province of the jury. The exception raising this question is overruled.

The next question for consideration is whether the testimony showed that the plaintiff was injured as the result of negligence on the part of a fellow servant. As the plaintiff was under 14 years of age, the presumption is that she could not assume the risk arising from the negligence of a fellow servant. Furthermore, there was testimony to the effect that the injury was not caused by the negligence of a fellow servant. It would therefore have been error for the presiding judge to have refused to submit the testimony to the jury.

The other exception was not argued, and therefore will not be considered.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(83 S. C. 34)

STATE v. GIBSON.

(Supreme Court of South Carolina. June 9, 1909.)

On petition for rehearing. Dismissed.
For former report, see 64 S. E. 607.

PER CURIAM. After careful consideration of the petition herein, the court fails to discover wherein any material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(83 S. C. 68)

TALBERT v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. June 17, 1909.)

On petition for rehearing. Denied.
For former opinion, see 64 S. E. 862.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition for rehearing be dismissed, and that the order heretofore granted, staying the remittitur, be revoked.

(83 S. C. 78)

Ex parte ZEIGLER et al.

T. T. HAYDOCK CARRIAGE CO. v. ZEIGLER et al.

(Supreme Court of South Carolina. June 17, 1909.)

On petition for rehearing. Denied.
For former opinion, see 64 S. E. 513.

PER CURIAM. All the matters set out in the petition for rehearing were fully con-

sidered before the decision of the cause, and the petition is therefore dismissed, and the order staying the remittitur revoked.

(65 W. Va. 622)

KANAWHA HARDWOOD CO. v. EVANS et al.

(Supreme Court of Appeals of West Virginia. May 4, 1909.)

1. EQUITY (§ 450*)—BILL OF REVIEW.

A person interested in the subject-matter of a bill in equity and a decree thereon, but not made a party thereto, may, after final decree therein, file an original bill in the nature of a bill of review for correction of any adjudication therein to his prejudice and vindication of his rights in the premises, and have it treated as a cross-bill in the original cause.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1095; Dec. Dig. § 450.*]

2. EQUITY (§ 465*)—BILL OF REVIEW.

Under its power of restitution, the court may make in such case any decree or order between the parties to the first bill, if made parties to the second, that may be necessary to the effectuation of equity and justice between them, whether there be specific prayers for such relief or not; it being based upon errors appearing in the record.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1142; Dec. Dig. § 465.*]

3. PARTNERSHIP (§ 227*)—SALE BY PARTNER—INTEREST TRANSFERRED.

An assignment, sale, or transfer of the right, title, and interest of a partner in and to partnership property passes only the title of the individual partner, not that of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 473½, 474; Dec. Dig. § 227.*]

4. PARTNERSHIP (§ 161*) — RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

If a copartnership extend only to certain property, and one of the members of the firm, having property of his own of the same kind, receive advances of money on account of his own property and his interest in the social property, the person making such advances is a creditor of the individual, but not of the firm.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 161.*]

5. PARTNERSHIP (§ 37*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—ESTOPPEL.

If, in such case, the person making advances knows the other member of the firm has an interest in part of the property, the latter is not estopped from asserting his rights in respect thereto.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 52; Dec. Dig. § 37.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Clay County.

The Kanawha Hardwood Company tendered its petition in a suit by Noah Evans against J. H. Perrine praying to be made a defendant and to have its petition taken as a cross-bill against Evans, Perrine, and others. Decree for the Kanawha Hardwood Company, and Evans and another appeal. Reversed and remanded as to Evans.

H. B. Davenport and McWhorter & Loewenstein, for appellants. Linn & Byrne, for appellee.

POFFENBARGER, J. J. H. Perrine, engaged in the manufacture of lumber and owning a sawmill and tramway, in Clay county, entered into a contract of copartnership with Noah Evans, the owner of timber on two tracts of land, containing in the aggregate about 100 acres, on the 23d day of January, 1900. Evans' timber and Perrine's mill and tramway were to be used without charge in the common enterprise, and they were to bestow their care and labor upon it and contribute equally to expenses, and share equally in profits and losses. Prior to the date of this contract, Perrine had been financed in his timber operations by the Kanawha Hardwood Company, a copartnership to whom he had furnished on account of the advancements considerable quantities of lumber. Their relations had been established by a contract dated August 11, 1899, purporting a sale by Perrine to said company of the lumber he then expected to cut, estimated at 100,000 feet, at certain prices therefor, delivered on board cars. At the date of execution of the contract \$500 was advanced on the lumber. On February 21, 1900, the company had advanced and paid Perrine \$3,391.23, and credited him with \$2,064.07, leaving a balance due of \$1,329.16, according to the testimony of J. Q. Barker, manager of the company. On that date, which was about a month after the formation of the partnership between Perrine and Evans, Barker went to Perrine's place of business to look after the company's interests, and, finding Perrine embarrassed by lack of funds, made a new contract, dated February 22, 1900, by which his company agreed to make further advancements, and purchased the mill, tramway, and all of Perrine's "right, title, and interest in and to the lumber" then on sticks, his "interest in and to" the timber already purchased, his rights of way, and his "right and title" to mill and lumber yards wherever located on Queen Shoals creek, but there was a provision for reconveyance in case Perrine should pay back the money advanced to him. Future advances were provided for not to exceed \$9 per 1,000 feet for purchasing timber, cutting, hauling, sawing, and loading on cars. Of course, shipments were to continue, and the lumber, as received, was to be credited on the indebtedness. Evans was not expressly made a party to this contract, though interested as aforesaid. Barker says the company advanced \$1,200 to Perrine on the next day, paid a freight bill of \$32.17 on the 24th, and his note at a certain bank for \$258.20 on the 26th. While matters were in this situation, C. C. Young, a creditor of Perrine, sued him in assumpsit for the sum of \$354.15, and had an attachment levied on the lumber and timber about the mill and on the yards by D. H. Stephenson, a deputy sheriff, and it was subsequently sold under an order of the court pending the suit for the sum of

\$529.01, the Kanawha Hardwood Company becoming the purchaser, retaining the money and giving the sheriff its obligation, with the intention of resisting Young's claim to the fund on the ground of title to the property in the purchaser. Part of the property sold under the attachment belonged to Perrine and the residue to Perrine and Evans; the former bringing \$150.67 and the latter \$378.34. Later the attachment was quashed. In July, 1900, Evans brought his suit in equity, setting up the copartnership between himself and Perrine, and the proceeding in the action at law, resulting in the conversion of the social property into a fund in the hands of the sheriff, and praying a settlement and dissolution and a decree for the fund, less an amount sufficient to pay the firm debts. Such proceedings were had as resulted in a decree in his favor for \$378.71 out of said fund, less the sheriff's commission thereon, \$19.93. This decree was pronounced at the September term of the court, 1901. Before the expiration of that term, but after the entry of the decree, the Kanawha Hardwood Company, not having been made a party to the cause, came into court and tendered its petition, praying to be made a defendant and to have its petition taken and treated as a cross-bill against Evans, Perrine, Stephenson, and Young. The court took time to consider it, but adjourned without having acted upon it, and, at the ensuing December term, permitted it to be filed, over objections of Evans, remanding the cause to rules for process. At the May term, 1902, all the parties except Perrine appeared, waiving the issuance and service of process, and answers were filed by Evans and Stephenson, that of the latter showing he had paid Evans the fund in his hands arising from the sale of the partnership property, under the decree formerly made, and praying a decree against the Kanawha Hardwood Company for \$529.01, the purchase money of the property sold. On these pleadings and the evidence taken, the decree complained of, allowing the Kanawha Hardwood Company to retain said sum of \$529.01, and requiring Evans to repay to Stephenson the money received from him, was pronounced, and Evans and Stephenson have appealed from it.

The so-called cross-bill was really an original bill, having for its object correction of a decree in a cause to which the Kanawha Hardwood Company had not been a party, but to which it should have been made a defendant, as the object of Evans' bill had been to acquire the fund in the hands of said company. That decree was not binding on it, but it related to, and affected, the fund in its hands. Hence the new bill was germane to the old one, and may be termed an original bill in the nature of a bill of review. The decree made on the first bill, between Evans and Stephenson, became final as to them on the adjournment of the term, and could not be set aside, but subsequent proceedings on

the new bill disclosed a miscarriage of justice due to Evans' failure to make necessary parties to his bill. Assuming that he was not entitled to that fund, the decree in his favor so wrongfully procured by him passed into his hands a fund under the control of the court and constructively in its possession. We think the court, seeing the erroneous and wrongful disposition of the fund, and having all the parties before it, could, under its power of restitution, decree repayment of it by Evans, though Stephenson did not ask it in his answer to the cross-bill. The decree was a mere order of restoration, based upon error, disclosed by the record, as the circuit court thought, rather than a pleading *inter partes* and prayer for relief. *August v. Glimmer*, 53 W. Va. 65, 44 S. E. 143; *Brown v. Cunningham*, 23 W. Va. 109; *Eubank v. Ralls*, 4 Leigh (Va.) 308. We think this principle answers fully the objection of want of pleadings between Stephenson and Evans as a basis for the decree between them.

The form of the contract of sale, purporting to pass only Perrine's right, title, and interest in and to the lumber, constitutes the basis of further complaint. Of course, it carried nothing beyond the extent of its terms. *Jones v. Neale et al.*, 2 Pat. & H. (Va.) 339. However, if the cross-bill plaintiff can be regarded as a creditor of the firm in respect to the indebtedness due it, the decree is right, since the fund, constituting the social assets, is confessedly a partnership fund, as to which creditors have preference over members of the firm. The crucial question, therefore, is whether the advancements are to be regarded as having been made to Perrine or to the firm. Evans says he knows nothing of them, nor of the use of any of them in the manufacture of the partnership lumber. According to his testimony and the finding of the commissioner, on a reference under the first bill, he paid out for labor \$561.98. His deposition was taken on the issues, made under the cross-bill, to the same general effect and no effort was made to show he had received this money from the advancements made to Perrine, or that he was not financially able to have made the payments from his own funds. He received from Perrine and sales of lumber \$183.22, which may have been used in paying for labor, leaving, if it was, \$378.76 paid out of his other funds. There was unpaid indebtedness, amounting to about \$125. Besides the work of his teams, \$555.20, and the money he paid Evans, Perrine paid out \$131.27. Evans furnished the timber and Perrine the use of his mill and tramway, and each his services without charge. No doubt the principal part of the money received by Evans from Perrine and paid by Perrine for labor and timber came out of the advancements made to Perrine by the cross-bill plaintiff; but the extent to which it came from that source is impossible of ascertainment. Perrine seems to have been hopelessly embarrassed when these advancements were

made, and most of the money must have gone to pay his individual debts. Barker says \$258.20 went to pay Perrine's individual note, and it is not likely that \$1,200 was needed for, or used in, the partnership business within a month after that business commenced. Assuming that the cost of manufacture and loading would be as much as \$9 per 1,000 feet, these advancements were far in excess of the entire cost of manufacturing 100,000 feet of lumber, and must necessarily have been made to cover some of Perrine's individual indebtedness. If we could say the cross-bill plaintiff is a creditor of the firm, the extent to which the debt is a firm debt has not been ascertained, and this precludes recovery on that theory. Adding to this the circumstances of a contract on the faith of which the advancements were made, looking only to Perrine's interest in the property, and, in terms, binding only that interest, and Barker's knowledge that Evans claimed an interest in portions of the lumber, it seems clear that the advancements were made to Perrine individually, and not to the firm. The circuit court seems to have been of this opinion, for, in its decree, it says Evans has estopped himself by his conduct.

We find no evidence justifying the application of the principle of estoppel. Barker says he knew or was informed that Evans had an interest in some of the lumber. That was sufficient to put him on inquiry, and there seems to have been no difficulty in ascertaining the lumber in which he had an interest, nor the extent of the interest. Evans made no false or misleading representation, nor, indeed, any at all, beyond that, arising from his having put his timber into the mill under his agreement with Perrine, and of that Barker had sufficient notice to put him upon inquiry, and seems clearly to have respected that interest in framing the contract and making the advancements.

Under the contract between Perrine and Evans, each was entitled to one-half of the net proceeds or profits of the business. That is all either could dispose of on his individual account or for his individual benefit. That profit, as shown by the commissioner's report, as well as by the evidence, was \$105.25, one-half of which sum the cross-bill plaintiff is entitled to, in addition to the sum of \$150.67, proceeds of individual property of Perrine's sold by the sheriff, and constituting part of said sum of \$529.01. Having had all the parties before it, the court should have ascertained the costs in the attachment suit in which the sale was made, and required Young, at whose instance they were incurred, to pay the same. This should now be done and provision for restitution made, allowing interest, but the preparation of such a decree will involve investigations, ascertainment of facts, and calculations that can be more

easily and expeditiously made in the court below.

For the reasons stated, the decree complained of will be reversed, with costs to the appellant Evans, and the cause remanded.

(65 W. Va. 719)

KIRBY et ux. v. STEELE.

(Supreme Court of Appeals of West Virginia.
May 11, 1909.)

CREDITORS' SUIT (§ 27*)—PARTIES.

A person who conveys property to the wife of a debtor, by deed fraudulent as to creditors of the husband, is not a necessary party to a suit by a creditor to subject the land in the wife's hands to the husband's debt. Such grantor is a mere medium of transfer, not a party in interest.

[Ed. Note.—For other cases, see Creditors' Suit, Dec. Dig. § 27*.]

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill of review by T. R. Kirby and wife against L. L. Steele. Decree for plaintiffs, and defendant appeals. Reversed.

Blackwood & Sanders and Simms, Enslow, Fitzpatrick & Baker, for appellant. Switzer & Wyatt, for appellees.

BRANNON, J. L. L. Steele brought a chancery suit against T. R. Kirby and Mary J. Kirby, his wife, to make liable to a debt of Steele against T. R. Kirby a tract of land conveyed to Kirby's wife by L. B. Bowles. The facts are that Kirby owed Steele, and Steele obtained a judgment against Kirby. Kirby owned the tract of land, and made a deed of trust to Morris, trustee, to secure a debt to Bowles. Morris sold the land under the deed of trust, and Bowles purchased it, and the trustee conveyed to Bowles. Then Bowles conveyed the land to Mary J. Kirby. Steele's debt antedated these transactions. Steele's bill charged that Kirby and wife and Bowles formed a combination by which Kirby was to make the deed of trust to secure Bowles and default in payment, and that Bowles was to cause sale to be made under the trust, buy the land, and convey it to Kirby's wife, for the purpose of defrauding Steele out of his debt. It charged that the husband paid Bowles for the land. A decree was made subjecting the land to the debt of Steele, holding the right of Mrs. Kirby void as to the debt. Later Kirby and wife filed a bill of review to reverse the decree for error of law, and the court did reverse the decree and enjoin the sale directed by the decree and Steele appeals.

The court in its decree assigned as ground for reversal the fact that the trustee, Morris, "and the administrator and heirs of L. B. Bowles" were necessary parties. They were not. What interest had the trustee? The legal title had passed from him. Bowles was not a necessary party. The legal title had

passed from him to Mrs. Kirby. His deed was valid as between him and her, and passed title to her, and is void only as to creditors, and Bowles is not a necessary party. *Herzog v. Weller*, 24 W. Va. 199. Hogg's Eq. Procedure, § 65, says that a person through whom the fraudulent conveyance passes, acting only as a medium to transfer title, is not a necessary party. Bowles had no title, and the decree does not touch his debt or interest. But where it is a question between fraudulent debtor, the grantor, and the grantee and creditor, the grantor being not a stranger acting as a mere medium, it is different. The grantor is in that case a necessary party. *Herzog v. Weller*, just cited, and many others in this court, say that a deed to a married woman is presumed fraudulent as to the husband's creditors, and she must prove that she paid for the conveyance out of her means. Not a particle of evidence meets this requirement.

We reverse the decree made upon the bill of review on the 10th day of November, 1906, and dismiss the bill of review.

(65 W. Va. 648)

THOMPSON & LIVELY v. MANN et al.

(Supreme Court of Appeals of West Virginia. May 4, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 96*)—CONTRACTS OF ADMINISTRATOR—VALIDITY.

The general rule, subject to few exceptions, is that a personal representative cannot charge the estate by contracts originating with himself, although for the benefit and in the interest and on behalf of the estate; such contracts binding him only in his private capacity.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 410; Dec. Dig. § 96.*]

2. EXECUTORS AND ADMINISTRATORS (§ 535*)—LIABILITIES ON BONDS—CONCLUSIVENESS OF ADJUDICATION AGAINST PRINCIPAL.

A judgment at law against an administrator de bonis testatoris on such contracts will not estop the surety on his fiduciary bond in a subsequent suit in equity to charge him with the payment of such judgment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 535.*]

3. EXECUTORS AND ADMINISTRATORS (§ 529*)—BOND OF ADMINISTRATOR—LIABILITY OF SURETY.

A surety on the fiduciary bond of a personal representative is not liable thereon for obligations of the fiduciary contracted after the death of the decedent, although in the interest and for the benefit of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 529.*]

4. EXECUTORS AND ADMINISTRATORS (§ 51*)—ASSETS—JUDGMENT IN ACTION FOR WRONGFUL DEATH.

Money recovered in an action by an administrator pursuant to sections 3488, 3489, Code 1906, for causing the death of his decedent by wrongful act, neglect, or default, does not constitute general assets of the estate of such decedent in the hands of the administrator to be administered, and liable for his debts, and a judgment at law against the administrator de

bonis testatoris constitutes no lien or charge on such fund. Such money belongs to the particular persons who by law are entitled thereto.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 51.*]

5. EXECUTORS AND ADMINISTRATORS (§ 530*)—SETTLEMENT BY ADMINISTRATOR—SURCHARGING SETTLEMENT.

Where an administrator has recovered and collected money in an action for causing the death of his decedent, and before an order has been made making allowance to the attorney employed in such action for fees, and appropriating and charging thereon a sufficient portion of such fund to pay the same, such administrator has settled his accounts, and been allowed and credited therein with a sufficient sum retained for attorney's fees to cover the fees of such attorney, but not paid to him, a court of equity in a suit by such attorney against the administrator and the surety on his fiduciary bond brought for that purpose will not surcharge and falsify such settlement, respecting the item credited therein for attorney's fees, so as to create a devastavit and render the surety in such fiduciary bond liable for and give decree against him for the amount of such fees. *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178, and *Crim v. England*, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826, distinguished.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 530.*]

6. JUDGMENT (§ 21*)—TRIAL OF ISSUES—FORMAL REQUISITES—EFFECT OF AMBIGUITY.

A decree so ambiguous in its terms as to be incapable of being rendered certain within the requirements of the law will be set aside for that reason.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 7; Dec. Dig. § 21.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Summers County.

Bill by Thompson & Lively against T. G. Mann and others. Decree for plaintiffs, and defendants appeal. Reversed and remanded.

T. N. Read and T. G. Mann, for appellants. Thompson & Lively, for appellees.

MILLER, P. This cause was here before upon an appeal by the same appellants from a final decree against them in favor of the plaintiffs. 53 W. Va. 432, 44 S. E. 246. The original bill was held bad principally for the reason that the judgment relied on appeared from the abstract thereof and the execution thereon exhibited with the bill to be a judgment against Mann, not as administrator, but against him individually, although describing him as administrator of the estate of Clarkson; such judgment not being enforceable against Flanagan, the surety, since he had not engaged for Mann's individual debt. Judge Brannon in the opinion pronounced on the former appeal says: "If the final judgment were before us, we might see that it was to be levied of the goods of the deceased in the hands of his administrator, but it is not before us." Numerous cases cited hold that notes, bonds, and contracts signed by and judgments given against persons in the

descriptio personæ are individual contracts and obligations, not binding on the estate or person represented. The case is now before us upon the amended bill, and the final decree thereon in favor of the appellees. The amendment consisted solely in reciting the facts alleged in the original bill, and in filing as an exhibit therewith a certified copy of the judgment referred to, and a renewal of the prayer of the original bill. That judgment was *de bonis testatoris* for \$250, the sum assessed by the jury, less \$250 paid and the interest released, and costs, "to be levied of the estate, goods, and chattels of said Sherman Clark, alias H. C. Clarkson, deceased, in the hands of said T. G. Mann to be administered." The bill is framed as a general creditors' bill, to surcharge and falsify the administration accounts, and to show a devistavit, and to recover against the administrator and the surety on his bond the amount of the judgment at law against the principal. This calls upon us to determine the status of the plaintiffs. Are they general creditors of the estate of Clarkson, and entitled to maintain such a suit, or is their claim the individual debt of the administrator? It is a general rule of law, subject to few exceptions, that a personal representative cannot charge the estate by contracts originating with himself, although for the benefit and in the interest and on behalf of the estate, and that for such contracts and claims the remedy is against the executor or administrator in his private capacity; whilst, on the other hand, for the contracts of the decedent, the representative is bound not personally, but in his representative capacity. 2 Woerner, Amer. Law of Admin. § 356, *pp. 756, 757; Croswell on Ex. & Adms. §§ 656-660; Schouler on Ex. & Adms. 334, 335, and cases cited; Fitzhugh's Ex'r v. Fitzhugh, 11 Grat. (Va.) 302, 62 Am. Dec. 653; Dangerfield v. Smith, 83 Va. 81, 1 S. E. 599; 18 Cyc. 881; 11 Am. & Eng. Ency. Law, 932, and many cases cited in note 5. In Austin v. Munro, 47 N. Y. 366, cited in this note the court says: "The rule must be regarded as well settled." In Fitzhugh's Ex'r v. Fitzhugh, supra, this rule was applied in a suit for funeral expenses, the court holding that a personal representative cannot be sued as such for services rendered or goods furnished to his testator's or intestate's estate since his death. It is also there decided upon the authority of 2 Saun. R. 117e, note, and Epes' Adm'r v. Dudley, 5 Rand. (Va.) 437, that promises which charge a man as executor cannot be joined with those which charge him personally because the judgment in the one case would be *de bonis propriis* and in the other *de bonis testatoris*. Mr. Schouler says: "This doctrine applies to a debt incurred by the representative in employing counsel to advise and assist him in the discharge of his duty"—and so says this court in Hall v. McGregor (decided at the present term) 64 S. E. 736. And Woerner says (page 756), citing many cases, that the estate is not liable to an

attorney for his services at the instance of an executor or administrator, but that the latter is himself liable in a suit by the attorney. "Indeed," says Schouler, "the rule is that executors and administrators cannot, by virtue of their general powers as such, make any contract which at law will bind the estate and authorize a judgment *de bonis decedentis*; but for contracts made by them for necessary matters relating to the estate they are personally liable, and must see to it that they are reimbursed out of the assets." At page 473 he says: "In causes of action wholly accruing after his decedent's death, the personal representative is in general liable individually [citing *De Valengin v. Duffy*, 14 Pet. 282, 10 L. Ed. 457; *Kerchner v. McRae*, 80 N. C. 219]. And, wherever an action is brought against an executor or administrator, on promises said to have been made by him after the decedent's death, he is chargeable in his own right and not as representative [citing *Wms. Ex. 1771*; *Cro. Eliz. 91*; *Cowp. 289*; *Jennings v. Newman*, 4 T. R. 348; *Clarke v. Alexander*, 71 Ga. 500]." On the question whether funeral expenses constitute a claim against the estate of a decedent there is conflict of authority. 8 Am. & Eng. Ency. Law, 1024, says: "By the great weight of authority the reasonable costs and charges of the funeral constitute a claim against the estate, or more properly a charge upon the estate for which the executor or administrator is liable as such to the extent of the assets in his hands. In such cases the law implies a promise to pay therefor." But this is opposed to the Virginia case cited. And we think it will be found that many of the cases depend on local statutes, or do not support the rule as stated. However, this question is not before us, and is not decided.

This rule upon due consideration seems a wise one. It furnishes proper protection to an estate against waste and extravagance of a personal representative, while working no injustice to him. Section 3280, Code 1906, provides for reimbursing a personal representative for debts contracted by him as such in the distribution of the estate. If he makes improper contracts binding on him personally, the estate is protected, because his disbursements out of the funds of the estate are subject to the scrutiny of the probate authorities, and his accounts may be surcharged and falsified by distributees, even after they have been approved on *ex parte* settlements thereof by probate officers. *Edwards v. Love*, 94 N. C. 365, 369; *Seabright v. Seabright*, 28 W. Va. 412. If, then, Mann is not liable to the plaintiffs in his representative capacity, and was not properly sued as such, the question comes: Is his surety on his fiduciary bond concluded by the judgment of the plaintiffs against Mann *de bonis testatoris*? The authorities seem to hold that, although the principal is estopped, the surety is not. *Munford v. Overseers*, 2 Rand. (Va.) 313, and note; *Montague's Ex. v. Turpin's Adm'rs*,

8 Grat. (Va.) 453; 2 Woerner, 757, 758, citing (note 8) *Curtis v. National Bank*, 39 Ohio St. 579; *McLean v. McLean*, 88 N. C. 394. In the Ohio case the question is pointedly decided. The surety was no party to the suit at law. The bill shows on its face that the contract was with Mann, though in the interest of the estate, was made after the death of his decedent, and binding, not the estate, but him personally. In *State v. Nutter*, 44 W. Va. 385, 389, 30 S. E. 67, 69, this court said that "judgments bind parties and privies in estate, but a surety is not a privy in estate with the principal; that it is not on the ground of privity that a surety is bound." In this state, says the court, "a judgment against a principal does not bind the surety as a general rule. It depends on the character of the bond." Instances are given where judgments against principals do bind the surety, but none of them include cases of sureties on administration bonds. They cover cases where bonds are given in legal proceedings conditioned to abide the result of the suit and the like. *State v. Abbott*, 63 W. Va. 189, 61 S. E. 369. "A judgment against the principal alone is as a general rule evidence against the surety of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment." 2 *Brandt on Suretyship and Guaranty*, § 802, and note 32.

The record shows that the money which came to the hands of the administrator was money recovered for the death of the decedent by wrongful act, neglect, or default, an action which did not survive at common law to the estate of decedent, but one created by sections 3488, 3489, Code 1906. Wherefore this money did not constitute estate of the decedent in the hands of the administrator to be administered, and by the very terms of said statute it was not subject to any debts or liabilities of the deceased. Plaintiffs in their action at law and in this suit proceeded upon the theory that this fund was estate of the decedent, and they took their judgment *de bonis testatoris*, and they rely upon that judgment as binding the estate of the decedent. But the decedent does not appear to have had any estate to be bound. The judgment, therefore, can have no binding force or effect at law upon the fund in question, though it be conclusive as against the administrator, and that it is a debt of the decedent. In *Richards v. Iron Works*, 56 W. Va. 510, 513, 49 S. E. 438, quoting from *Railroad Co. v. Swayne's Adm'r*, 26 Ind. 484, it is said: "The action given by the statute is for causing the death by a wrongful act or omission in a case where the deceased might have maintained an action had he lived for an injury by the act or omission. The right of compensation for the bodily injury of the deceased which died with him remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury

sustained thereby by the widow and children or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund when recovered is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin." And this case, in connection with the authorities cited, makes it clear that because the statute authorizes action by the administrator and collection of the fund the appointment of an administrator is for the sole purpose of collecting and receiving assets which will not be general assets of the estate of his intestate or liable for the debts, but which will belong to particular persons who by law or by contract with the deceased will be entitled thereto. We do not think, therefore, that the judgment gives the plaintiffs any better standing in a court of equity than if they had no judgment. That judgment does not bind this fund. It creates no lien upon it. It is not binding upon a court of equity or upon any court of probate as to the amount or justness of the claim, and whatever rights the plaintiffs may have of an equitable nature as against said fund must be determined independently of the judgment.

We are of opinion, however, that an administrator in a case like this, as in other cases of administration, has the right to be reimbursed and credited in his accounts as such, with commissions, and with all other reasonable costs and expenses of administration. These would, of course, include reasonable attorney's fees incurred in the prosecution of the suit. Otherwise no one could be found willing to act in such fiduciary capacity. Right and justice demand this. But as in other cases of administration the contract of the administrator is personal. He cannot bind the estate by his contracts in the one class of cases any more than in the other. But it is said this position is in conflict with previous decisions of this court in *Thompson v. Nowlin*, 51 W. Va. 346, 41 S. E. 178, and *Crim v. England*, 46 W. Va. 490, 33 S. E. 310, 76 Am. St. Rep. 826. We do not think so. Those cases do no more than hold that in equity and before an estate has been fully administered attorneys may by an original suit or in a pending proceeding intervene, and have an order made making application of a sufficient sum, and the administrator decreed to pay the same out of the assets in his hands; such order, if disobeyed, giving cause of action, at least in equity, against the administrator and the sureties on his fiduciary bond as for a devistavit. In *Thompson v. Nowlin* there had been no settlement of the administration accounts. There had been no allowance to the administrator for counsel fees, and the court went far, perhaps too far, in giving relief to counsel in that case.

In *Crim v. England* the attorneys had intervened and obtained an order of court making them an allowance, and charging it specifically upon the funds in the hands of the administrator yet to be administered. No other allowance had been made the administrator in his administration accounts by way of disbursement for counsel fees. But the case we have here is different. The bill and exhibits show that in his settlement before a commissioner of accounts he was allowed \$950, retained for attorney's fees nearly half the entire amount recovered, and out of which plaintiffs admit they were paid \$250, and they now seek by their bill to surcharge and falsify that item in the administrator's settlement to the extent at least of the amount of the judgment and costs recovered by them, so as to show a devistavit, and thereby render liable the surety upon the administration bond. Can they reasonably ask this action by a court of equity? We think not. We think it would be inequitable to go that far. Mann himself, the administrator, was an attorney, and plaintiffs were co-counsel with him. They trusted him personally. He is personally liable to them. They suffered him to settle his accounts as administrator and obtain credit against the estate for a large sum for counsel fees without having asserted any lien upon the fund, and without having obtained any order of the court making application of a sufficient portion thereof to pay them their fees, and we think it is now too late for them in this suit to be heard upon a bill to surcharge and falsify the settled account of the administrator for the sole purpose of fixing a liability upon the surety in the bond, but that they should be required to look solely to Mann, who is primarily liable to them for their fees.

The conclusions to which we are forced as to the status of the plaintiffs as creditors of the estate of Clarkson, and as to the liability of the surety upon the fiduciary bond of the administrator, and the disposition which will have to be made of the case upon this appeal, would seem to render it unnecessary to consider another serious question in relation to the decree appealed from. That decree adjudges that the plaintiffs Thompson & Lively recover of the defendant Mann, the administrator, to be levied of the goods and chattels of said decedent in his hands to be administered, and of the defendant Wm. G. Flanagan, the surety, on his official bond as such, "the sum of \$317.50 and the further sum of \$67.50, the amount of costs recovered against said administrator in the judgment of plaintiffs set up in this cause, together with all their costs in this behalf expended, including an attorney's fee of \$20." The decree then says: "Said recoveries shall be credited by the amount of costs yet remaining unpaid recovered by the defendants against the plaintiffs in the Supreme Court of Appeals

of this state, to wit, the sum of \$14 due the circuit court for transcript, the further sum of \$1.50 due H. Ewart, sheriff, for serving process, and the further sum of \$30 for attorney's fees recovered aforesaid in the Supreme Court, and any other costs expended not herein specified, and execution is awarded said plaintiffs." Appellants claim that this decree is so ambiguous in its terms that it cannot be rendered certain within the requirements of the law, and is erroneous for uncertainty. In this position we think they are correct, and that the decree for this reason, if for none other, would have to be reversed. *Humphrey's Adm'r v. West's Adm'rs*, 3 Rand. (Va.) 516; *Williams' Ex'r v. Strickler*, 3 Call (Va.) 281; *Stratton v. Assur. Soc.*, 6 Rand. (Va.) 22; *Early v. Moore*, 4 Munf. (Va.) 262.

What disposition then can properly be made of the case? If jurisdiction in equity could be maintained on any other ground, we might remand the cause to the circuit court to ascertain the correct amount due plaintiffs from defendant Mann, and for a decree against him therefor; but, the bill not being good as a bill to surcharge and falsify the accounts of the administrator, we do not see upon what equitable ground it can be retained for any purpose. There was demurrer to the bill overruled in the court below.

For the reasons given in the foregoing opinion, we think the demurrer should have been sustained and the bill dismissed, and that will be the order here.

(65 W. Va. 682)

TAYLOR v. RUSSELL.

(Supreme Court of Appeals of West Virginia.
May 4, 1909. Rehearing Denied
June 9, 1909.)

1. EJECTMENT (§ 9*)—TITLE TO SUPPORT.

Except under special circumstances, a plaintiff in ejectment must for recovery have legal title and right to possession. An equitable title will not do.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 17; Dec. Dig. § 9.*]

2. EJECTMENT (§ 9*)—EVIDENCE.

A plaintiff in ejectment must recover upon the strength of his own title, not the weakness of the defendant's title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 18; Dec. Dig. § 9.*]

3. VENDOR AND PURCHASER (§ 54*)—EXECUTORY CONTRACT—TITLE ACQUIRED.

Character of right conferred by an executory contract for sale of land discussed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 54.*]

(Syllabus by the Court.)

Error from Circuit Court, Tyler County.
Action by W. T. Taylor against Frances Russell. Judgment for defendant, and plaintiff brings error. Affirmed.

Dave D. Johnson, for plaintiff in error. S. Bruce Hall, for defendant in error.

BRANNON, J. W. T. Taylor brought an action of ejectment in Tyler county against Frances Russell to recover a lot of land in the town of Sistersville. The case was tried by the court on agreed facts, and the court gave judgment for the defendant, and Taylor sued out a writ of error.

Taylor showed no right but a right under an agreement selling him the lot, and stipulating for a future conveyance of the legal title on payment of deferred purchase money, which agreement was made with Josephine B. Stone and others. He showed no legal, but only an equitable, title. That fact alone bars Taylor from recovery, because it is a settled rule in this state, and in Virginia, that a plaintiff in ejectment must have legal title. No matter whether he claims for years or life or in fee, it is a hard and fast general rule, except under special circumstances, that he must have legal title. A mere equity will not do. *Chapman v. Coal & Coke Ry. Co.*, 54 W. Va. 193, 46 S. E. 262. There we find it stated in quotation from *Witten v. St. Clair*, 27 W. Va. 770, that: "To enable the plaintiff to sustain this action, it is essential that he be clothed with the legal title and right of possession at the time the action is instituted. The plaintiff must always in the first instance make out a legal and possessory title to the premises in controversy." *Suttle v. Railroad Co.*, 76 Va. 284; 2 Am. & Eng. Ency. L. 10, 482. There we find also the rule: "A plaintiff in ejectment must at the time of instituting his action, and at the time of its trial, have legal title to the land he sues for." 17 Cent. Dig. 1960; *Warvelle, Ejectment*, 244. The Supreme Court of the United States said in *Fenn v. Holme*, 21 How. 481, 483, 16 L. Ed. 198: "That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself at the time of the demise made in the declaration, and that evidence of an equitable estate will not be sufficient for recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them." Repeated in *Langdon v. Sherwood*, 124 U. S. 83, 8 Sup. Ct. 429, 31 L. Ed. 344. See many authorities cited in *Cyclopedic Digest, Va. & W. Va. Reports*, 878. Do we have to state this fundamental rule over again? A person who has a mere executory agreement for the purchase of land, not a deed conveying legal title, has a mere equitable title. A court of law does not know such a title. It is only the creature of a court of equity. A court of law regards only the legal title as to land. Prior to the statute found in Code 1906, c. 90, § 20 (section 3355), the vendor by executory contract selling land could turn out the vendee in possession even though he had paid the purchase money or performed other obligations resting on him under the contract. *Williamson v. Paxton*, 18 Grat. (Va.) 475; *Twyman v. Hawley*, 24 Grat. (Va.) 512, 18 Am. Rep. 661. Why so?

Because a court of law knows nothing of an equitable title to land. The vendor holds the only title it knows. It will not enforce it, except by way of an action for damages for failure to convey, treating it as a contract calling for damages for its breach, but not as passing any land rights. We find in 6 *Pomeroy, Eq. Remedy*, § 838, this: "The effect of a contract to purchase is very different at law and in equity. At law the estate remains that of the vendor; and the money that of the vendee. It is not so here (in equity). The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will." See *Warvelle on Ejectment*, § 174. All the books tell us that in equity the vendor holds the legal title in trust for the vendee. *Story's Eq.* § 789. In fact, some of the authorities go so far as to say that such a contract gives no equitable title to the land even in equity until payment of the purchase money. "The oft-asserted proposition that from time of the contract for the sale of land the vendor as to the land becomes a trustee for the purchaser, and the latter as to the purchase money becomes a trustee for the vendor, who has a lien upon the land, while fully expressing the rule of equity in general application, it is nevertheless subject to some qualification. * * * The essential feature of an equitable title is that it is one which appeals to equity for confirmation and enforcement. Hence a mere contract or covenant to convey at a future time on the purchaser performing certain acts does not create an equitable title. It is only when the purchaser performs or tenders performance of all the acts necessary to entitle him to a deed that he has an equitable title and may compel a conveyance. Prior thereto he has, at best, only a contract for the land when he shall have performed his part of the agreement." *Warvelle on Vendors*, § 176. This is held in *Chappell v. McKnight*, 108 Ill. 570, upon reputable authority. Strictly speaking, it is not far wrong. At any rate, until a deed is made executing a contract, the vendee has no title in a law forum. This is so true that a vendee, unless the contract otherwise provides, cannot enter into possession. "There is no implied authority for the vendee to enter. The facts are opposed to the idea that he is to come into possession of the consideration before he has complied with the contract. When the contract is silent as to the possession of the land, it remains with the vendor. The vendee if in possession, unless the contract authorize it, is a mere licensee until he has performed the contract and is entitled to a conveyance." So states *Newell on Ejectment*, 157, upon many authorities. *Warvelle on Ejectment* says the same in section 145. This, though not so material here, goes to sustain the proposition that an equitable title will not sustain ejectment. Our own case of *Supervisors v. Ellison*, 8 W. Va. 308, holds that a ven-

dee in an executory contract of purchase cannot maintain an action of unlawful detainer against the vendor for possession of the premises. So clear is it that an equitable title will not do in ejectment that it has been generally held that it is not even color of title for adverse possession, as will appear in *McNeely v. South Penn.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562, and *Lewis v. Yates*, 62 W. Va. 581, 59 S. E. 1073. Under our statute it is good for defense against an ejectment by the vendor against his vendee; but not good for an action by the vendee against his vendor. Between them it is a weapon of defense, but not of offense. As to strangers, much less is it a basis for ejectment by its owner. *Warvelle on Ejectment*, § 151, says that a vendee differs essentially from a tenant, and that the relation between the parties is not that of landlord and tenant.

This lot was sold under decree and purchased by Thorn, and by him taken possession of, and he conveyed to Frances Russell, and she went into actual possession. The decrees of sale and confirmation were reversed. Counsel say that makes void the title under the judicial sale. Suppose for argument that that title no longer exists. That is immaterial here, because the plaintiff has not shown title to recover in ejectment, and, no matter what the title of the defendant, she is in actual possession, and it is a fixed rule that the right of plaintiff to recover rests upon the sufficiency of his own title, and not upon the weakness of the defendant's title. *Witten v. St. Clair*, 27 W. Va. 762. It will not do for the defendant's counsel to sustain this action upon such cases as that just cited and *Tapscott v. Cobb*, 11 Grat. (Va.) 172. They say that when one in possession actual is entered upon and ousted by a mere intruder or trespasser, who has no color of title or authority to enter, the party ousted may recover in ejectment on mere possession. That doctrine does not apply. There is no evidence that Taylor was ousted by an intruder. When Thorn entered, he entered under a deed made under judicial sale, not yet affected by reversal. Entered peaceably. There is no evidence that he physically ousted or intruded upon the possession of Taylor. Taylor was not then in actual possession. The principle just stated applies only where there is one in actual possession intruded upon wrongfully by one having no shadow of title. It does not apply to parties having competitive rights or title, where the question is which is the better title. The *Witten Case* and the *Supervisors Case*, supra, repel this claim to recover.

So for want of legal title the plaintiff cannot recover. The defendant's right is not in question; and we therefore affirm the judgment.

(65 W. Va. 694)

SOUTH PENN COAL CO. v. MALE et al.
(Supreme Court of Appeals of West Virginia.
May 11, 1909.)

1. EVIDENCE (§ 589*)—WEIGHT OF EVIDENCE.

The supreme importance of a transaction to one of the persons engaged therein will, as a general rule, make his testimony of greater weight, because his memory is more trustworthy, than that of an adverse party, to whom the transaction is of less importance.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 589.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW—WEIGHT OF EVIDENCE.

Where a cause turns on the effect and weight of evidence, and credit of witnesses, and that evidence is such that reasonable men may differ as to its effect, an appellate court will not reverse the decree below based thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by the South Penn Coal Company against Reese Male and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. Hop Woods, for appellant. W. B. Kittle, for appellees.

MILLER, P. The South Penn Coal Company, a copartnership, by bill filed in December, 1905, seek specific execution of a contract made January 23, 1902, by defendants Reese Male and wife, whereby, in consideration of \$25, paid, they agreed to sell and convey to plaintiffs by deed of general warranty, free from all incumbrances and defects of title, a tract of 25 acres of coal land in Barbour county, at the rate of \$24 per acre, one-third cash on delivery of the deed, the balance in two equal annual payments, with interest, the plaintiff to have until May 1, 1902, to accept said option, and, if notice of acceptance should not be given the optioners before that date, the contract was to become null and void and of no further effect, but, should such notice be given, the contract was to become absolute and binding between the parties. Another object of the bill is to cancel and set aside as clouds on plaintiffs' right and title to said land a subsequent contract of sale of said land, made November 9, 1905, and a deed therefor made November 20, 1905, by said Male and wife to defendant William T. George. On final hearing on bill, answers, and depositions, the circuit court by its final decree appealed from dismissed plaintiff's bill, thereby denying them the relief prayed for.

A number of questions are raised and argued here, but the one on which all the others depend is whether plaintiffs, as charged in their bill and positively denied in the answer of the defendant Male, gave to said Male and wife notice of their acceptance of

said contract within the time prescribed thereby. If this question be determined adversely to plaintiffs, it will be unnecessary to consider the other questions, for in that event they cannot be said to fairly arise on the record. To establish the fact of such notice before May 1, 1902, plaintiffs rely mainly on the testimony of W. W. Rainey, a member of said firm, who swears that on April 24, 1902, he served notice in writing on Male of the acceptance of said contract, the time, but place and circumstance not given, and he exhibits what he claims is a copy of the notice. The only return of service indorsed thereon, and identified by him as being in his handwriting, are the words, "Copy served by W. W. Rainey." This alleged return bears no date, was not sworn to at the time, and no other witness testifies to the fact of such service. The copy of the notice exhibited is addressed to "Reese and Martha Male," but there is no claim that any notice was served on Mrs. Male. J. N. Wilkinson, another member of the firm, swears that he prepared the notice, and that a copy thereof was served by Rainey; but he was not present, and his testimony is entitled to little weight on the fact of service. Plaintiffs also rely to some extent on a copy of a letter exhibited with the bill, alleged to have been written to defendant Male October 23, 1902, purporting to refer to a former letter, but not by reference to its date, calling Male's attention to certain specific liens on the land and other defects in his title, and requesting him to remove the same. Under each item in this letter is a memorandum showing releases or defects cured, except a deed of trust to W. B. Kittle of May 22, 1900, not released. The defendant Male in his answer does not deny having received such a letter. He simply says that all the liens and defects referred to had long since been released or corrected except the deed of trust to Kittle, which he says plaintiffs at the time of the contract of January 23d agreed to pay off and discharge for him out of the purchase money. So far as we can find, no reference is made to this letter in the testimony of the witnesses. Plaintiffs claim that Male's procurement of such releases after the date of that letter goes to show that he regarded his contract of January 23, 1902, binding, and supports their claim of notice to him of its acceptance. It is a circumstance we think to be considered in connection with the other evidence on this important question; but it is by no means conclusive, and we do not think it entitled to very great weight, for, admitting the letter to have been received by Male, it was long after plaintiff's rights would have expired without notice of acceptance given, and neither receipt of the letter, nor procurement by him of releases of liens or other defects in his title, could have in any way operated as a waiver of his rights under the contract, or estop him from denying any rights of plaintiffs not actually ac-

quired by acceptance of the contract according to the provisions thereof. We may even assume that Male concluded on receipt of that letter to act on the suggestion to clear his title of defects, and that, if plaintiffs should come forward with their money and notes, he would let them have the land upon the terms of the contract, but no one would say that in law or equity he would have been bound to do so. More than two years elapsed after the date of this letter before the plaintiffs undertook to have said contract recorded. They first presented it for record October 23, 1905, after the business of buying and selling coal lands had revived, and they had learned that defendant George was buying lands in that vicinity. They did not actually get the contract on record until December 1, 1905, after George had purchased the land at an advanced price, and had actually had his contract and deed recorded.

Opposed to this testimony of the plaintiffs is the positive evidence of Male that notice of acceptance was never given him. Supporting him is the fact of long delay of plaintiffs in asserting their rights under the contract. Male swears positively that, besides want of notice of acceptance, no request or demand was ever made upon him for the abstract of title called for in the contract. Plaintiffs claim that by subsequent agreement with Male they agreed to abstract the title; but when was such an agreement made? They fail to prove it. And this suggests another very suspicious fact in connection with the alleged notice of acceptance. There is appended to the alleged copy of the notice exhibited with the bill a form of receipt, as follows: "Received of the South Penn Coal Company the sum of one dollar in addition to the sum of twenty-five dollars heretofore paid, as per receipt, on the purchase price of the said coal described in the above option, and we agree to execute proper deed for the same as soon as said company has the same properly surveyed, abstract of title made and all liens are removed, and deed prepared for proper signature; for which work we agree to allow the sum of _____ dollars, to be credited on said purchase money. This the 24th day of April, 1902." But this receipt was never signed by the optionors, or either of them. Why not? True, it is dated April 24, 1902, within the time for acceptance; but what the necessity for such receipt? Male was illiterate. He could neither read nor write. A most significant fact about this form of receipt is its recital of a new consideration of \$1, and that it contains a new agreement to convey as soon as the plaintiffs should have the land properly surveyed, a deed prepared, abstract of title made, and all liens should be removed, "for which work we agree to allow the sum of _____ dollars, to be credited on said purchase money." "We" meant Male and wife, and that the receipt was to be signed by both, making a new contract at a

time when the one now sought to be enforced was still operative. Rainey, though admitting that the memorandum of service on the notice is in his handwriting, does not distinctly say that that memorandum was made by him at the time. May it not have been made subsequently from his mistaken recollection of the fact of service. He had been engaged with his copartners in the business of buying and selling coal lands, and in serving notices, no doubt. Is it not reasonable to suppose that the notice was prepared by Wilkinson as he testifies, but not actually served, and laid away, and that afterwards when the question became important, and the notice was found among the papers, the indorsement of service was made by Rainey from faulty recollection? The doubt and uncertainty might have been cleared by evidence of the place and circumstances of service, or an explanation given as to why full return was not made and verified at the time, but Rainey says not a word about this. Another circumstance relied on by defendants is that Male was anxious to sell his land. Indeed, it appears there was necessity therefor, in order that he might pay off the deed of trust to Kittle in favor of Crim. Male admits that he inquired of Rainey several times whether they had his money for his land, but says Rainey made him no answer whether they would ever take it or not. Plaintiffs claim these inquiries amounted to an admission by Male that their contract was still in force. But defendants answer, and with force, that, if Male knew he had a binding contract with plaintiffs, he would have been advised to do what the record shows others did do, sue plaintiffs for specific execution. Before contracting or selling his land to George, Male says he gave a 10 days' option to W. F. McGee, and that he neither told McGee nor George at the time of making the contracts with them that he had previously optioned the land to plaintiffs, for the reason that their option had been out so long that he did not think it worth while.

On this state of the evidence counsel for plaintiffs inquire whether the evidence of an ignorant and illiterate witness like Male, who can neither read nor write, will be allowed to outweigh the testimony of intelligent witnesses like Rainey and Wilkinson as to the fact of notice? So far as the evidence of Wilkinson is concerned, it has little evidential force on the fact of service. He was not present, did not see the notice served, and, of course, his testimony as to the fact of service is necessarily hearsay and incompetent. This leaves Rainey and Male in direct conflict as to the fact of service. While Male admits his illiteracy, his evidence shows him far from ignorant. He appears to have more than ordinary intelligence for a man of his years and opportunities. With Male this was his most important business

transaction. It involved all, or practically all, the property he owned. He had a pressing obligation existing against the land, requiring a sale thereof, while Rainey was engaged in many other and various transactions requiring his thought and attention. A rule of evidence applicable in such cases is that the supreme importance of a transaction to one of the persons engaged therein will make his testimony of greater weight, because his memory is more trustworthy than that of an adverse party to whom the transaction was of far less importance. 17 Cyc. 782, citing in note 13, among other cases, *Platt v. Stewart*, 19 Fed. Cases, No. 11,220, 13 Blatchf. 481. There is no documentary evidence controlling this material question of fact. The copy of the alleged notice is a document with which Male denies all connection, and the letter of October 23, 1902, has little bearing on the question, nothing, indeed, inconsistent with defendants' denial of notice. The fact of notice practically stands on conflicting oral evidence. In such cases the rule so often announced here, and lastly perhaps in *Bank v. Thompson*, 63 W. Va. 196, 59 S. E. 974, is applicable, namely, that "where a chancery cause turns on the effect and weight of evidence and credit of witnesses, and that evidence is such that reasonable men may differ as to its effect, the appellate court cannot reverse the circuit court's decree." While the decree below does not in terms find the fact of notice against plaintiffs, yet, as plaintiff's case practically depends on this important question of fact, we must dispose of the case on the assumption that the court below did so find.

Our conclusions, therefore, are that the decree below was right and to affirm it.

(65 W. Va. 712)

COOPER v. COOPER et al.

(Supreme Court of Appeals of West Virginia.
May 11, 1909.)

1. SPECIFIC PERFORMANCE (§ 24*)—CONTRACT OF SUPPORT—LIABILITY OF DECEDENT'S ESTATE.

Equity will entertain a suit against the estate of a decedent by one whom deceased had bound himself by contract to maintain and support, and upon proper proof will grant relief by decreeing against his estate the reasonable cost of such support.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 54, 55; Dec. Dig. § 24.*]

2. SPECIFIC PERFORMANCE (§ 121*)—CONTRACT—ENFORCEMENT AGAINST DECEDENT'S ESTATE.

In order to establish such contract against the estate of a decedent, if it be by parol, the proof must be so clear, cogent, and convincing as to leave no doubt in the mind of the chancellor that the particular contract as averred was made, and its terms and conditions must be clearly shown.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

3. SPECIFIC PERFORMANCE (§ 117*)—PLEADING AND PROOF.

The proof must conform to the averments of the bill. Plaintiff cannot allege an agreement made with a certain person and obtain relief by proving another agreement made with a different person.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 377-381; Dec. Dig. § 117.*]

4. WITNESSES (§ 139*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

The *prochein ami*, being liable for costs in the event the suit should terminate adversely to plaintiff, is not a competent witness, under section 3945, Code 1906, to prove a parol agreement made between himself and a deceased person, against the heirs at law of such deceased person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 593; Dec. Dig. § 139.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by Bertha Cooper, by her next friend, against John A. Cooper and others. Decree for plaintiff, and defendants appeal. Reversed, and petition dismissed.

Harding & Harding and W. W. Brannon, for appellants. W. B. Maxwell, for appellee.

WILLIAMS, J. Bertha Cooper, an infant, who sues by next friend, her mother, Gettie Purkey, files her bill against the administrator and heirs of John A. Cooper, deceased, to specifically enforce a contract, alleged to have been made for her benefit between said Cooper and her mother, against said estate, for her support until she arrives at "full age." The facts are these: John A. Cooper died intestate and unmarried about the last of December, 1903, leaving brothers, sisters, nieces, and nephews as his heirs at law and distributees. His personal property being insufficient for the payment of his debts, his administrator brought a suit in the circuit court of Randolph county for the sale of his land to pay them. After the payment of debts, there remained in the hands of the special commissioner a fund, derived from the sale of the land, amounting to \$1,408.96.

Cooper was the father of a bastard child, who is the petitioner and appellee, Bertha Cooper, begotten of Gettie L. Vance. On the 8th day of May, 1897, in a bastardy proceeding in the circuit court of Randolph county by the county court of Randolph county, he was adjudged to pay to the county court, for the maintenance of the child, the sum of \$60 and the costs of the suit, and the sum of \$60 per annum for six successive years, payable on the 10th of May of each year, unless the child should sooner die; the first of the six payments falling due on the 10th day of May, 1898. He was required to give bond in the penalty of \$800 with security for the faithful performance of the court's judgment,

and did so on May 13, 1897. On the 22d of November, 1897, he appeared before the county court, by counsel, and moved to be released from the original bond, and to be allowed to substitute another bond in the penalty of \$400 for the performance of other conditions, and this was allowed to be done. This order permitting it contains the following recital: "And it appearing to this court that said John A. Cooper has taken charge of said child, with the consent of said Gettie L. Vance to keep and maintain it, at his own expense, and has this day tendered a bond in the penalty of \$400 executed by himself with Christian Cooper, Asa Cooper, and George W. Cooper, as sureties, conditioned that he will maintain said child. It is ordered that said bond be accepted in lieu of the bond executed by him before the circuit court, and that he and his sureties in said original bond be released from all liability under the same." Cooper then took the child and placed it in the home of his brother, who kept it, and took care of it, until April next after the death of said Cooper. The child's mother, whose maiden name was Vance, having in the meantime married one George F. Purkey, then took it to her own home. Pending the suit by the administrator for the settlement of Cooper's estate, plaintiff filed her petition therein, against the heirs of John A. Cooper, deceased, claiming the balance of the estate after payment of debts, on the ground that the alleged agreement made her his adopted daughter, and, if it did not amount to adoption, it at least entitled her to support and maintenance out of said fund until she should arrive at the age of 21 years. The petition does not aver whether, or not, the agreement was in writing and signed by Cooper, but contains the following averment in relation thereto, viz.: "That after the said judgment had been rendered against said John A. Cooper as aforesaid, and when petitioner was about 16 months old, the said John A. Cooper entered into a contract and agreement with petitioner's said mother, whereby petitioner was given into his custody and control with the express agreement and understanding that he was to take petitioner, provide her with a home and with a support suitable to her age and condition until she arrived of full age and able to take care of herself, and not only did he agree to do this, but he also gave her his name, and agreed and promised to adopt her as his child, and did take her under his control, did, as long as he lived, provide her with a home and support suitable to her age and condition, did give her his name, but failed to formally adopt petitioner as his child in the way and manner provided by the statute regulating the adoption of children."

Defendants demurred to and answered the petition. In the answer they admit that

Cooper had taken care of, and provided for, petitioner at the home of a relative of his for about six years; but they deny the alleged agreement that he was to take care of her for any longer time than the six years during which he was obligated by the judgment of the circuit court to pay \$60 a year to the county court for her maintenance. They also deny that he gave her his name, or that he ever promised to adopt her as his child. The demurrer does not appear to have been directly passed upon. On the 10th of September, 1906, the two causes were heard together, the petitioner's cause being heard upon the bill, answer, and replication, and the depositions of witnesses taken on behalf of both parties; and the court decreed petitioner her reasonable support out of said Cooper's estate, and directed the special commissioner to pay the funds in his hands belonging to the estate over to the general receiver of the court, and the general receiver was directed to lend it, subject to the future order of the court. The cause was referred to a commissioner to ascertain what would be a reasonable sum to be paid annually for the support of the child, and he ascertained and reported that \$75 a year would be a reasonable amount, and on the 23d of January, 1907, a final decree was made confirming the report and directing the general receiver to pay to G. F. Purkey, guardian for petitioner, the sum of \$75 a year, until she should arrive at the age of 21 years. The decree further found that four annual payments were then due, making \$300, which sum the receiver was directed to pay to the guardian at that time. From these two decrees the heirs of John A. Cooper obtained an appeal and supersedeas.

The decree passing up the merits, in effect, overrules the demurrer. *Bantz v. Basnett*, 12 W. Va. 772; *Craig v. Craig*, 54 W. Va. 183, 46 S. E. 371. It is insisted that it should have been sustained. We do not think so. The bill avers sufficient matter to entitle plaintiff to some relief, even if not the full relief prayed for, and, under the prayer for general relief, she might obtain some other relief. The averments of the bill, if sufficiently established by evidence, would entitle plaintiff to a decree for her yearly support until she arrives at the age of 21 years, provided she live so long. Equity has jurisdiction, and the bill is good on demurrer. *Ralphsnyder v. Ralphsnyder*, 17 W. Va. 28; *Rex v. Creel*, 22 W. Va. 373; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Jangraw v. Perkins*, 77 Vt. 375, 60 Atl. 385. The bill alleges that, after said Cooper promised to support the child, he was released from paying the \$60 a year to the county court. This is sufficient consideration to support the promise. Defendants admit that John A. Cooper made a contract to support plaintiff, but allege that it bound him for a period of six years only. They deny that he made the

contract alleged in the petition. This brings us to a consideration of the evidence.

The material allegations of the bill are denied, and the burden of proof rests upon plaintiff. The child's mother, who is also her next friend, and Leslie Harding, deputy clerk of the county court, are the only witnesses who testify in behalf of plaintiff. The latter was introduced only to prove the loss of the second bond executed by Cooper before the county court, and inability to find it. The testimony of plaintiff's mother was objected to on account of the relationship existing between witness and deceased. We do not think this a valid objection. Neither the relationship between Cooper and the witness, nor the fact that the promise was made for the benefit of witness' child, would exclude her from testifying. She could not, for these reasons, be said to have such an interest in the result of the suit as would render her incompetent under section 3945, Code 1906. *Godine v. Kidd*, 64 Hun, 585, 19 N. Y. Supp. 335, was a case very similar to the present, and the court there permitted the mother to give testimony to prove a personal contract made between herself and deceased for the benefit of her child, and under a statute similar to our own, prohibiting "a person from, through, or under whom a party derives his interest or title, by assignment or otherwise, to be examined as a witness in behalf of the party succeeding to his title or interest, against a person deriving his title or interest from, through, or under a deceased person, concerning a personal transaction or communication between the witness and the deceased person." But having objected to the testimony for one reason, appellants are not precluded from now assigning a different one. Neither would they be precluded from raising the objection for the first time in this court, when the admissibility of the testimony depends on competency of a witness. *Hill v. Proctor*, 10 W. Va. 59; *Rose v. Brown*, 11 W. Va. 122; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611; and *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140. But the witness, being next friend to the plaintiff, is liable for costs. *Fisher v. Bell* (decided at the present term) 63 S. E. 620. This shows her to have such an interest in the result of the suit as disqualifies her as a witness to prove the contract between herself and John A. Cooper, deceased. The common-law rule excluding parties in interest from testifying in any case embraced all persons having any interest at stake in the suit whatsoever, even though it extended only to a liability for costs, and included a prochein ami, guardian, executor, etc. 1 *Greenleaf on Evidence*, § 347; 3 *Jones on Evidence*, § 745; 30 *A. & E. E. L.* (2d Ed.) 911; *Clutterback v. Huntingbower*, 1 *Strange*, 506; *James v. Hatfield*, 1 *Strange*, 548; *Hopkins v. Neal*, 2 *Strange*, 1026; *Cogbill v. Cogbill*, 2 *Hen. & M. (Va.)* 467. Section 3945, Code 1906, removing the

common-law disability, excepts testimony of a witness "in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person or the assignee or committee of such insane person or lunatic." As to such testimony the rule of the common law still obtains. She was therefore incompetent to prove the contract, and her evidence should have been excluded.

But appellee relies upon the recitals, as evidence, made in the order of the county court of Randolph county, made on November 22, 1897, whereby Cooper was discharged from the original bond and was allowed to file instead a bond in the sum of \$400. The order does not recite the agreement that is averred in the bill. It simply recites that it was made with the mother's consent, and that Cooper had tendered a bond in the penalty of \$400 with security "conditioned that he will maintain said child." It does not say he was to maintain the child until it arrived at the age of 21 years, or "full age," which means the same thing. 1 A. & E. E. L. (2d Ed.) 927, note 1; Hamlin v. Stevenson, 4 Dana (Ky.) 597; Est. of Kohne, dec'd (Pa.) 1 Parson's Select Cases, 399. Nor does it say he was to maintain the child only for the length of time during which he was bound to pay to the county court the sum of \$60 a year for the maintenance of the child, which by the judgment of the circuit court was for six years. This time only lacked a month of expiration when the mother of the child says she took it from Lige Cooper's, where it had been kept and cared for; but the recital in the order shows that the new bond was given in lieu of the old one which was given for the benefit of the county court. It therefore tends to prove a different contract from the one averred in the petition. Plaintiff cannot aver one cause of action, or suit, and be allowed to prove a different one. The rule that the allegata and probata must correspond applies to suits in equity as well as to actions at law. Floyd v. Jones, 19 W. Va. 359; Baugher v. Eichelberger, 11 W. Va. 217; Pligg v. Corder, 12 Leigh (Va.) 69. Before a court of equity will specifically enforce a parol agreement of this nature against the estate of a decedent, it must be established by evidence that is clear, cogent, and convincing. Godine v. Kidd, 64 Hun, 585, 19 N. Y. Supp. 335; Wallace v. Rappleye, 103 Ill. 229. In Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895, it is held: "An oral contract by a foster parent to take a child into his family, treat her as his own child, and let her share in his estate equally with his own children, must be proven by proof so clear, cogent, and convincing as to leave no doubt in the mind of the chancellor, not only that a contract of

the general nature alleged was made, but that the particular contract as alleged was made, and its terms and conditions must be clearly shown."

Plaintiff has failed to establish a prima facie case, and it is therefore unnecessary to discuss the objections made by plaintiff to defendants' evidence. If we could see that petitioner's evidence was sufficient to entitle her to relief if her pleadings were made to conform thereto, we might, according to the practice of this court, remand the cause with leave to plaintiff to amend her petition; but it clearly appears that she cannot aid her cause even by an amendment.

We reverse the decrees appealed from in so far as they give petitioner any recovery against the estate of John A. Cooper, deceased, and will enter a decree here dismissing appellee's petition.

(65 W. Va. 667)

BERNS v. SHAW.

(Supreme Court of Appeals of West Virginia.
May 11, 1909.)

1. EQUITY (§ 44*)—JURISDICTION—MONEY LOST IN GAMING CONTRACTS—RECOVERY.

Courts of equity have concurrent jurisdiction with courts of law in suits to recover back money lost in gaming contracts, regardless of the question of necessity for discovery.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 44.*]

2. GAMING (§ 17*)—PARTNERSHIP—GAMBLING BUSINESS.

As a general rule there can be no partnership in an illegal business. This includes the business of gambling.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 33; Dec. Dig. § 17.*]

3. GAMING (§ 26*)—PERSONS ENGAGED IN BUSINESS—JOINT AND SEVERAL LIABILITY.

Where two or more persons engaged in the business of gambling, by whatever arrangement the business is conducted, if all are to share in the profits, and money is lost to them, they are all joint tort-feasors, and liable jointly or severally, and may be sued jointly or severally by the loser to recover the money lost to them.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 61; Dec. Dig. § 26.*]

4. GAMING (§ 41*)—RECOVERING BACK MONEY LOST IN GAMING—CROSS-BILL.

In a suit in equity by one to recover back money lost by him to another in a gambling contract, the defendant may, by a cross-bill or a cross-answer, also recover back money lost by him to plaintiff in such gambling contract.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 41.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Marion County.
Bill by Charles Berns against A. E. Shaw.
Judgment for defendant, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Cornwell & Abbatichio, for appellant. C. Powell and Harry Shaw, for appellee.

MILLER, P. This is a suit in equity under sections 3435 and 3437, Code 1906, to re-

cover \$335 alleged to have been lost by plaintiff to defendant in March, 1904, in playing the game called "roulette." The suit was commenced in the intermediate court of Marion county, where on bill, answer, and proof the plaintiff's bill was dismissed on the ground, as recited in the decree appealed from, that the suit could not be maintained against defendant alone, the evidence showing that D. E. Thomas was a partner with Shaw in the transaction and a necessary party to the suit, and upon his petition presented to the circuit court the plaintiff was denied an appeal and supersedeas to said decree, and he has brought the case here.

The appellee claims that, regardless of the reason given by the intermediate court therefore, the decree dismissing the bill was clearly right for want of equity and should have been dismissed on demurrer. This presents the question argued here on both sides whether the remedy in equity given by section 3437 is cumulative of the remedy at law given by the preceding section 3436, or is available only where some discovery is necessary and the remedy at law inadequate. Said section 3437 provides: "Such loser may file a bill in equity against such winner, who shall answer the same, and upon discovery and repayment of the money or property so won, or its value, such winner shall be discharged from any forfeiture or punishment which he may have incurred for winning the same." The appellee insists that, as the bill shows no necessity for discovery, but, on the contrary, that plaintiff has an adequate remedy at law, given by section 3436, a court of equity is without jurisdiction. The allegations of the bill in effect simply charge that plaintiff lost to defendant the said sum of money, and prays for a discovery by defendant of the money so won by him from plaintiff and for a decree for the money.

These statutes have come down to us through Virginia, practically unchanged, from St. 9 Anne, c. 14, 2 Kelly's Rev. St. Ann. W. Va. p. 646; *White v. Washington's Ex'r*, 5 Grat. (Va.) 645. Story says (1 Story, Eq. Jur. § 303, p. 307), referring to jurisdiction in equity to suppress gaming contracts: "No one has doubted that under such circumstances a bill in equity might be maintained to have any gaming security delivered up and canceled; but it was at one time held that, if the money were actually paid in a case of gaming, courts of equity ought not to assist the loser to recover it back upon the ground that he is *particeps criminis*." And in section 304 he says: "But it is difficult to perceive why upon principle the money should not be recoverable back in furtherance of a great public policy, independently of any statutable provision. It has been decided that, if money is paid upon a gaming security, it may be recovered back, for the security is utterly void. Why is not the original gaming contract equally void? And, if it be, why is it not equally within the rule,

and the policy on which the rule is founded?" To the same effect is 2 Pom. Eq. Jur. (3d Ed.) § 941. It would thus seem that independently of statute such cases were within the domain of original equity jurisdiction, and that the statute was unnecessary to confer jurisdiction; but, in states like ours, which have adopted the provision of the Statute of Anne, the question of equity jurisdiction, it seems, is no longer a subject of doubt or controversy. *White v. Washington*, supra; *Bonner v. Montgomery*, 9 B. Mon. (Ky.) 123; 20 Cyc. 955, and other cases cited in notes. As before the statute jurisdiction to recover back money paid in execution of a gaming contract was in equity alone, it is by virtue of the statute that courts of law now have concurrent jurisdiction. In the well-considered case of *McKinney v. Pope's Adm'r*, 3 B. Mon. (Ky.) 98, the policy and purposes of these statutes is considered, and the previous case of *Downs v. Quarles*, Litt. Sel. Cas. (Ky.) 489, 12 Am. Dec. 337, is referred to, in which latter case the bill alleged the necessity of a discovery which the courts say possibly might have been deemed a ground for taking jurisdiction if there had been a legal remedy under the statute. "But," says the court, at page 98 of 3 B. Mon., "the question formally stated by the court, after showing that there was no remedy under the statutes, seems to relate to the general power and jurisdiction of a court of equity to decree the restitution of money paid on a gaming contract, which question is unaffected by the mere fact that a discovery might or might not be necessary in the particular case. The solution of the question is made to turn, not upon the want of jurisdiction in the court to decree the money to the loser, if he had been equitably entitled to it, but upon the absence of a right to recover, arising from the equality of his guilt, and upon the doubtful propriety, with a view to the policy of suppressing the vice of gaming, of restoring to the loser the money which he has paid." The case of *Downs v. Quarles* was decided before the statute of Kentucky of 1833. In considering the effect of the statute, the Kentucky court in this case further says: "Then the question whether the objects of the statute will be promoted by restoring to the loser his losses is closed, and the courts, both of law and equity, are bound to advance the object by using their appropriate powers in advancement of the means adopted by the Legislature." And the court in that case, in deciding the exact question we have here in favor of the concurrent jurisdiction in equity to recover back money lost in gaming, says: "The court then has jurisdiction to grant this relief in the case of gaming, by analogy, and because it has jurisdiction in like cases. And it is not too liberal a construction of the statute, which gives the right to sue 'in any court having jurisdiction in like cases,' without intimating any preference for the remedy at law, to say that, as the court of

equity had jurisdiction in like cases, the right of suing in that forum, as well as in the court of law, is expressly given by the statute. It may be added that it has been maintained by eminent jurists that, independently of any statutory provision for the recovery of money lost at gaming, it should be recoverable back, because it is in furtherance of a great public policy (1 Story's Equity, 303), and consequently that the court of equity should have granted such relief."

We think this case states the law correctly. But has the plaintiff made out a case entitling him to relief? The intermediate court evidently thought Thomas a partner, and therefore a necessary party to the suit, and denied relief on that ground. As a general rule there can be no partnership in an illegal business. This includes gambling. *Parsons on Partnership*, § 8, and note; *George on Partnership*, 25. Illegality of a partnership, however, affords no reason why it should not be sued on a transaction with it that is legal in itself. 1 *Lindley on Partnership* (4th Ed.) star page 200. There was no plea in abatement, however, nor is there any defense in the answer on account of the nonjoinder of Thomas. The answer of defendant is not that the claim sued for is a partnership obligation, and that the action should abate because of nonjoinder of Thomas, but that the money alleged to have been lost by plaintiff was lost to Thomas and not to him. Shaw denies the partnership and claims that Thomas and not himself was engaged in the gambling business. So we need not consider the question of partnership or partnership liability. The question does not fairly arise.

The statute gives right of action against the person to whom the money is lost. The question then is: To whom did plaintiff lose his money? It is admitted that he lost it, and that, when he lost it, Thomas was in charge of the roulette wheel on which the game was played, and the evidence shows that the money plaintiff lost was paid to Thomas and put in a drawer belonging to defendant. It is admitted the place where the gambling was done was the place of business of defendant, and that the wheel on which the game was played and all the furniture and other paraphernalia belonged to him. And Thomas, when asked on cross-examination in whose name the business was being run, said that he did not know whether there was any name attached to it, that there hardly ever is, that nobody is anxious to assume it, that the contract between defendant and himself was that Shaw was to furnish the room, lights, and the money to back the games with, and that he should take the place, manage it, and divide the proceeds. He says he was supposed to handle the money, and that Shaw was incompetent to run the gambling room. But the evidence shows that, a night or two after plaintiff lost his money, Shaw was himself in charge of the

wheel, when defendant lost to plaintiff between \$250 and \$300, and gave to plaintiff his check on a bank for \$246.75 part thereof, but on which he stopped payment before the check could be presented for payment. True it is defendant undertakes to explain his management of the wheel on this particular night by saying that, in the absence of Thomas, plaintiff persuaded him to open the wheel; but plaintiff denies this. Both defendant and Thomas admit that they were to share in the profits. This being so, plaintiff lost his money as much to defendant as he did to Thomas. By the terms of their agreement they both must have shared in the money which plaintiff lost, and, whether we treat them as copartners or as standing in the relation of principal and agent, the law makes them joint tort-feasors and liable either jointly or severally to plaintiff. *Preston v. Hutchinson*, 29 Vt. 144; *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744; 20 Cyc. 959. In 1 Page on Contracts, 839, it is said: "If the wager is illegal as well as void, the agent cannot recover for services or advances, since, properly speaking, there is no agency in illegal acts, but all are joint wrong-doers." While these authorities make Shaw and Thomas joint conspirators or joint tort-feasors and liable jointly, they also make them liable severally, and each is liable, we think, under the statute.

But in the answer of the defendant he seeks a cross-recovery against plaintiff for \$40 alleged to have been lost by him to plaintiff on the night he operated the wheel. Plaintiff in his reply thereto denies this, and his counsel contends that no such right is available in this suit. Why not? If he has made out a case against plaintiff by proof, the Kentucky case of *McKinney v. Pope's Adm'r*, supra, is direct authority that a defendant may recover on a cross-bill for money lost to plaintiff. Section 3855, Code 1906, we think gives him the same right by a cross-answer.

But has the defendant made out by proof a case for cross-relief? He testifies that he paid this money to plaintiff through Thomas the night he gave plaintiff his check for \$246.75. Plaintiff admits that the defendant paid him \$40 at that time, but says positively that this was money he had paid defendant for checks. Shaw claims the \$40 lost by him to plaintiff was covered by \$100 paid by him at the time through Thomas to plaintiff's brother, and Thomas says that the way he came to pay the brother was that he had checks to cash in calling for \$100. He says, moreover, that the plaintiff and his brother were betting together; but whether these checks represent winnings, or part winnings and part money paid in for checks, is not clear. If plaintiff and his brother were playing together, and the \$40 represented winnings, we think both would be liable to defendant upon the principles already announced. Both would then be joint tort-feasors. But plaintiff posi-

tively swears that the \$40 he got personally was the amount he had paid for checks. He admits that he furnished some checks to his brother, but he thinks his brother lost some money before he went into the game. Inasmuch as Thomas gave the \$100 to plaintiff's brother, and inasmuch as he declared the game off as having been played unfairly, and defendant stopped payment on his check, the evidence as a whole supports the claim of the plaintiff, rather than that of defendant, that the plaintiff got back only the money he had actually paid for checks, and that the money paid him and his brother did not represent losses of defendant to them. As the burden was on defendant to make out his case by a clear preponderance of the evidence, we find the fact against him on this issue.

We are therefore of opinion, upon the whole case, to reverse the judgment below and to pronounce the decree here which we think the intermediate court should have pronounced, that the plaintiff recover of the defendant the sum of \$388.80, being the principal sum lost, with interest to the date of the judgment appealed from, with interest thereon from the 28th day of November, 1906, the date of said decree, together with his costs by him in this court and in the intermediate court in this behalf expended.

(65 W. Va. 639)

UNITED STATES OIL & GAS WELL SUPPLY CO. v. GARTLAN et al.

(Supreme Court of Appeals of West Virginia. May 11, 1909.)

1. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVIT.

An affidavit for order of publication, based upon the third instance mentioned in section 11, c. 124, Code 1899 (Code 1906, § 3813), is sufficient if its phraseology reasonably imports that process against the defendants as to whom publication is sought was twice directed and delivered, more than 10 days before the return day, to the officer of the county in which such defendants resided at the time, and has been returned without being executed.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. § 96.*]

2. PROCESS (§ 63*)—PERSONAL SERVICE—AFTER PUBLICATION.

If an action, embracing an attachment, has been properly matured against a defendant upon constructive service of process by publication, a personal summons may afterwards be issued and served on that defendant at any time, pending the action, such direct service can be had.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 63.*]

3. APPEARANCE (§ 19*)—EFFECT.

An appearance in an action, solely for the purpose of attacking the sufficiency of process, does not, if unsuccessful, submit the party so appearing to the court generally.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 81; Dec. Dig. § 19.*]

4. APPEARANCE (§ 9*)—SPECIAL APPEARANCE—EFFECT.

A defendant, who appears specially and moves to quash an attachment of his property

in the action, for insufficiency of the proceedings, does not thereby, if the motion should fail, make a general appearance in the case.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 44; Dec. Dig. § 9.*]

5. APPEAL AND ERROR (§ 253*)—EXCEPTIONS—REVIEW OF RULING AS TO PLEADING.

The rejection of a plea will be waived if no exception is taken thereto. In such case, the rejected plea is no part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1488; Dec. Dig. § 253.*]

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by the United States Oil & Gas Well Supply Company against J. A. Gartlan and others. Judgment for defendants, and plaintiff brings error. Reversed.

Dave D. Johnson, Chas. A. Smith, and Edward McSweeney, for plaintiff in error. Van Winkle & Ambler and A. G. Patton, for defendants in error.

ROBINSON, J. The attachment in this case was sustained by a decision of this court reported in 58 W. Va. 267, 52 S. E. 524. But the sufficiency of the affidavit for the order of publication against defendants was not then in question. That question of the sufficiency of constructive service of process by publication now arises. After the case was remanded, defendants appeared specially, and moved to quash the affidavit upon which the publication against defendants was had. The motion was sustained.

We are of opinion that the affidavit is sufficient. Constructive service of process, maturing the action so far as its reaching the attached effects is concerned, was properly had. To quash the affidavit was error. The affidavit is justified by section 7, c. 106, and section 11, c. 124, of the Code of 1899 (Code 1906, §§ 3542, 3813). It recites the issuance of the attachment, and the return thereof as executed. It also sets forth that process, directed to the officer of the county in which defendants resided, was twice delivered to such officer more than 10 days before the return day, and had been returned without being executed. The objection advanced is that the affidavit says that process was placed in the hands of the sheriff of the county in which the two defendants "resided," whereas the statute uses the present tense, "resides." The plain purport of that statute is that, to support an order of publication, the process shall have been directed and twice delivered, more than 10 days before the return day, to the officer of the county in which the defendants resided at the time the process is so delivered, and shall have been returned without being executed. The affidavit substantially sets forth this fact. It says that the process in each instance was directed to the sheriff of Wood county and by that sheriff returned "not found," that the defendants resided in Wood

county, and that "process was properly placed in the hands of the sheriff of said county in which said defendants resided twice more than 10 days before the return day of said process, and have been returned without being executed." It is insisted that this language does not show when defendants resided in Wood county; that such residence may have been long before the direction or delivery of the process to the sheriff. This contention seems extreme. The context of the phraseology used reasonably imports that the defendants resided in Wood county at the time the process was directed to the officer, delivered to him, and returned "not found" by him. If the present tense had been used it would have related to the date of the affidavit, not to the time mentioned in the statute. It was necessary to use the past tense to refer to the time spoken of in the affidavit. It most necessarily speaks of facts that existed before the affidavit was made, and must use the past tense.

The order quashing the affidavit also directed that the action should abate, unless it was matured by order of publication, or other process, within 60 days. No new affidavit was filed. Thereafter writs of summons were again sued out. One was served on defendant Gartlan, as a nonresident, in Pennsylvania. Another, directed to the sheriff of Lewis county, was served on defendant Ahner in that county. Some months later another writ, directed to the sheriff of Wood county, was issued and served on defendant Ahner in the last-mentioned county. The last writ was executed after the 60 days which had been given to mature the case had expired. The defendants again appeared specially, and moved the court to quash these three writs and the returns thereon, and to, abate the action. The motion was sustained, the writs were quashed, and the cause was stricken from the docket.

It is useless to discuss the sufficiency of the return of service on the summons which was served on Gartlan in Pennsylvania, as a nonresident. We have already held there was proper and sufficient order of publication against him. No such service outside of the state was necessary, and, if good, would have no more force than that order of publication. Nor shall we divert to the objections raised as to the validity of the service of summons on defendant Ahner in Lewis county. That process seems to have been abandoned by the act of plaintiff in securing service on him in Wood county, where the action was pending.

It was error to quash the summons served in Wood county and the return thereon, and to dismiss the action. There is nothing in the record justifying denial of jurisdiction of the action in that county. The return of "not found," made by the officer on the original writs, imports that defendants resided in Wood county. 18 Enc. of Pl. &

Pr. 945. They were not returned "no inhabitants." Residence by them in the county unquestionably gives jurisdiction there. The affidavit for the order of publication says defendants resided there. If there was no jurisdiction, defendants have not made that fact to appear. A plea in abatement by defendant Ahner to the Lewis county writ says that he is a resident of Ohio. That plea does not, by the record, appear to have been filed. At any rate, it is not a good plea. It does not aver that he was not a resident of Wood county at the time the suit was begun. The question of jurisdiction is determined upon facts existing at the commencement of an action. If jurisdiction is properly based upon residence, and that residence is changed after the action is commenced, the jurisdiction is not affected.

The error in the order quashing the writ served in Wood county is indeed interwoven with that of having quashed the affidavit for the order of publication, which affidavit, and the publication thereon, we have held sufficient. By that order of publication the action was regularly matured. The action was still pending. Plaintiff, having obtained the best service of process that it could, was entitled, pending its action, to personal service when that could be had. How far failure regularly to renew process may operate as a discontinuance of a suit or action we need not here set forth. 2 Blackstone's Com. 296; Hawkins' Pleas of the Crown, 416; Moss v. Moss' Adm'r, 4 Hen. & M. (Va.) 293; Exchange Bank v. Hall, 6 W. Va. 447; Opinion of English, J., in Blowpipe Co. v. Spencer, 46 W. Va. 590, 33 S. D. 342; 14 Cyc. 455; 20 Enc. of Pl. & Pr. 1179. There was no gap or chasm in the plaintiff's procedure to mature its cause justifying a discontinuance. The plaintiff had matured its case by the best process obtainable under the circumstances shown by the record. Writs to the county of the residence of defendants having twice proved unavailing, plaintiff chose the substituted method of service provided by law in that event. Plaintiff thereby as completely matured its cause as it was possible to do in such case. That maturing of the cause kept it a live, pending action. True, the force of a judgment upon such procedure would not be the same as upon personal service, but the action was kept alive nevertheless. It was a matured case. There was constructive notice to defendants. Service of process was completed, the force of which, so far as the law gave it force, extended to the end of all proceedings in the action. So when the time came that circumstances made it possible to get better service of process, that which would strengthen plaintiff's action and make it one for a better judgment, surely could plaintiff issue personal summons, and have the same served on defendant without the charge that he had not regularly kept up a

chain of process. There is a wide difference between no process at all and that which is the best process that one can, under the law and the circumstances, use to mature a case. The duly executed order of publication kept plaintiff's suit in shape for better process whenever the time should come that it would be effective. *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395.

The appearances by defendants which we have mentioned did not have the effect of general appearances to the action. The insistence of plaintiff in this behalf is not well taken. Defendants appeared specially only. They appeared for the purpose of having process quashed. They had the right so to deny that they had been summoned. To hold that they thereby appeared to the action generally would deny them the very test they sought to make. *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 50 S. E. 422. Nor did the special appearance made by defendants, prior to the former writ of error herein, whereby they moved to quash the attachment, submit defendants generally to the court. *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681; *Chapman v. Maitland*, 22 W. Va. 329; *Wynn v. Wyatt's Adm'r*, 11 Leigh (Va.) 584.

Defendants cross-assign as error the action of the court in rejecting the plea or counter affidavit tendered by them. This sworn plea expressly denied the fact of the residence of the defendants in Wood county as set forth in the affidavit for the order of publication. It was asserted that, at the time mentioned in the affidavit for the order of publication, and continuously to the date of that affidavit, one of the defendants resided in Harrison county, and the other one in Wetzel county. If it was error to deprive defendants of the issue sought to be raised by this plea, they have waived it by failure to except to the rejection of the plea. There must be an exception noted, else the rejection of a plea will be waived, and the plea become no part of the record. See the cases in point cited in 5 Enc. Digest, Va. & W. Va. Reports, 364, 365. Admission of such plea, and determination of the issue thereby raised, might have materially changed the phase of the case from that which comes to us by the record. Yet we express no opinion as to the propriety of the plea, since such question is clearly not before us. It may be that such plea would be a proper one upon which to overthrow a falsely acquired maturity of the action. *Lawson v. Moorman*, 85 Va. 888, 9 S. E. 150; *Kitchen v. Crawford*, 13 Tex. 516. However, if plaintiff's action was matured by process resting upon a false affidavit, as defendants insist, that fact has not yet been presented.

The order quashing the affidavit for the order of publication, the order quashing the

writ served on defendant Ahner in Wood county, and the order abating the action, are reversed, and the action is remanded for further proceedings to be had in the circuit court.

(65 W. Va. 700)

STATE v. EHRLICK et al.

(Supreme Court of Appeals of West Virginia.
May 11, 1909.)

1. DISTRICT AND PROSECUTING ATTORNEYS (§ 9*)—AUTHORITY—CIVIL PROCEEDINGS.

The prosecuting attorney of a county has authority, independent of the Attorney General, to institute and prosecute all criminal actions and proceedings, cognizable in the courts of his county, but has no such power or authority, respecting the prosecution of civil proceedings on the part of the state, beyond that expressly conferred by statute.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 36; Dec. Dig. § 9.*]

2. ATTORNEY GENERAL (§ 6*)—POWERS AND DUTIES.

As the chief law officer of the state, the Attorney General is clothed and charged with all the common-law powers and duties pertaining to his office, except in so far as they have been limited by statute.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 5; Dec. Dig. § 6.*]

3. ATTORNEY GENERAL (§ 7*)—POWERS AND DUTIES.

In the absence of any statutory provision to the contrary, the Attorney General has the management and control of civil litigation on behalf of the state.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

4. EQUITY (§ 214*)—MODE OF OBJECTION TO PLEADING.

A bill in equity on behalf of the state, signed by counsel other than the Attorney General, is not demurrable for lack of disclosure on its face of authority or direction from him to file the same. Such an objection must be raised by a motion to dismiss or plea in abatement.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 487; Dec. Dig. § 214.*]

5. EQUITY (§ 27*)—JURISDICTION—CHARGE OF CRIMINAL NATURE.

If a charge is of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, or health, it is not within the jurisdiction of a court of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 88; Dec. Dig. § 27.*]

6. NUISANCE (§ 79*)—ABATEMENT—JURISDICTION.

Equity has no jurisdiction to abate a public nuisance, either civil or criminal, at the instance of an individual or the state, not affecting or injuring the enjoyment of property or other personal rights.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. § 79.*]

7. NUISANCE (§ 80*)—PUBLIC NUISANCES—ABATEMENT BY INJUNCTION.

In so far as a public nuisance injures property or substantially interferes with the enjoyment thereof, directly or indirectly, or constitutes a purpresture, excluding citizens from the enjoyment of their civil rights in highways and other public grounds and places, or obstructing

or interfering with the execution of the public business, it is abatable by injunction.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. § 80.*]

8. INJUNCTION (§ 102*)—CRIMINAL ACTS.

If an injunction is necessary and proper for the protection of such rights, criminality of the injurious act does not bar the remedy in equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 176; Dec. Dig. § 102.*]

9. NUISANCE (§ 80*)—KEEPING OF GAMING HOUSE—ABATEMENT IN EQUITY.

Though the keeping of a gaming house is a criminal nuisance, punishable and abatable by indictment and conviction, there is no jurisdiction in equity to abate it, at the instance of either an individual or the state, unless it appears to be injurious to personal or property rights and the injury is not otherwise adequately remediable.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. § 80.*]

10. EQUITY (§ 27*)—JURISDICTION—CRIMINAL REMEDIES—SUFFICIENCY.

Criminal remedies and procedure must be deemed adequate to the maintenance of the public right, in respect to moral and political principles, except in so far as the Legislature may have provided others, since that body, having plenary power over such matters, has seen fit to rely upon existing remedies, and courts of equity are powerless to ordain jurisdiction for themselves.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 80; Dec. Dig. § 27.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Brooke County.

Bill by the State against George Ehrlick and others. Decree for plaintiff, and defendants appeal. Reversed, and bill dismissed.

J. J. Coniff, for appellants. G. W. McClery, H. M. Russell, and Wm. G. Conley, for the State.

POFFENBARGER, J. On a bill, purporting to be that of the state of West Virginia, not signed, however, by the Attorney General, nor showing, in any way, that that officer authorized the filing of the same, but signed by the prosecuting attorney of a county, and an individual, describing himself as attorney for the state, the circuit court of Brooke county awarded a preliminary injunction, inhibiting the defendants, George Ehrlick and others, from carrying on, or conducting, what is known as a "turf exchange" in said county, extensively resorted to by people from other counties and states, for the purpose of betting on horse races, occurring in different parts of the country, and reported by telegraph. On the maturing and submission of the cause to the court, a decree was made, perpetuating the injunction, from which the defendants have appealed.

The first objection to the bill is its failure to disclose any direction by the Attorney General to institute the suit, his employment of counsel therefor, or his assent to the

prosecution thereof; the record being entirely silent as to his attitude. Much authority is cited indicating power and authority in the Attorney General to institute suits on behalf of the state, in proper cases, and the propriety of his doing so, but none indicating that such suits cannot be instituted by the prosecuting attorney of the county, either by virtue of his office, considering it as being independent of, and not subordinate to, that of the Attorney General, or regarding it as a subordinate office in the executive department of justice of the state. The relation of the two offices to one another, their respective powers and duties, and the nature of the litigation all enter into the solution of this question. The office of Attorney General is of very ancient origin, and its duties and powers were recognized by the common law. That of prosecuting attorney is of modern creation, it seems, and its powers and duties are given, imposed, and prescribed by statutory law. 4 Cyc. 1028; Attorney General v. Forbes, 2 Myl. & C. 129. Prosecuting attorneys are generally described as deputies or assistants of the Attorney General (4 Am. & Eng. Ency. Law, 1026), but they are not dependent upon him for their powers in all cases nor in all respects subject to his control (23 Am. & Eng. Ency. Law, 275). In the exercise of his common-law powers, the Attorney General may, no doubt, advise the prosecuting attorney, as he does other officers, since he is regarded as the chief law officer of the state. As the Constitution and laws of the state make the two offices separate and distinct and vest in the prosecuting attorney certain powers and impose upon him certain duties, it seems clear that the Attorney General cannot strip him of the powers expressly given, nor increase the burdens laid upon him. The sense in which the local officer is subordinate to the general one seems to be that they are engaged in the same branch or department of the public business. This makes the relation theoretical, rather than practical. The business, once pertaining actually as well as theoretically to the office of Attorney General, has been divided between the two offices for purposes of convenience. We may say the office of prosecuting attorney has been carved out of that of Attorney General and made an independent office, having exclusive control, to some extent, of business of the state, arising within the county.

No doubt the Attorney General may assist the prosecuting attorney in the prosecution of such business, or perform it himself, in case of the nonaction of the prosecuting attorney, but he cannot displace that officer. He has neither power of removal nor control over him within his own province, so far as it is defined by statute, for, if the division of powers made by the statute were

not respected nor observed nor susceptible of enforcement, the object and purpose of the division would be defeated. There would be no individual responsibility, if the powers of the Attorney General and prosecuting attorney were coextensive and concurrent. The one would be no more responsible than the other for the nonenforcement of the laws. Concurrence would produce interference, conflict, and friction in many instances, delaying the disposition of business to the detriment of the state. We think it plain therefore that, in a practical sense, the two offices are distinct and independent; but all the business does not seem to have been divided. Part of the civil business of the state in the county seems to have been reserved to the Attorney General. Section 6, c. 120, Code 1899 (Code 1906, § 3778), defines generally the duties of the prosecuting attorney, in the following terms: "It shall be the duty of every prosecuting attorney in this state, to attend to the criminal business of the state in the county in which he is elected and qualified, and also to civil cases in which the state is interested in such county, when required by and under the direction of the auditor; and when he has information of the violation of any penal law committed within his county, shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. He shall also represent the county in all suits and proceedings for and on behalf of or against the county, or county court, overseers of the poor, or other public authorities of the county, and carefully look after and give attention to the general interests of the county." His authority extends to all the criminal business of the state in his own county. As to civil business in which the state is interested, he can act, on behalf of the state, only when required by the auditor and under the direction of the latter, or when the duty is enjoined by some statute. There are many other provisions imposing specific duties, concerning particular matters, but there is no statute giving him power to represent the state generally in respect to its civil business.

The conclusion just stated implies that the authority of the prosecuting attorney to institute this suit depends upon its character. If it is a criminal proceeding, he had such authority, but, if it is a civil one, he had not, unless it was given by the auditor, and, in the latter case, an inquiry might arise as to whether the auditor is chargeable with any duty or given any authority respecting a matter of this kind. As the bill was framed and is now regarded by its defenders, it is a criminal information, filed for the purpose of enforcing the criminal law. If it can be maintained as such, the

filing and prosecution thereof are within the statutory jurisdiction and power of the prosecuting attorney; but, if the procedure is not authorized by the criminal law, nor its object within the auditor's power of direction, it should have been instituted by the Attorney General. Whether the absence of the signature of the latter to the bill, or the lack of disclosure in the bill of his direction to institute the suit, makes the pleading bad on demurrer, is the question most extensively discussed in the briefs; but no authority for any of the contentions is cited. It seems to us, however, that such an objection ought to be raised by a plea in abatement or motion to dismiss. It is not the bill of the Attorney General. The state of West Virginia is the plaintiff, and there is a presumption that no attorney would institute such a suit without authority. It would be inconsistent with his duty and obligation as an officer of the court. When the question is properly raised, the authority of the attorney must be shown (*Mullin v. United States*, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170; *Railroad Co. v. United States*, 108 U. S. 512, 2 Sup. Ct. 802, 862, 27 L. Ed. 621, 806); but we think the question was not properly raised.

The charge against the defendants is the keeping and conducting of a gaming house, constituting a public nuisance. Nothing of detriment to the community or the public at large is alleged against them other than the unlawfulness of the enterprise. The bill says they take dishonest profits from the betting, and carry it on with great profit to themselves and at slight risk of loss. It is not alleged that anybody's property is injured, or that the place is in any sense disorderly. The theory of the bill, adhered to in the argument is that the enterprise, tending to corrupt the morals of the public, makes it a nuisance, abatable by injunction.

Jurisdiction in equity to abate nuisances is undoubted and of universal recognition. It is equally well settled that the state may institute suits for that purpose in proper cases, but it is nowhere asserted that either the state or a private individual may maintain such a suit in any and all cases of nuisance. In other words, relief in equity by abatement is not the necessary sequence of the establishment of the charge of nuisance. Some nuisances are criminal, while others are not. Criminal nuisances are abatable by criminal process, and, where this process is adequate, jurisdiction in equity fails, either because adequate legal remedy precludes jurisdiction in equity, or the subject-matter is beyond the scope of equity jurisdiction. If a nuisance, purely criminal, injures or affects a private plaintiff in certain respects, he may resort to equity for relief; but the existence of neither a civil nor criminal public nuisance necessarily calls for interposition by a court of equity. A private person cannot abate it, unless it is specially injuri-

ous or prejudicial to him, and the state cannot proceed against it in equity, if it be merely a criminal nuisance, unattended by injury to a personal or property right of some sort, creating necessity for prevention of irreparable injury.

"The cases in which chancery has interfered by injunction, to prevent or remove a nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right which the other party had long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this court." *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 511; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14. "To obtain relief in equity for a private nuisance, the threatened injury must be irreparable, incapable of compensation in damages, and not doubtful or contingent." *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378. "There is no case for equity, unless the charge be for injury to the enjoyment of property or other personal rights." *Sparhawk v. Railway Co.*, 54 Pa. 401. "It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of a court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property." *Sheridan v. Colvin*, 78 Ill. 237, 247; *People v. Condon*, 102 Ill. App. 449, 457; *Ocean City Ass'n v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914. "If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate; nor ought the process of injunction to be applied, but with the utmost caution. It is the strong arm of the court, and to render its operation benign and useful it must be exercised with great discretion, and when necessity requires it." *Attorney General v. Insurance Co.*, 2 Johns. Ch. 878; *Railroad Co. v. Prudden*, 20 N. J. Eq. 530, 536. "A court of equity has no jurisdiction in matters merely criminal or immoral. It leaves the discretion of these matters to the criminal courts. The remedy

at law is presumed to be adequate, but, if it is not so, the relief must come from the lawmaking power, and not from the courts." *People v. Condon*, 102 Ill. App. 449, Syl. point 4; *Cope v. Fair Ass'n*, 99 Ill. 489, 39 Am. Rep. 30; *Attorney General v. Insurance Co.*, 2 Johns. Ch. (N. Y.) 371.

The text in *Story's Equity Jurisprudence* (sections 921 to 924), according equity jurisdiction great latitude to interfere, by injunction, to abate nuisances, is to be taken and understood, not literally, but subject to the principles above stated. Although the language of these sections is very broad, it does not import in terms jurisdiction in equity to enforce the criminal laws or to interfere where the purpose is other than the vindication of personal and property rights. The English decisions referred to by *Story*, as showing the ancient origin of such jurisdiction, at the suit of the Attorney General, all had such objects. None of them contemplated mere enforcement of criminal laws or the maintenance of public policy. *Attorney General v. Cleaver*, 18 Ves. Jr. 211, had for its object the inhibition of the manufacture of soap and the preparation of materials used in the manufacture thereof, in a certain place, on the ground that it was offensive and injurious to the health of the inhabitants of the community. No questions of morality or criminality entered into the cause. The court, having concluded that the carrying on of such a trade was not per se a nuisance, directed an issue to a jury to determine whether it was in fact a nuisance. *Attorney General v. Forbes*, 2 Myl. & C. 123, related to a public highway; its object being to prevent, by injunction, municipal authorities from leaving a highway bridge open so that the general public could not pass over it. *Crowder v. Tinkler*, 19 Ves. Jr. 618, involved an injunction to prevent the defendants from using certain premises as a powder magazine on the ground that it was a public nuisance; it having been erected near a public road and the premises of the plaintiffs, and having also been improperly constructed. This clearly involved a property right. It was so peculiarly and distinctively a bill of that kind that it was entertained at the instance of private parties; but the court, being of the opinion that the evidence did not make out a clear case of nuisance, directed an indictment to be drawn and the question put in issue, in the meantime withholding the injunction. This course was taken because courts of equity are reluctant to exercise this jurisdiction at all, and will not do so except in clear cases. The indictment was directed, not for the purpose of enforcing the criminal law, but to the end that, through it, the chancellor might know whether the carrying on of that trade was unlawful under all the circumstances; it not being per se a nuisance.

Another extensive class of cases, cited in

the text of Story's Equity Jurisprudence, is composed of those having for their object the vindication of public rights in respect to property, such as obstructions to highways, public grounds, harbors, and landings. These obstructions are classed by the old writers as "purprestures," signifying inclosures. One who erects a structure in a street, road, park, harbor, or river, or makes inclosures thereon, may be said to take over to himself, or inclose for his sole benefit, the portion so occupied, and withdraw it from the use and enjoyment of all the citizens, to the injury and detriment of the general public. It may be no more to the detriment of one person than to another, so that no individual could enjoin the act as being peculiarly and especially injurious to him. In such cases the Attorney General may proceed in equity on behalf of the public to abate the nuisance, if it be one. Whether it be a criminal nuisance or not is wholly immaterial. If it is indictable as a crime, it does not bar the remedy in equity, because the citizen and the general public have an immediate right to the enjoyment of the thing interfered with. A criminal prosecution is inadequate in such cases, because it does not prevent the doing of the unlawful act. It may ultimately correct the wrong, but, while the process of correction is going on, the public is deprived of an important and valuable right, wherefore the injury is irreparable. In such cases it is not the criminality of the act that gives jurisdiction in equity, but the deprivation of personal and property rights interfered with, injured, destroyed, or taken away by the unlawful act. For the mere vindication of the criminal law and the enforcement of the public policy of the state, let it be founded upon moral or other considerations, the legal remedy by indictment and prosecution is fully adequate and peculiarly appropriate.

The decisions in this country, awarding injunctions to abate purprestures, are numerous. The principle upon which they proceed underlies the decisions in the notable case of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. After he had been committed for contempt in refusing to obey an injunction, Debs tested the jurisdiction in equity by a writ of habeas corpus from the federal Supreme Court. In reply to his contention that court asserted right in the government to proceed by injunction to clear from obstruction the artificial highways of the country for the passage of interstate commerce and the transmission of the mails. Debs was the leader of a great strike of railway men, and their organization and method of operation were such as to wholly prevent transportation of every kind through the city of Chicago and other places. The blockade or interference was as complete and effectual as would have been that of structures built entirely across the railroads. Though there were no buildings or structures inter-

posed, there was an occupation of the railroads, the great common carriers of the country, so that nothing could pass. It wrought injury, personal and financial, to all the citizens of the United States, and deprived them of personal rights, such as those of travel and communication. All this constituted more than a crime. It was a material, substantial, incalculable injury to the people. The interference produced the same results that would have come from the erection of buildings or other structures on the railroad so as to prevent transportation. It fell completely and perfectly within the definition of a "purpresture." Other cases illustrating this doctrine are the following: *Inhabitants of Raritan v. Railroad Co.*, 49 N. J. Eq. 11, 23 Atl. 127; *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351; *Biddle v. Ash*, 2 Ashm. (Pa.) 211; *People v. Beaudry*, 91 Cal. 213, 27 Pac. 610; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564. By far the greater number of cases cited by Story are those of purpresture. All the balance involved injuries to property or to the health of individuals. Of course a direct injury to the health of an individual is not remediable by anything other than a preventive process. Besides, offensive trades or pursuits, poisonous and injurious to the health, affect the property of citizens in the vicinity thereof, detracting from the right of enjoyment of dwellings, and interfering with trade in business houses, and sequentially impairing the value of the properties. All these elements enter into the cases holding it to be within this branch of equity jurisdiction.

Such has been the interpretation by the American courts, including the Supreme Court of the United States. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, is relied upon by counsel for the appellee as having interpreted it otherwise, but it does not do so. The statute involved expressly conferred the jurisdiction exercised in that case, namely, to prevent the use of real estate in the manufacture of intoxicating liquors. It declared all places where intoxicating liquors were manufactured, sold, bartered, or given away, in violation of the provisions of the act, to be common nuisances, and authorized the Attorney General, county attorney, or any citizen of the county, in which such nuisance existed, to sue in the name of the state to abate and perpetually enjoin it. Plainly this was a jurisdiction created by statute. It is true that Mr. Justice Harlan, in the discussion of the case, refers to the text in Story as justifying such use of the writ of injunction; but the main purpose of that argument was to sustain the constitutionality of the statute giving the remedy. In *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280, the court granted an injunction to prevent the use of certain premises for the holding of a prize fight, on the ground that

such use of the property would constitute a public nuisance, but declared, at the same time, that it could not grant an injunction to prevent the prize fight, because the process of the criminal court was adequate for that purpose. It limited the injunction to the prevention of the illegal use of the property only, and this was done under a statute which enjoined upon all judges of courts the duty to suppress or prevent prize fights by the exercise of all the powers vested in them for the prevention of crime. The court interpreted this statute as inhibiting the use of real property for the maintenance or giving of a prize fight. In *Cella v. People*, 112 Ill. App. 376, an injunction was awarded to restrain the maintenance of a poolroom—a turf exchange—similar to the one involved here, in the village of Venice, just across the river from the city of St. Louis; but in that case the court emphasized the want of equity jurisdiction to prohibit the mere commission of the offense of operating the poolroom or the repetition thereof. It entertained jurisdiction and awarded the injunction, however, on the ground that the maintenance of the turf exchange at that place was a civil nuisance, because the evidence showed that the citizens of the village were greatly annoyed and disturbed by the existence and operation thereof, and that direct financial injury to real estate in the vicinity resulted from it. In closing its opinion the court said: "In our opinion, unless the relief prayed in the bill can be granted, the evidence warrants the conclusion that the law-abiding citizens most directly interested in this case will be driven to the alternative of continuing to suffer intolerable annoyance and disturbance and great financial injury amounting to an insufferable nuisance, or of disposing of their property and business for what it may bring, and abandoning their homes and going with their families elsewhere, to their great loss, to the great public loss to the community in question and to the state." Among other things, it was alleged and proven that the operation of the poolroom interfered with the operation of mills and factories in the community by attracting the employees therefrom.

The Kentucky and Illinois cases just analyzed are all we have found which go even to the extent of their holdings, and in both of them the inability of a court of equity to enjoin the mere commission of crime, or to abate mere criminal nuisances, when the vindication of no personal or property right is involved, is reiterated and emphasized. They adhere to the long line of cases asserting it, among which are the following: *State v. Uhrig*, 14 Mo. App. 413, holding that equity will not restrain the keeping of an unlicensed dramshop, though the keeping of it is a public nuisance; *Cope v. Fair Ass'n*, 99 Ill. 489, 39 Am. Rep. 30, refusing an injunction to restrain gambling at a fair; *People v. Condon*, 102 Ill. App. 449, refusing an in-

junction to restrain gambling, pool selling, etc.; *Tiede v. Schneidt*, 99 Wis. 201, 74 N. W. 798, refusing an injunction to prevent the keeping of slaughterhouses on the banks of a running stream or depositing therein dead animals, such acts being illegal, but no injury to property or property rights being alleged; *Ocean City Ass'n v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914, refusing an injunction to restrain the breach of a covenant on the ground that the act covenanted against was criminal, injury to property resulting therefrom having been waived. To these authorities may be added a dictum of the United States Supreme Court in the *Debs Case*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, saying: "Again it is objected that it is outside the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the law of the land is necessary to call into exercise the injunctive powers of the court. There must be some interference, actual or threatened, with property rights of a pecuniary nature; but, when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

That criminal procedure and remedies are adequate to maintain and uphold the public right in so far as moral and political principles and general state policy are involved is perfectly obvious. In cases of criminal nuisances, there may be, on conviction of the defendant, a judgment of abatement, effectually preventing repetition. 1 *Bishop, Cr. Law*, § 1079; *State v. Noyes*, 10 *Fost. (N. H.)* 279; *Wroe v. State*, 8 *Md.* 416; *Rex v. Stead*, 8 *Term Rep.* 142; *Barclay v. Commonwealth*, 25 *Pa.* 503, 64 *Am. Dec.* 715; *Crippen v. People*, 8 *Mich.* 117. It is also competent for the Legislature, within the constitutional limits of its powers, to declare any act criminal and make the repetition or continuance thereof a public nuisance, so as to enable the courts, on conviction, to pronounce judgments of abatement, or to vest in courts of equity the power to abate them by injunction; but it is not the province of the courts to ordain such jurisdiction for themselves. We have some statutes of that character now relating to violation of the laws regulating the liquor traffic, and others. They stand on the principle underlying the Kansas statute, construed and upheld in *Mugler v. Kansas*, cited.

It would be a waste of time to examine and discuss the numerous cases, declaring the maintenance or operation of a gaming house a criminal nuisance, and as such indictable. Its criminality gives no right to injunction. An additional element, not shown by this bill, is required, namely, some injury to property or person. Immorality is not

enough. There is a broad distinction between immoral acts and those injurious to health. A man can keep himself pure in an immoral atmosphere, but he cannot keep himself well in a poisonous atmosphere. Immorality does not kill, or injure, the body. Foul air or poisonous water does. If we should sustain an injunction on the ground that the act is immoral as well as criminal, we would be bound to award it in all criminal cases, for, in every instance, there is some reason, affecting the body politic, for prohibiting acts and making the commission thereof criminal, and soon there would be no distinction between courts of law and courts of equity in respect to criminal jurisdiction.

From the principles and conclusions stated, it results that the decree complained of must be reversed, the preliminary injunction dissolved, and the bill dismissed.

(109 Va. 608)

FITZGERALD et ux. v. FRANKEL et al.
Supreme Court of Appeals of Virginia. June 10, 1909.)

1. FRAUD (§ 58*)—EVIDENCE—PRESUMPTIONS. Fraud is not to be assumed on doubtful evidence or suspicious circumstances, but must be alleged and clearly proved.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

2. FRAUD (§ 58*)—EVIDENCE—SUFFICIENCY.

A transaction may of itself and by itself furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of defendants or even the evidence of witnesses, and circumstances attending and following a transaction are often such as to leave not even a shadow of a doubt as to the real object or motive of the parties engaged therein.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

3. FRAUD (§ 11*)—FRAUDULENT REPRESENTATIONS—MATTERS OF FACT OR OF OPINION.

A matter of opinion may amount to an affirmation, and be an inducement to a contract, especially where the parties are not dealing on equal terms, and one of them has, or is presumed to have, means of information not clearly open to the other.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

4. VENDOR AND PURCHASER (§ 44*) — RELIANCE ON FALSE REPRESENTATION — SUFFICIENCY OF EVIDENCE.

If a purchaser has not equal means or information with the vendor, in a case in which he has a right to rely on a false representation, the evidence to show that he did not rely thereon must be of the clearest and most satisfactory character and leave no room for inference or implication.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 76; Dec. Dig. § 44.*]

5. EXCHANGE OF PROPERTY (§ 3*)—RATIFICATION OF FRAUDULENT TRANSACTION — ACCEPTANCE OF RENT.

If, after a party, defrauded of his property by an exchange thereof for an equity in certain real estate, became mentally irresponsible on realizing what he was about to lose, he accepted rent sent by the agent of the owner of the property traded for, after the agent had

been informed that he was insane, it cannot be said that the agent was misled by the acceptance of the rent, or that the party defrauded intended thereby to affirm the transaction in which he and his wife were jointly interested and for a rescission of which suit was then pending.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 3.*]

6. FRAUD (§ 58*)—CONFIRMATION OF FRAUDULENT TRANSACTION—SUFFICIENCY OF EVIDENCE.

An affirmation must be a solemn and deliberate act, and, when the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition that the courts watch it with the utmost strictness and do not allow it to stand but on the clearest evidence.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

7. CONTRACTS (§ 256*)—WAIVER OF RIGHTS OF PARTIES.

No man can be bound by a waiver of his rights unless such waiver is distinctly made with full knowledge of the rights which he intends to waive, and the fact that he knows his rights and intends to waive them must plainly appear.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 256.*]

8. EXCHANGE OF PROPERTY (§ 8*) — FRAUD AND MISREPRESENTATION—SUFFICIENCY OF EVIDENCE.

Evidence held to establish fraud and misrepresentation in procuring an exchange of property so as to entitle complaining parties to relief.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 8.*]

Appeal from Circuit Court, Pittsylvania County.

Action by W. R. Fitzgerald and wife against Mandel Frankel and others. From a decree for defendants, plaintiffs appeal. Reversed.

S. A. Anderson and A. A. Phlegar, for appellants. Peatross & Harris and Hill Carter, for appellees.

HARRISON, J. The bill exhibited in this case by the appellants, W. R. Fitzgerald and his wife, Sallie J. Fitzgerald, sets out that they were joint owners of certain valuable real and personal property in the county of Pittsylvania, and that they had been induced by fraud and misrepresentation to convey the same to one Maurice Franklin in exchange for certain real estate in the city of Chicago. The prayer of the bill is that the contract entered into between the parties and the deed carrying out the contract, dated November 20, 1905, be set aside, vacated, and rescinded, and that their property be restored to them, and the defendant required to refund the sums paid to him by them under the terms of the contract.

The relief asked for by the appellants rests upon two grounds: (1) Fraud and misrepresentation in the procurement of the exchange of properties; and (2) the mental in-

capacity of then appellant, W. R. Fitzgerald, to contract.

In the view that we take of the case, it is only necessary to consider the first of these grounds.

It is true, as contended on behalf of the appellees, that fraud is not to be assumed on doubtful evidence or circumstances of mere suspicion, but must be alleged and clearly proven. It is, however, equally well established, that "a transaction may of itself and by itself furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of defendants, or even the evidence of witnesses. The circumstances attending and following a transaction are often of such character as to leave not even a shadow of a doubt as to the real object and motive of the parties engaged in it."

* * * Experience attests that in a majority of cases fraud can only be established by circumstances. The motives and intentions of the parties can only be judged of by their actions, and the nature and character of the transaction in which they are engaged. They often furnish more conclusive evidence than the most direct testimony." *Hazlewood v. Forrer*, 94 Va. 703, 706, 707, 27 S. E. 507.

In the present case the record shows that the appellants owned in Pittsylvania county a very valuable farm, known as their "home place," containing about 600 acres; another less valuable tract containing about 150 acres; five pieces of improved property in the town of Chatham, used as storehouses and offices; a considerable quantity of personal property, consisting of farming implements, stock, crops, etc.; and a solvent investment of \$5,000 secured by mortgage. The appellant W. R. Fitzgerald was advancing in life and growing feeble in health, and for this reason he desired to sell his "home place" with a view to investing the proceeds in a way to secure him an income without the care and labor incident to farm life. With this in view he began a correspondence with one C. M. Williams, a Chicago real estate broker. Williams came to Virginia, and, finding that the appellants owned considerable property other than the "home place," he suggested an exchange, through another agent, for the "Willard Apartments" in Chicago, a 21 flat building, valued at \$100,000, with a mortgage upon it for \$50,000. He had with him a picture and printed description of the property, and expressed the belief that he might be able to exchange the equity of redemption in this property for all of the property the appellants owned, except a small portion of the personalty. He offered to ascertain if the agent in Chicago would entertain a deal, and if so to wire the appellant W. R. Fitzgerald to meet him in Charlottesville and go to Chicago. The so-called Chicago agent was willing to negotiate. Williams, however, did not meet Fitzgerald at Charlottesville, as agreed up-

on, but went to Chicago a day in advance and met him at the station there, showed him the property, and introduced him to one H. W. Duncanson as the agent for the owner of the property, and introduced the person who was personating Maurice Franklin as "Mandel Frankel."

Agent Duncanson, after taking a list of the properties owned by the appellants, told Fitzgerald that he would talk it over with "his people" and let him know. He said that the property was being held at \$100,000, but he thought he could get the deal through. At 2 o'clock he told Fitzgerald that he had not yet been able to see "my people," and to return at 5 o'clock, when things might be in shape to talk definitely. When Fitzgerald returned at 5 o'clock, he found Duncanson with a contract already prepared consummating the exchange of properties, which was signed by Fitzgerald without comment. By the terms of this contract Fitzgerald was to transfer to Maurice Franklin all of his real estate in Virginia, and practically all of his personal property, including the \$5,000 mortgage, and the so-called agent of Franklin was to have six days in which to examine the Fitzgerald property and affirm or cancel the contract.

Within the prescribed time, H. W. Duncanson, with one J. B. Smiley, came to Virginia. After examining the property, they expressed dissatisfaction with the Chicago contract, prepared another contract, which included all of the personal property owned by the appellants, some of which was not embraced in the Chicago contract, and further provided that the appellants should in addition give their note for \$1,500. This contract was signed by J. B. Smiley and the appellants; W. R. Fitzgerald signing his wife's name. On this occasion the Chicago property was again represented to be worth \$100,000, to have cost \$75,000, and to be rented for \$9,000. The appellants were also given, at the time, pictures and descriptions of the property, which stated that the property was renting for about \$9,000. Duncanson and Smiley also represented themselves as agents for Maurice Franklin, the owner of the property, describing him as a wealthy man in bad health, who was at that time in California. Shortly after this agreement was made, deeds of exchange were executed by Maurice Franklin and the appellants. After this suit was brought in April, 1906, and a "lis pendens" had been docketed, a deed was executed by Maurice Franklin conveying the Virginia property to J. B. Smiley.

It is fortunately rare that a record presents such a scheme of fraud and deceit as appears to have characterized these transactions from their inception to their conclusion. It is established that there was no such person as Maurice Franklin, who was represented by Duncanson as the wealthy owner of the Chicago property. This so-called "Maurice Franklin" turns out to have

been Mandel Frankel, a young clerk in Duncanson's office, who is shown to have been a tool of Duncanson, ready and willing to sign any paper by any name that his employer might dictate. He files an answer in this cause, admitting his relations with Duncanson, disclosing Duncanson as the real owner of the Chicago property, admitting much of the fraud and deceit that had characterized Duncanson's conduct in the matter, and expressing the belief that unless the transaction was annulled and set aside the appellants would lose their entire property.

J. B. Smiley appears as another tool of Duncanson, actively uniting with him in suppressing the real facts and making a false impression. He files a petition in the cause and an answer to the amended bill, asserting himself to be the owner in fee simple of the Pittsylvania property. In the further progress of the case he admits that Duncanson was the real owner, and asks for an order, which was entered, striking out of his answer so much thereof as sets up an equitable claim in himself to the land in controversy.

H. W. Duncanson, the real owner of the Chicago property, is shown to be concealing his property from his creditors, using for this purpose a fictitious person or a false name, declaring his existence as a real person, describing him as a wealthy man in bad health and a traveler, representing himself as the agent of this myth, and denying any interest in the property, or claiming it all, as he thinks the exigency of the occasion requires.

The Chicago property was purchased by Duncanson in January, 1905, when unimproved, and the conveyance made to his clerk under the false name of Maurice Franklin. Instead of costing, with the improvements put upon it, \$75,000, as represented to appellants, it is shown to have cost about \$38,000. Instead of renting for \$9,000 per annum, as represented to appellants, it is shown to have been renting for little more than enough to pay the expenses including the interest on the \$50,000 mortgage upon it. It is shown that the written lease contracts taken by Duncanson from the tenants occupying the building called for a much larger rental than was actually paid, and that this was done to enhance the sale value of the building and to keep up the rental value with other would-be tenants. Duncanson claims that this was a custom in Chicago. It is avowedly a fraudulent purpose, intended to entrap the first unwary victim, and behind such a custom, if it exists, one cannot shield himself in a court of conscience.

About the time this suit was brought, or soon thereafter, a suit was filed in Cook county, Ill., for the purpose of foreclosing the mortgages on the Chicago property involved in this litigation. The weight of the

evidence shows that, instead of the property being worth \$100,000, as represented to appellants, it is hardly worth more than enough to pay the mortgages resting upon it.

It is insisted that these representations as to the fee simple and rental value of the Chicago property were only expressions of opinion, and sellers' commendation. This is not tenable. The evidence as a whole leaves no room to doubt that the representations as to value were intended to mislead.

In *Grim v. Byrd*, 32 Gratt. 293, 301, where the principles controlling this case are fully and clearly stated, by Judge Staples, it is said: "Even a matter of opinion may amount to an affirmation, and be an inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other."

If the purchaser has not equal means of information with the seller (which is the case at bar), if it be a case in which he had the right to rely upon the representation, the evidence to show that he did not rely upon it must be of the clearest and most satisfactory character. In such cases there ought to be no room for inference or mere implication. *Grim v. Byrd*, supra.

So far from the appellants not having relied on the representations in question, it appears that the only source of information they had was through those who made the representations, and that reliance upon those representations caused them to make the contract.

The appellant W. R. Fitzgerald, after this suit was brought, received from H. W. Duncanson \$137.95 on account of rent derived from the Chicago property, which it is claimed was an affirmation of the original transaction. The evidence shows that, after the appellant realized that he was about to lose his entire estate as the result of this transaction, he grew rapidly worse in mind and body, and became mentally irresponsible. Before this \$137.95 was sent, Duncanson had been told that Fitzgerald was insane. It cannot be said, under such circumstances, that Duncanson was misled by the acceptance of this rent, or that Fitzgerald intended by its acceptance to affirm a transaction in which he and his wife were jointly interested, and for a rescission of which they then had a suit pending.

Affirmation must be a solemn and deliberate act. When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence. No man can be bound by a waiver of his rights, unless such waiver is distinctly made with full knowledge of the rights which he intends to waive, and the fact that he knows his rights and intends to

waive them must plainly appear. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824.

Without prolonging this opinion with further details, it is sufficient to say that the facts established by the voluminous record before us justify the conclusion that the appellants have been, by preparation for the wrong, concealment of the truth, and false statements as to material facts, defrauded of their property; and that they are entitled, at the hands of a court of equity, to relief from the imposition practiced upon them.

The decree appealed from must therefore be reversed, and the cause remanded for a decree to be entered by the circuit court, rescinding the contract between the parties whereby the exchange of properties mentioned in this cause was agreed to, and vacating and canceling the deed of November 20, 1905, carrying out such contract; and further requiring Maurice Franklin to reconvey to the appellants all of the property, real and personal, in Pittsylvania county, which passed under the deed from them of November 20, 1905, and, in default of such reconveyance being made, to have said property reconveyed to the appellants by a commissioner appointed for that purpose; and further requiring the appellants to reconvey the Chicago property to Maurice Franklin, when the amount paid by the appellants on account of the exchange of properties, whether by bond, note, or money, and the costs which are herein decreed to the appellants, and such costs as may be decreed to them by the circuit court, have been refunded and paid to them.

Reversed.

(108 Va. 749)

WHITE OAK COAL CO. v. CITY OF MANCHESTER.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

LICENSES (§ 6*)—POWER TO LICENSE—VEHICLES OWNED BY NONRESIDENTS.

The charter of a city provided that the council may grant licenses to owners of wagons, drays, etc., employed in the city for hire, and may require such owners using them in the city to take out a license therefor, and an ordinance declared that no wheel carriage shall be kept in the city for hire unless the owner or keeper thereof procure a license therefor. *Held*, that the city could not impose a license tax upon the vehicles of a coal company that had no yard within the city, but unloaded coal within the city and delivered it to a purchaser outside the city limits.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 6.*]

Appeal from Corporation Court of Manchester.

Action by the City of Manchester against the White Oak Coal Company. Judgment for plaintiff, and defendant appeals. Reversed, and proceedings dismissed.

Page & Leery, for appellant. Charles L. Page, for appellee.

WHITTLE, J. The plaintiff in error, the White Oak Coal Company, is a corporation engaged in business as a coal merchant at the city of Richmond, with its yards, offices, and stables located in that city, where it pays a license tax on the wagons employed in its business. Having sold a consignment of coal to a customer in Chesterfield county, it caused the cars containing the coal to be stopped on a siding of the railroad company in the city of Manchester, and from that point proceeded to haul the coal in its wagons over the streets of the city to the place of business of the purchaser outside the city limits.

The charter of the city provides that "the council may grant or refuse licenses to owners or keepers of wagons, drays * * * and other wheel carriages kept or employed in the city for hire, and may require the owners and keepers of wagons, drays and carts, using them in the city, to take out a license therefor, and may require taxes to be paid thereon, and subject the same to such regulations as they may deem proper, and prescribe fees and compensation."

The ordinance passed in pursuance of the foregoing provision declares that "no wagon, dray * * * or other wheel carriage shall be kept or employed in the city for hire, directly or indirectly, unless the owner or keeper thereof obtain a license therefor."

Upon the foregoing facts the plaintiff in error controverts the contention that the city had authority to impose a license tax on its wagons.

The general principle is well recognized that the highways of the commonwealth, whether urban or rural, belong primarily to the public, and that the absolute dominion over them is lodged in the Legislature. It is true the control of streets is commonly delegated to the municipalities in which they are located in such measure as the Legislature sees fit to bestow. Nevertheless the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose. *City of Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; *Elliott on Roads & Streets* (2d Ed.) § 645. Moreover, it is the policy of the state that each locality shall bear the burden of maintaining its own highways.

Bearing in mind these principles, it is generally regarded as a reasonable exercise of such charter powers to lay a license tax upon vehicles of residents of the municipality and upon persons residing outside of the corporate limits who employ their vehicles in furtherance of business and occupations carried on within the city. But to levy such tax on vehicles of nonresidents whose business or pleasure casually carries them into or

through the city would be in derogation of their reserved right to use the highways of the commonwealth and impose intolerable conditions upon the public, and lead to absurd results.

As corollary to these well-settled rules, the grant by the Legislature of municipal control over streets must be construed strictly in the interest of common right.

In *Bennett v. Birmingham*, 31 Pa. 15, discussing the power of cities to demand such exactions, the court says: "Such statutes and ordinances are contrary to the usual course of taxation and embarrassing to the public, and ought to be strictly construed." In that case, by act of the Legislature, the town council of Birmingham "were authorized to direct all owners of carts, wagons and other vehicles using the paved streets of said borough, to pay such moderate license for such use as they might by ordinance direct." The court held that this grant of power did not authorize the imposition of a tax on vehicles owned by nonresidents and used in hauling goods and produce through the town from one adjacent township to another.

So, also, in the case of *Cary v. North Plainfield*, 49 N. J. Law, 110, 113, 7 Atl. 42, 43, the court said: "The inconvenience attendant upon the exercise by every municipality in the state of the power of excluding from its limits all unlicensed vehicles engaged in transporting goods or passengers for hire is manifest. Its legitimate operation would require the owners of such vehicles to obtain licenses not only from the authorities of the place where their business had its headquarters, but also from every neighboring town into which their casual engagements might call them, or else to unload their vehicles at the border line. A general law having effects so burdensome or so absurd is not to be anticipated, and only unequivocal language could convince a court that such legislation was intended. The statute now under review is not of this character. Its terms are satisfied by holding that license taxes are to be imposed only by that municipality in which the business or occupation is carried on or conducted." *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440; *East St. Louis v. Bux*, 43 Ill. App. 276.

The same principle is recognized by this court in *Frommer v. City of Richmond*, 31 Grat. 646, 31 Am. Rep. 746. *Frommer* lived outside of the city limits, but rented a stall in the city market, where he conducted his business as a butcher. He prepared his meat for market at his residence, and used his carts to haul it to his stall in the market. Upon these facts, the court held that *Frommer* was amenable to license tax on the carts thus used. The court rested its decision on the ground that the license tax was exacted

for the privilege of using the carts on the streets of the city in pursuit of the owner's business in the city.

If the plaintiff in error had established a coalyard within the corporate limits of Manchester, the case would have been analogous to *Frommer's* case and ruled by it. But it is clear that the sporadic act of hauling a single consignment of coal from the siding in Manchester over the streets of the city to its customer on the outside was not carrying on such a business or occupation within the city as would subject the coal company to the license tax on vehicles imposed by the ordinance.

The conviction and fine imposed for the alleged violation of the ordinance was consequently illegal, and the judgment must be reversed, and the proceeding dismissed, with costs.

Reversed.

CARDWELL, J., absent.

(109 Va. 632)

LAMBERT v. PHILLIPS & SON.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. PRINCIPAL AND AGENT (§ 136*)—LIABILITIES TO THIRD PERSONS—ACTION IN PRINCIPAL'S NAME—AGENT'S LIABILITY.

If defendant was merely the agent of the owner to supervise improvements upon property, and fully disclosed his relation to plaintiff, he would not be liable for work done and materials furnished by plaintiff, unless credit was given to him expressly and exclusively, so that it was error to instruct that the jury should determine the relation between plaintiff and defendant upon all the evidence, and if defendant was not an independent contractor, but an agent of the owner, and fully disclosed his relationship, and credit was given to the owner, and not to defendant, he was not liable.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 476-491; Dec. Dig. § 136.*]

2. PRINCIPAL AND AGENT (§ 133*)—AGENT'S LIABILITY—CONTRACTS.

That defendant was an independent contractor in making improvements on property, so as to be responsible to employes and others for injuries resulting from his negligence, was not conclusive of whether he was liable for materials furnished in doing the work, but was only a fact to be considered in determining whether credit was given to him or to the owner; that being the criterion of liability for the materials.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 133.*]

3. TRIAL (§ 244*)—INSTRUCTIONS—UNDUE PROMINENCE OF PARTICULAR MATTERS.

In an action for work done and materials furnished in making improvements on property which defendant was superintending, instructions which specifically called the jury's attention to whether defendant was an independent contractor and only slightly referred to the question of whether credit was given to defendant or to the owner, which was the final criterion of liability, were misleading, as giving undue importance to the question whether defendant was an independent contractor, which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was but a circumstance for consideration in determining to whom credit was given.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 244.*]

Error to Circuit Court of City of Richmond.

Action by Phillips & Son against G. W. Lambert. Judgment for plaintiff, and defendant brings error. Reversed.

Wm. L. Royall, for plaintiff in error. John A. Lamb, for defendant in error.

BUCHANAN, J. Phillips & Son instituted their action of assumpsit against G. W. Lambert to recover the value of certain work and labor done and materials furnished by them as plumbers on two houses situated in the city of Richmond, one at the corner of Broad and Ninth streets, and the other on the corner of Broad and Tenth streets. The property was owned by the Richmond Realty Company, but at the time the said work was done and materials furnished was leased to one Jake Wells, who had employed Lambert to superintend the making of the improvements which he was having put on the property. The question involved in the case is whether or not Lambert was personally responsible to the plaintiffs for the work done and materials furnished by them.

There was a verdict and judgment for the plaintiff. To that judgment this writ of error was awarded.

The errors assigned are to the action of the court in giving two instructions asked for by the plaintiff, the refusal to give instruction A offered by the defendant, and the giving of the court's own instruction in lieu thereof.

The instruction given by the court in lieu of the defendant's instruction is as follows: "The court instructs the jury that the existence and character of the relation between the plaintiffs and the defendant depending upon a verbal contract, it is the province of the jury to determine from the whole evidence in the case what was the relation between the parties. The court instructs the jury that if they believe from the evidence that Lambert was not an independent contractor, as defined in these instructions, but was merely an agent to supervise improvements to be made at the corner of Ninth and Broad streets, and also if they further believe from the evidence that he (Lambert) made full disclosure of his principal to the plaintiffs, and that credit was given by the plaintiffs to the Hotel Allen Company, and not to the defendant, then the jury should find for the defendant."

This instruction is, we think, erroneous. If, as it hypothetically states, Lambert was merely the agent of Jake Wells, or the Allen Hotel Company, to supervise the improvements to be made upon the property, and made full disclosure of his principal to the plaintiff Lambert was not responsible for

the work done and materials furnished unless credit was given to him expressly and exclusively.

Chancellor Kent, in volume 2 of his Commentaries, side page 629, says: "Every contract made with an agent in relation to the business of the agency is a contract with the principal, entered into through the instrumentality of the agent, provided the agent acts in the name of the principal. The party so dealing with the agent is bound to his principal, and the principal and not the agent is bound to the party. It is a general rule, standing on strong foundations and pervading every system of jurisprudence, that where an agent is duly constituted and names his principal and contracts in his name, and does not exceed his authority, the principal is responsible and not the agent. The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or where the agent becomes responsible by an undertaking in his own name, or where he exceeds his power."

In note 1 American Leading Cases, 454, it is said that: "When the relation of principal and agent exists in regard to a contract, and is known to the other party to exist, and the principal is disclosed at the time as such, the contract is the contract of the principal, and the agent is not bound unless credit had been given to him expressly and exclusively and it was clearly his intention to assume a personal liability."

In *Mechem on Agency*, § 558, it is said: "Where dealings are had with the agent of a known principal, the legal presumption is, as has been said, that the credit was given to the principal, rather than to the agent personally, and this presumption will prevail in the absence of evidence that the credit was given exclusively to the agent, and the burden is upon the party alleging it." See, also, *Meeker v. Claghorn*, 44 N. Y. 349; *Humes v. Decatur Land Co.*, 98 Ala. 461, 13 South. 368; *Strider v. Wench*, etc., 21 Grat. 440, 445; *Story on Agency*, § 447; 1 Am. & Eng. Enc. L. 1120; *Clark & Skyles on Law of Agency*, § 565.

If the jury believed from the evidence that Lambert was the agent of the party having the improvements made, and that he (Lambert) made full disclosure of his principal to the plaintiff, then the legal presumption was that the credit was given to the principal and not to the agent, unless it further appeared that the credit was expressly and exclusively given to the agent, and the instruction ought to have been so framed as to make this plain to the jury.

From what has been said it is clear that the defendant's instruction A was plainly erroneous and was properly refused by the court.

We are further of opinion that instructions Nos. 1 and 2, given at the request of the plaintiffs, were misleading. Lambert may

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have been an independent contractor in making the improvements upon the said buildings and responsible to his employes and third persons for injuries resulting from his negligence in doing that work, and yet the owners or lessee of the property may have been responsible to the plaintiffs for the work and labor done and materials furnished. Whether Lambert or the owner or lessee was liable to the plaintiffs depended upon the question: To whom was the credit given? The fact that Lambert was or was not an independent contractor was a fact to be considered along with all the other facts and circumstances of the case in determining to whom the credit was given by the plaintiffs, but it was not decisive of that question. All the instructions given, and especially No. 1, call the attention of the jury to that question specifically, with but little reference to other questions involved in the case, thus tending to impress unduly on the jury that question and the facts bearing upon it, to the disadvantage of the other evidence in the case bearing upon the issue to be determined. Upon the next trial that should be avoided, and the jury left to determine upon all the facts and circumstances of the case to whom the credit was given by the plaintiffs in doing the work and furnishing the materials.

Reversed.

(109 Va. 612)

HUNDLEY et al. v. NEALE.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. FISH (§ 7*) — OYSTER GROUNDS — ALLOTMENT—APPLICATION.

Evidence held to justify a finding that bona fide applications for the allotment of oyster ground in controversy had been filed, antedating the petitioners' application.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

2. FISH (§ 7*)—OYSTER GROUND—ALLOTMENT—APPLICATIONS—DELAY.

Petitioners for the allotment of oyster ground were not prejudiced by delay in securing action on their petitions, due to no fault of theirs.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

Error to Circuit Court, Essex County.

Application by Peyton Hundley and others against R. G. Neale, oyster inspector for Essex county, Va., for a writ of mandamus. From an order denying the writ, petitioners bring error. Affirmed.

Thos. E. Blakey and Jos. W. Chinn, Jr., for plaintiffs in error. J. N. Stubbs, H. I. Lewis, and Jno. R. Saunders, for defendant in error.

HARRISON, J. This is an application by the plaintiffs in error to the circuit court of Essex county for a writ of mandamus to compel the defendant in error to post no-

tices of their application for certain oyster planting grounds, in conformity with the statute, for the purpose of establishing the right of the petitioners to an assignment of such ground.

A jury was waived, and the whole question of law and fact was submitted to the court. The sole issue of fact, agreed upon by the parties, to be determined by the court, as shown by the order of submission, was as follows: "Did the petitioners make application according to law to R. G. Neale, oyster inspector for Essex county, Va., district No. 9, for the oyster bottom described in the petition, and, if so, were the said petitioners the first bona fide applicants for said bottom?"

Upon the evidence the circuit court held that the petitioners had made application according to law for the oyster bottom described in their petition, but that they were not the first bona fide applicants for such oyster bottom; the same having been previously applied for, according to law, by Walter C. Palmer and Garrett & Hunt, respectively, as set out in the answer of R. G. Neale, inspector. Thereupon the writ of mandamus was denied, and the petition dismissed.

The record before us abundantly sustains this action of the circuit court. It appears that on January 3, 1903, Walter C. Palmer filed with the oyster inspector his application for the oyster bottom in controversy. It further appears that Palmer frequently, after filing his written application, applied verbally to the inspector, asking that the ground in question should be assigned to him, and was told by the inspector that his application was on file and was the first to be filed, but that the oyster ground covered by the application was within the Baylor survey, and not, therefore, such public bottoms as it was proper for him to rent out.

It further appears that on February 7, 1903, Garrett & Hunt filed their application for a portion of the ground in dispute, and were informed of Palmer's application and the difficulty in the way of the inspector's acting; and on August 5, 1907, the petitioners filed their application for the oyster bottom in question.

It is satisfactorily shown that from 1903, when the early applications were made for these grounds, up to 1907, when the petitioners made their application, it was not known whether these oyster grounds were within or without the Baylor survey. If they were within the Baylor survey, the inspector had no authority to post notices with respect to them. The matter was in such confusion that nothing could be done until there was a survey re-establishing the line of the Baylor survey. This survey was ordered, and a report made in August, 1907, to the Board

of Fisheries by the surveyor, showing that the grounds were without the Baylor survey. After the result of this survey was known, the petitioners, for the first time, filed their application for the oyster grounds in question; and before the report of the surveyor had been confirmed by the Board of Fisheries they presented their petition for this writ of mandamus to compel the oyster inspector to post notices of their application for the purpose of establishing their right to an assignment of the oyster bottoms in controversy.

The bona fide applications of Walter C. Palmer and Garrett & Hunt, respectively, were made and filed long before that of the petitioners was made, and the delay in securing action upon such applications was due to no fault of theirs, and did not prejudice their rights.

Upon the issue submitted to its determination, the circuit court could not have held otherwise, and its judgment must be affirmed.

Affirmed.

(109 Va. 670)

NORFOLK & P. TRACTION CO. v. O'NEILL.
(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—MISCONDUCT OF TRIAL COURT.

The misconduct of the court in expressing opinion as to its understanding of the testimony of a witness, made while overruling an objection to a question asked another witness, was not prejudicial, where the witness had testified as the court understood him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. § 1046.*]

2. WITNESSES (§ 379*)—IMPEACHMENT.

The admission of statements, made by the motorman after an accident resulting in injuries in a collision with his car, as to the circumstances attending it, is proper, where the statements were admitted as affecting the credibility of the motorman testifying as a witness, and not as admissions binding his employer, and the jury were so instructed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1209; Dec. Dig. § 379.*]

3. STREET RAILROADS (§ 81*) — INJURIES TO TRAVELERS—LIABILITY.

A traveler on a street on which a street car is operated may go on or near the track in passing a wagon standing near the curb, and the motorman must warn her of the approach of the car, where there is danger of running her down, and must slow down his car so as to avoid injuring her, if he can do so in the exercise of reasonable care after he ought to have seen her peril.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

4. TRIAL (§ 260*)—INSTRUCTIONS.

Where, in an action for injuries to a bicycle rider struck by a street car, the evidence showed that the rider went on or near the track in passing a wagon standing near the curb, and the proof was conflicting whether the accident occurred before or after the car had passed the wagon, an instruction that the car had the right of way at the point at which the accident

occurred, and that if the motorman was proceeding at a lawful rate of speed, and plaintiff was not approaching a place of obvious danger, the motorman owed no duty to slow down his car, covered both phases of the case and left the jury to determine at what point plaintiff was injured, rendering it proper to refuse instructions assuming that the accident did not occur until after the car had passed the wagon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. APPEAL AND ERROR (§ 1003*)—VERDICT—CONCLUSIVENESS.

A verdict contrary to the preponderance of the evidence, but supported by evidence, rendered on proper instructions, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Error to Circuit Court of City of Norfolk.

Action by Vivian W. O'Neill, an infant, by her next friend, against the Norfolk & Portsmouth Traction Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson and J. R. Tucker, for plaintiff in error. Jeffries, Wolcott & Wolcott, for defendant in error.

BUCHANAN, J. Vivian W. O'Neill, an infant nine years of age, whilst riding on a bicycle on Olney road, in the city of Norfolk, upon which was operated a double line of street railway tracks, was injured by a street car of the Norfolk & Portsmouth Traction Company. To recover damages therefor she instituted her action, by her next friend, in which there was a verdict and judgment in her favor. To that judgment this writ of error was awarded.

The first error assigned is to the action of the court in expressing an opinion as to its understanding of what O'Brian, one of the plaintiff's witnesses, had stated. Another witness was asked if he knew whether or not the car which inflicted the injury rang its gong as it approached the place of the accident. This question was objected to upon the ground that the motorman was under no obligation to ring the gong unless he saw that the plaintiff (who was riding in the same direction in which the car was moving and near the track) was going to get in front of his car, and that O'Brian had not stated, as the plaintiff claimed he had, that in going around a wagon she was so near the track as to be in danger from the car. The court, in ruling upon this objection, said, in substance, that it understood the witness O'Brian as plaintiff's counsel did, and overruled the objection, but expressly told the jury that the court's understanding of O'Brian's evidence was not to have any weight with them.

While it might have been better to have overruled the objection without expressing any opinion as to what its understanding of O'Brian's testimony was, clearly no prejudice resulted to the defendant from the court's ac-

tion, since it plainly appears from the stenographer's notes of the evidence that O'Brian testified as the plaintiff's counsel and the court understood him. His credibility was, of course, for the jury, and the court expressed no opinion on that question.

Neither did the court err in permitting Dr. Woodward and Mr. Miller to testify as to a statement made by the motorman after the accident in reference to the circumstances attending it. That evidence was admitted as affecting the credibility of the motorman's testimony, and not as an admission binding his company, and the jury were so informed by the court.

The plaintiff offered 3 instructions, all of which were given. The defendant offered 23, of which 17 were given. The action of the court in giving those asked for by the plaintiff and in refusing to give 6 of those offered by the defendant is assigned as error; but the only grounds of objection to the action of the court pointed out in the petition apply to instruction No. 1 given for the plaintiff, and instructions L and M of the defendant refused by the court.

The objection made to the plaintiff's instruction No. 1 is "not as to the contents of the instruction, but the omission from it of any charge as to contributory negligence."

That instruction is as follows: "The court instructs the jury that if they believe from the evidence that, immediately preceding the injury complained of, the plaintiff was riding upon and along Olney road, in the city of Norfolk, as alleged in the declaration, and that the defendant's car was approaching her from behind, both going in the same direction, and that by reason of a wagon standing near the curb on said street there was left a narrow space between said wagon and the street car track, and that the motorman of said car either saw, or by the exercise of ordinary care ought to have seen, that the plaintiff was about to ride near to or upon the track at that place in passing said wagon, and that she would be in danger of being injured if overtaken by the car at that place, it was the duty of the motorman to give the plaintiff timely warning, unless he saw that his approach was observed by her, and to reduce his speed to a point sufficient to enable him to stop his car if it became necessary to avoid a collision, and to continue to run at such guarded rate of speed until the plaintiff reached a place out of danger of a collision with said car, and if they believe from the evidence that the said servants of the defendant could by the exercise of ordinary care have performed their duty in this respect in time to have avoided the accident, but failed to do so, and that as a direct and proximate result of such failure the plaintiff was injured as alleged in the declaration, they must find for the plaintiff."

If the jury believed the facts hypothetically stated in that instruction, the plaintiff was entitled to recover, even if she had been

guilty of negligence in going on or near to the railway track in passing around the wagon. She had the right to go upon or near the track in passing the wagon, and it was the duty of the motorman to warn her of the approach of the car, if there was danger of running her down, and to slow down his car so as to avoid injuring her if he could do so in the exercise of reasonable care after he saw, or ought to have seen, her peril. That is all that the instruction required of him and was plainly right. See *Richmond Traction Co. v. Clarke*, 101 Va. 382, 386-389, 43 S. E. 618, and authorities cited.

The defendant's instruction L, rejected by the court, was as follows: "The court instructs the jury that the defendant's car had the right of way at the point on the street at which this accident occurred, and if you believe from the evidence that he was proceeding at a lawful rate of speed, and that the plaintiff, as he approached her, was riding a bicycle down the street with her bicycle under control, and far enough from the track for the car to pass her in safety, the motorman owed the plaintiff no duty to slow down or stop the car."

The defendant's instruction M, which the court also refused to give, was substantially the same as instruction L, as stated in the petition.

The court gave the defendant's instruction O, which was as follows: "The court instructs the jury that the defendant's car had the right of way at the point on the street at which this accident occurred, and if you believe from the evidence that he was proceeding at a lawful rate of speed, and that the plaintiff, as he approached her, was riding a bicycle down the street of the city, with her bicycle under control, and far enough from the track for the car to pass her in safety, and was not approaching a place of obvious danger of her turning in front of the car, then the motorman owed her no duty to slow down or to stop the car."

The objection made to the court's action in refusing instructions L and M is that instruction O assumes that the accident occurred before the car had passed the delivery wagon standing near the track, while there was evidence tending to show that it did not occur until after the car had passed the wagon, which latter phase of the case was intended to be cured by instructions L and M.

As we construe instruction O, it does not assume at what point the accident occurred. It covers both phases of the case, and leaves the jury to determine at what point the plaintiff was injured.

The 20 instructions given in the case covered every aspect of it, and some of them two or three times, and submitted the case to the jury as favorably to the defendant as it was entitled to have it submitted.

The refusal of the court to set aside the verdict as contrary to the evidence is assigned as error.

Without discussing in detail the evidence, which is conflicting, we are of opinion that, while the preponderance of evidence is in favor of the defendant's theory of the case—that the plaintiff's injury was caused by her losing control of her bicycle and falling against and under the car as it passed her—yet there is sufficient evidence to support the verdict of the jury that the accident was the result of the defendant's negligence. This being so, and there being no error in the manner in which the case was submitted to the jury to the prejudice of the defendant, the judgment of the trial court, under the well-settled practice, must be affirmed.

Affirmed.

(109 Va. 530)

BROWN v. LYNCHBURG NAT. BANK.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. BANKS AND BANKING (§ 151*)—RELATION BETWEEN DEPOSITOR AND BANK—OBLIGATION OF DEPOSITOR.

A bank depositor must examine within a reasonable time and with ordinary care the account rendered in the passbook and the vouchers returned by the bank to him, and report any error discovered without unreasonable delay.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 300, 301, 345; Dec. Dig. § 151.*]

2. BANKS AND BANKING (§§ 119, 138*)—RELATION OF BANK TO DEPOSITOR—OBLIGATIONS OF BANK.

A bank is the debtor of the depositor and must keep careful and faithful accounts with the depositor, scrutinize checks, and exercise proper care and skill to prevent or discover fraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 239, 398-404; Dec. Dig. §§ 119, 138.*]

3. BANKS AND BANKING (§ 112*)—FRAUD OF BANK EMPLOYE.

An employe of a bank in the perpetration of a fraud on a depositor is not the agent of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 271, 272; Dec. Dig. § 112.*]

4. BANKS AND BANKING (§ 154*) — MISCONDUCT OF EMPLOYE—LIABILITY OF BANK TO DEPOSITOR.

Whether a bank was liable to a depositor for loss resulting from the fraud of employes of the bank in making false entries against the account of the depositor, notwithstanding his failure for about three years to discover the fraud, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 154.*]

Error to Corporation Court of Lynchburg.

Action by J. Thompson Brown against the Lynchburg National Bank. There was judgment for defendant, and plaintiff brings error. Reversed and rendered.

Harrison & Long, for plaintiff in error.
Wilson & Manson and Lee & Howard, for defendant in error.

KEITH, P. The plaintiff in error brought this action to recover a balance alleged to be due him on a deposit account by the Lynchburg National Bank of \$3,066.20. The bank denied its liability, except for the sum of \$139.90, which amount it tendered, and as to the residue issue was joined upon the plea of non assumpsit. The defendant in error demurred to the evidence, and, the verdict of the jury having been rendered, the court entered judgment for the defendant, and the case is before us upon a writ of error awarded Brown.

The evidence tends to prove: That the plaintiff in error had been for many years a depositor with the defendant bank; that beginning with August, 1900, and continuing until December, 1903, an employe or employes of the bank, from time to time, embezzled the funds of the bank and fraudulently entered the amounts so taken against the account of plaintiff in error. It was the custom of the bank to render monthly to plaintiff in error a statement of his account, consisting of his canceled checks for the past month, a machine-made slip, represented to contain a list of these checks, and a statement showing the totals of debits and credits, and the balance to the credit of plaintiff in error. Brown did not keep a passbook, but relied solely on these statements rendered by the bank. His examination of these statements consisted of seeing that his checks as drawn were returned to him as vouchers, that his signature to the checks was genuine, and that the checks returned corresponded with the stubs from which they were taken, and by verifying the total debits and credits. He did not check the individual checks with the items on the machine-made list of checks, but assumed that the machine-made list of checks corresponded with the checks returned with it and correctly represented his withdrawals from the bank, and he did not examine it to see if it contained any item of charge against his account not represented by a check. In the method of examination he pursued, he discovered nothing about the statements of his account returned to him which put him upon notice of any wrongdoing until about the middle of November, 1903, when he received notice of an overcheck. He had received frequently within the past three years notices of overchecks, but had assumed that the bank was keeping his account honestly and correctly. At the time mentioned, however, November, 1903, the amount of the overcheck attracted his attention, and he called for his checks for the current month of November to be sent to him, and upon receiving them he made a critical examina-

tion, checking up each check with the machine-made list of checks, and discovered that the checks returned did not correspond with that list, that the list contained more items than there were checks, and that apparently some of his checks had been used as a basis of charge against his account more than once. For example, the machine-made list of checks contained two items of \$33 and two of \$23.75, though he had only drawn one check for each of these amounts. He proceeded to examine his account for several years back, and discovered that false entries had been systematically made from month to month, extending from August, 1900; the false entry always corresponding in amount with some check drawn by him. The sums thus withdrawn from the funds of the bank and fraudulently charged against his account amounted, with interest, to about \$3,000. The president of the bank admitted that this money had been stolen by some agent or employé of the bank.

It is difficult to conceive of a fraud more easy of detection than the one under investigation. As soon as a comparison was made by plaintiff in error between the machine-made slip and the checks which he had drawn, the fraud was discovered, and yet plaintiff in error had for three years accepted the bank's statements without question. If upon this evidence the case had been submitted to the jury, and it had found a verdict for the defendant, it could not have been disturbed.

As was said by this court in *Bank of Richmond v. Richmond Electric Company*, 106 Va. 347, 56 S. E. 152: "A bank depositor is under obligations to the bank to examine within a reasonable time and with ordinary care the account rendered in the passbook and the vouchers returned by the bank to him, and to report any errors discovered without unreasonable delay. The examination need not be so minute as to exclude any possibility of error, but it should be made in good faith and with ordinary diligence, and such care should be used as is required by the circumstances of the particular case."

In *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, a like doctrine is announced. In that case, "the main dispute," said Mr. Justice Harlan, "is as to the right of the depositor to question the account rendered by the bank, so far as it charges him with certain checks which he signed, but which, before payment, were materially altered by his clerk, without his knowledge or assent." The facts of that case are as follows: Berlin was the confidential clerk of Cooper from January, 1878, to March, 1881, and had the entire management of his office, kept his books, and had full charge of Cooper's account, as agent of Ashburner & Co., with the bank. With the full knowledge of Cooper, Berlin filled up all checks drawn upon that account, entering on the stub of the checkbook the date and amount

of each check, the name of the payee and the purpose for which it was drawn. Pursuant to Cooper's instructions, or in the regular course of business, he filled certain checks between September 11, 1880, and February 13, 1881, which, being signed by Cooper and delivered to him, were altered by Berlin before they were taken from the office. The teller of the bank testified that the checks, when presented by Berlin, were always carefully examined by him as to signature, amount, date, and indorsement, and that there was nothing about the checks to excite suspicion or to suggest alteration or erasure. Upon the checks so altered, Berlin received from the bank the full raised amount, out of which he paid to Cooper or to his use the several amounts for which they were originally drawn, and appropriated the balance to the discharge of gambling debts which he had contracted. The entries in the checkbook were made by Berlin and were correct, but he forced the footings of the stubs by making false additions equal to the increase of the altered checks. Cooper's passbook was written up at the bank in October, 1880, November, 1880, and January, 1881, and balances struck showing the amounts to his credit on those dates. Upon each occasion the book was returned with all checks that had been paid subsequent to the previous balancing, including the altered checks. Across the face of the passbook on the first balancing was written, "62 vouchers returned," on the second "79 vouchers returned," and on the last "66 vouchers returned." Each time the passbook was returned with the vouchers, Berlin destroyed such of the checks as he had altered. Berlin stated that Cooper was in the habit of examining his checkbook from time to time, and it is clear that the latter knew of these balancings, for he testifies that his account with the bank was balanced from time to time, which was done by the bank writing up the passbook and returning the checks that had been paid by it; that when the passbook was so returned it went to the clerk, Berlin, who then balanced the checkbook, that being one of the duties imposed upon him; that witness took no part in such balancings, but Berlin generally showed him the vouchers that were returned, because he liked to look at them, but he never gave Berlin any particular instructions so to do. Cooper testified, also, that he was in the habit of looking over his checkbook and keeping track of the balance, and that when he asked Berlin as to the balance his answer agreed with about what he supposed was in the bank. He also knew the object of such balancings, for he testified that he had been a dealer with the bank for upwards of 18 years, and that he knew it was its custom, as well as the custom of all banks, to balance at intervals the passbooks of its depositors and to return the same when balanced, accompanied by the checks

drawn by the depositor and charged to the account, as the vouchers of the bank for such payments. Cooper states that the forgeries were discovered by him about the 1st or 2d day of March, 1881. Berlin having stayed away from the office for a day, he compared his passbook with the stubs of the checkbook, and ascertained that a certain number of checks appearing on the stubs were not charged against him in his passbook, and did not appear to have been returned by the bank, while others which appeared on the passbook to have been charged against and returned to him did not appear by the stub of the checkbook to have ever been drawn. Thereupon he sent his passbook to the bank to be balanced, and it was balanced on March 2, 1881. Cooper admits that if on any of the several balancings he had made such examination of his checkbook and passbook as was done on March 1, 1881, he would have easily discovered that his account had been charged with altered checks, and that for the previous 5 or 10 years he knew of various means adopted by bankers and merchants to prevent the raising or alteration of checks, but he had not employed or used any of them. Upon one occasion, the date not given, he discovered by adding up the footings of the checkbook an error, and spoke to Berlin about it. The latter having replied that it was very seldom he was caught in a mistake, Cooper believed him and looked no further into the matter.

Upon this evidence the circuit court directed a verdict for the plaintiffs, and the case was carried to the Supreme Court of the United States upon a writ of error. Mr. Justice Harlan, in his opinion, fully discusses the authorities, and the result of his investigation is stated in the syllabus as follows: "When a bank depositor sends his passbook to the bank to be written up, it is his duty upon its return, either in person or by duly authorized agent, to examine the account and vouchers returned within a reasonable time, and give to the bank timely notice of any objections thereto. If he fails to do so, he may be estopped from questioning the conclusiveness of the account. If the examination is made by an agent, it must be done in good faith and with ordinary diligence; and, where such agent himself commits forgeries which mislead the bank and injure the depositor, the latter is not protected, in the absence of at least reasonable diligence in supervising the conduct of the agent. In this case it was error to direct a verdict for the plaintiffs, as the questions whether the depositor is estopped, whether the bank exercised due caution before paying the altered checks, and whether a certain check was indorsed in blank or for deposit, are for the jury." Justice Harlan concludes his opinion as follows: "It results from what has been said that the court erred in peremptorily instructing the jury to find for

the plaintiffs. Both causes of action are peculiarly for a jury to determine, under such instructions as may be consistent with the principles announced in this opinion. Whether the plaintiffs are estopped by the negligence of their representative to dispute the correctness of the account as rendered by the bank from time to time is, in view of all the circumstances of this case, a mixed question of law and fact. As there is, under the evidence, fair ground for controversy as to whether the officers of the bank exercised due caution before paying the altered checks, and whether the depositor omitted, to the injury of the bank, to do what ordinary care and prudence required of him, it was not proper to withdraw the case from the jury."

In the case of *Brown v. Bank*, the bank demurred to the evidence, and the judgment upon the demurrer was rendered in its favor. Here, too, as in the case of *Bank v. Morgan*, the cause of action was one peculiarly for the jury to determine, and we think that the court erred in taking it from the jury.

It is true that the fraud was perpetrated in this case in a very crude and simple manner. It is not a case of forgery, which if cleverly performed is difficult of detection, but consisted merely in making a double charge for the amount represented by a single check, which could have been detected, as the petition for the writ of error admits, by adding up the amounts on the stubs of the checkbook and comparing the total with the total shown on the statement of "checks as per list." As a matter of fact, as soon as plaintiff in error did this, the fraud was discovered. But, on the other hand, it is to be remembered that the bank is the debtor of the depositor, and that it is under obligation to keep careful and faithful accounts with its depositors, to scrutinize checks, and to exercise proper care and skill to prevent or to discover fraud.

It is true that the employé of the bank, in the perpetration of a fraud upon a depositor, is not the agent of the bank; but in this case, for three years, one or more employés of the bank had engaged in systematically defrauding the plaintiff in error, and in the concealment of those frauds by making and rendering false accounts.

The court is of opinion that looking to the long course of dealing between the parties, the numerous occasions upon which the money of the bank had been abstracted and charged to the account of plaintiff in error, to the monthly accounts (more than 30 in number) rendered by the bank to plaintiff in error through its employés, to the probability that such fraudulent practices could not have been perpetrated and successfully concealed through so long a period unless participated in by more than one of the employés of the bank, and regard being had to the relations which exist between a bank

and its depositors, and to the reciprocal duties owing from one to the other, it was a case for a jury to determine, under proper instructions from the court.

The judgment of the corporation court must therefore be reversed, and this court will proceed to enter such judgment as that court should have rendered.

Reversed.

(109 Va. 733)

THOMPSON v. NORFOLK & P. TRACTION CO.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. CARRIERS (§§ 320, 347*)—INJURIES TO PASSENGERS—STREET CARS—TIME TO ALIGHT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a street car passenger as she was attempting to alight, whether defendant's alleged premature starting of the car before plaintiff had time to alight, or plaintiff's alleged negligence in attempting to alight before the car stopped, was the proximate cause of the accident, *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 320, 347.*]

2. NEW TRIAL (§ 72*)—VERDICT—VACATION.

A verdict should not be disturbed even by the trial court, unless plainly against the weight of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.*]

3. NEW TRIAL (§ 72*)—VERDICT—WEIGHT OF EVIDENCE.

Where, in an action for injuries to a street car passenger, the evidence was amply sufficient to sustain a finding either way that plaintiff alighted before the car stopped, or that the car started prematurely before plaintiff had time to alight, a verdict for plaintiff, accepting the latter alternative, should not have been set aside as against the weight of the evidence, under the rule that to warrant a new trial, where the evidence is conflicting, the evidence must be insufficient to warrant the finding.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.*]

Error to Law and Chancery Court of City of Norfolk.

Action by Virginia D. Thompson against the Norfolk & Portsmouth Traction Company. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

Ed. R. Baird, Jr., for plaintiff in error. W. H. Venable and H. W. Anderson, for defendant in error.

KEITH, P. Mrs. Virginia D. Thompson brought suit in the court of law and chancery of the city of Norfolk to recover damages for injuries received by reason of the negligence of the Norfolk & Portsmouth Traction Company. Upon the trial the jury found a verdict in her favor for \$3,000, which the court set aside, and at a subsequent trial, neither party offering any testimony, a judgment was entered for the defendant. The record of the first trial is

preserved by proper bills of exceptions, and the case is before us upon a writ of error.

Mrs. Thompson was a passenger on a car of the Norfolk & Portsmouth Traction Company, and her account of the occurrence is that: She rang the bell to stop the car, intending to alight at Madison street, but her signal was not obeyed, and she waved her hand to the conductor, and the car was brought to a standstill. She arose from her seat while the car was in motion and had gotten to the door when the car stopped, and she then stepped upon the platform. There was at the time no one upon the platform but herself and the conductor. Her statement of what then occurred is as follows: "I was holding onto the rail that goes down from the car, and I had hold of this with my right hand, and in attempting to alight from the car on the street I had one foot—say the platform is here, in attempting to put the other foot on the street, the car threw me suddenly, and it broke this arm, but I did not know it was hurt." She then goes on to describe with more particularity the injuries which she received, with respect to which it is sufficient to say that they were of such a character that we are unable to say that the verdict was excessive in amount.

Her statement is corroborated by the testimony of her granddaughter, a child 10 years of age, but who was not objected to as a witness. Mr. and Mrs. Childress also testify that they saw Mrs. Thompson come out on the end of the car, that she had hold of the railing and was about to step off, and just before she got her other foot upon the ground the car started and threw her.

Five disinterested witnesses, who were passengers upon the car at the time of the accident, testify in behalf of the defendant company. Their testimony is in conflict with that of the plaintiff in error.

There was no exception taken to the instructions given by the court to the jury. The question for decision therefore is purely one of fact.

It is true that the case does not come before us as upon a demurrer to evidence, and that, as was said by this court in *Chapman v. Virginia Real Estate Company*, 96 Va. 188, 31 S. E. 74, when the judge who presided at the trial is dissatisfied with the verdict and grants a new trial, some latitude must be allowed to his discretion. It is also true, as was said in *Marshall v. Valley R. Co.*, 97 Va. 854, 34 S. E. 455, while approving *Chapman v. Va. Real Estate Co.*, *supra*, that "the verdict of a jury, however, is entitled to great respect, and should not be disturbed, even by the trial court, unless plainly against the weight of the evidence."

This case seems to be very similar to that of *Morien v. Norfolk & Atlantic Terminal Co.*, 102 Va. 622, 46 S. E. 907, in which

Judge Harrison says: "The contention of the defendant company is that the injury sustained by the plaintiff was the result of her own negligence in alighting from the car while it was in motion and slowing down to stop. The clearly defined issue of fact therefore submitted to the jury was, had the car stopped, or was it still moving, when the plaintiff attempted to alight? The evidence on behalf of the plaintiff, if the jury believed it, fully sustained her contention that the car had stopped, and the evidence of the defendant was ample, if the jury believed that, to sustain its contention that the car was still in motion when the plaintiff attempted to alight. The jury accepted as true the evidence on behalf of the plaintiff and returned a verdict in accordance therewith."

In *Virginia Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8, Judge Cardwell, speaking for the court, says: "There is nothing better settled in this jurisdiction than that the credibility of witnesses and the weight to be given to their evidence in a particular case are properly to be determined by the jury. * * * The mere fact that the court doubts the correctness of the verdict, or if on the jury would have rendered a different verdict, will not be sufficient to justify setting aside the verdict found by the jury. To warrant a new trial in cases where the evidence is conflicting, the evidence must be insufficient to warrant the finding of the jury."

We are of opinion that the court of law and chancery should be reversed, and this court will proceed to enter a judgment in accordance with this opinion.

Reversed.

(109 Va. 539)

**CITIZENS' BANK OF NORFOLK v.
SCHWARZSCHILD & SULZ-
BERGER CO.**

(Supreme Court of Appeals of Virginia. June 10, 1909.)

PAYMENT (§ 85*)—PAYMENT BY MISTAKE—RECOVERY.

Where a bank paid certain coupons payable to bearer at its banking house on surrender of the coupons under the mistaken belief that the debtor had money in the bank available for the purpose, the bank could not recover the money so paid.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 272-281; Dec. Dig. § 85.*]

Appeal from Law and Chancery Court of City of Norfolk.

Action by the Citizens' Bank of Norfolk against the Schwarzschild & Sulzberger Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. B. Seldner, for appellant. Tobert W. Shultice, for appellee.

BUCHANAN, J. This is an action of assumpsit to recover money paid by the plaintiff under an alleged mistake of fact. Upon the issue of nonassumpsit, the whole matter of law and fact was submitted to the court and a judgment rendered in favor of the defendant.

The material facts of the case are that on the 4th day of November, 1907, the defendants, the Schwarzschild & Sulzberger Company, a corporation, presented through the Norfolk National Bank of Norfolk for payment 15 coupons of \$70 each, due on the 1st day of that month, taken from bonds held by the defendant. The bonds from which the coupons were taken were issued by the Jamestown Hotel Corporation and held by the defendant. The coupons were in the following words:

"\$70.00.

"The Jamestown Hotel Corporation will pay to bearer, at the Citizens' Bank of Norfolk, Virginia, upon surrender of this coupon, seventy dollars in gold coin of the United States, on the first day of November, A. D., 1907, for one year's interest then due on its bond, No. 1.

"Chas. M. Barnett, Treasurer."

At the time the coupons were presented for payment at the plaintiff bank, the Jamestown Hotel Corporation, the maker thereof, had on deposit with the plaintiff the sum of \$1,898.97; but on the 16th day of the preceding month an execution creditor of the hotel corporation whose judgment amounted to more than \$14,000 caused a summons on suggestion to be served upon the plaintiff bank. When the summons was served upon the president of the plaintiff bank, he notified the other officers of the bank and the bookkeeper in charge of the account not to pay out any part thereof except by order of the court. Subsequently, and before the coupons in question were paid, the existing account of the hotel corporation which had been garnished in the hands of the plaintiff was transferred from the active ledger of the bank to the inactive department and marked "Corp.," and a new account opened with the hotel corporation, then in a failing condition and being operated under the direction of the court. When the coupons were presented for payment, the plaintiff bank had changed its clerks and a new clerk misread the word "Corp." for "coupons," and, thinking that the hotel corporation's account marked "Corp." was set apart for the payment of coupons, as the bank's habit was, paid them and charged them to that account. The mistake was not known until some two weeks afterwards, when the president of the plaintiff bank, in looking over the hotel corporation's account to ascertain the amount to its credit when the summons on suggestion was served upon him, discovered it. The plaintiff bank at once notified the defendant

of the mistake, offered to return the coupons, and requested repayment, which after some months of correspondence was refused. The plaintiff bank was compelled to pay the whole \$1,898.97 in its hands when garnished to the execution creditor, and will lose the \$1,050 paid the defendant, unless it can recover it from the defendant, as the hotel corporation is insolvent.

The general rule is that money paid under a mistake of fact may be recovered; but the payment of a check or note by a bank upon which it is drawn or at which it is made payable under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note seems to be an exception to the general rule. The cases do not seem to be entirely agreed upon what principle this exception is based, but the great if not the overwhelming weight of authority maintains this exception to the general rule. Some place it upon the ground that there is no privity between the holder of the check or note and the bank; others upon the ground that, since the bank always has the means of knowing the state of the depositor's account by simply looking at its own books, the payment is not a payment by mistake within the meaning of the legal rule which permits a recovery; others still place their decision upon both grounds.

In *Bank v. Hull*, Dud. 259, one of the earliest American cases that we have found, the Supreme Court of South Carolina said that: "The question was one to be decided rather upon authority than general reasoning on the subject. No part of a commercial community is more interested in commercial usages than banks, and they cannot complain when they are required to strictly conform to them. They cannot always guard against fraud and imposition, but they may against mistakes depending on an inspection of their own books and accounts. * * * They accepted and paid the check presented by the defendant for and on account of Hepton, the drawer, whose money they kept for his convenience and accommodation. The privity of contract was between them and their customer, Hepton, and not between them and one who may have happened in the course of dealing to present a check drawn by Hepton."

In *First National Bank v. Burkham*, 32 Mich. 328, 331, Judge Cooley said in discussing this question: "But we think it would be an exceedingly unsafe doctrine in commercial law that one who has discounted a bill in good faith and received in its payment the strongest possible assurance that it was drawn with proper authority should afterward hold the money subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consist in their perfect certainty and

reliability. They would be worse than useless if the ultimate responsibility for such paper as between payee and drawee, both acting in good faith, could be made to depend upon the motive which influenced the latter to honor the paper."

In *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, the Court of Appeals of New York (Chief Justice Church) in discussing this question said: "When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463; but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. * * * The bank always has the means of knowing the state of the account of the drawer, and, if it elects to pay the paper, it voluntarily takes upon itself the risk of recovering it out of the drawer's account or otherwise."

In *Manf. Nat. Bank v. Swift*, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381, it was said that, if any other rule prevailed, "no one could know when he could safely receive payment of a check." It is further said: "It is the duty of a bank to know the state of its depositor's account, and, if it makes a mistake, it must abide the consequences. The presentation of a check is a demand for payment. If it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles if, when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as finality, and the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder."

In *National Bank of New Jersey v. Berrall*, 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, 1 Am. & Eng. Ann. Cas. 630, it was held that where a payee of a check, after indorsing it generally, deposits it to his account in his own bank by which it is forwarded to the bank upon which it is drawn for collection, and the latter bank pays it by mistake, there is no privity between the paying bank and the payee to support an action by the former against the latter to recover the amount of the check as for money paid by mistake. It was further held in that case that, aside from the question of privity, the payment cannot be said to have been made by mistake, where the alleged mistake consists in having overlooked the fact that payment of the check had been stopped; for a bank is under no legal obligation to the

holder thereof to pay a check drawn upon it, and the bank being bound to know the state of its depositors' accounts, if it does make payment of a check to a bona fide holder who is without notice of any infirmity therein, the transaction is closed as between the parties to the payment.

Morse in his work on Banking says without qualification that, if a bank pays or accepts a check under the misconception that it has funds, it cannot recover from the holder, but it must look to the drawer alone for redress, except that under the clearing house rules a check paid through the clearing house may be returned within a certain time if the funds are found insufficient. 2 Morse on Banking, § 455. See, also, generally, *Bantench v. Dorrien*, 6 East. 199; *Levy v. Bank of United States*, 4 Dall. (Pa.) 234, 1 L. Ed. 814; *First Nat. Bank v. Devenish*, 15 Colo. 229, 25 Pac. 177, 22 Am. St. Rep. 394; *Riverside Bank v. First Nat. Bank*, 74 Fed. 276, 20 C. C. A. 181; 5 Cyc. 534, 535.

The coupons which were paid were payable to bearer at the plaintiff bank and possessed all the qualities and incidents of commercial paper. *Arents v. Commonwealth*, 18 Grat. 750, 766, 767, and cases cited. Their payment under the facts disclosed by the record would no more entitle the plaintiff bank to recover from the defendant than if the paper paid had been the Hotel Corporation's check, bill, or note. The same reasoning that applies in the one case is equally applicable in the other. If there be no privity in the one case, there is none in the other, and, if the misapprehension as to the state of the maker's account is not a mistake within the meaning of the legal rule which permits a recovery in the one case, it is equally not such a mistake in the other.

While the reasoning of the courts in the cases quoted from that there can be no recovery in a case like this is not altogether satisfactory, the conclusion reached by them is sustained by the great current of authority, and seems to be in accord with commercial usage.

We are of opinion, therefore, to affirm the judgment complained of.

Affirmed.

(109 Va. 651)

MILLER et al. v. SMITH et al.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. APPEAL AND ERROR (§ 1194*)—REVERSAL IN PART AND REMAND—EFFECT IN LOWER COURT OF DECISION.

The decree in a suit to falsify and surcharge the accounts of trustees regularly settled and confirmed, and to set aside sales of real estate by trustees to themselves, was on appeal reversed so far as it sustained said sales, in all other respects was affirmed, and was remanded for further proceedings. *Held*, that the affirmance of the decree with respect to the matter of

surcharge and falsification was a finality as to all the accounts which the trustees had settled prior to the suit, including an item not mentioned in the bill, and not brought to the attention of either court, as it properly belonged to the subject of litigation, and by exercise of reasonable diligence might have been brought forward at the time.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1194.*]

2. EVIDENCE (§ 586*)—WEIGHT AND SUFFICIENCY — POSITIVE AND NEGATIVE EVIDENCE.

A bond executed by M. to J. and paid must be held to have covered a certain item; the deposition of M. to that effect being clear and positive, being fortified by a statement in the handwriting of J., and being corroborated by the attitude of J., with respect to the matter from which the item arose, as shown by the uncontradicted depositions of M. and another, and there being on the other side merely the negative testimony of J., with an admission that he could not remember how the figures were reached.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2434; Dec. Dig. § 586.*]

Appeal from Circuit Court, Rappahannock County.

Suit by Mary A. Smith and others against Robert E. Miller and another, trustees, and others. From the decree against John B. Miller, trustee, he appeals. Reversed and remanded for further proceedings.

H. G. Moffett and J. A. C. Keith, for appellant. E. T. Jones and O'Flaherty & Fulton, for appellees.

KEITH, P. This case is a sequel to that of *Smith v. Miller*, reported in 98 Va. at page 535, 37 S. E. 10. The parties then before the court are before us now, either in person or by representation.

The original bill was filed to surcharge and falsify the ex parte accounts of Robert E. and John B. Miller, who were the trustees of John Miller under a deed dated October 5, 1872. Those accounts had been regularly settled and confirmed in the county court of Rappahannock. The bill alleged that the trustees had failed to charge themselves with a large number of items with which they were properly chargeable, varying in amounts from a sum as small as \$5 up to one amounting to as much as \$2,650. These items are mentioned to show the care with which the accounts were scrutinized by the parties in interest when the bill was filed to surcharge and falsify them.

Another ground of complaint in the bill was that the trustees had become purchasers at the sale made by them of two parcels of land; one containing 275 acres, and the other 600 acres, known as the "Hog Back" tract.

The circuit court, as the result of a long and tedious litigation, the record of which covers nearly 800 pages, sustained some of the items surcharged and falsified in the

bill, and overruled others, and denied the relief prayed as to the two tracts of land just mentioned.

On appeal by the plaintiffs from this decree, this court was of opinion that the decree was erroneous with respect to the two tracts of land containing respectively 275 and 600 acres, and to that extent reversed the decree; but it was "further decreed and ordered that in all other respects the said decree of February 12, 1898, be affirmed." The cause was remanded for further proceedings, as a result of which the lands before mentioned were resold at a price considerably in excess of that which they had brought at the first sale, accounts were ordered, reported, and excepted to, with the result that decrees were entered in June, 1908, and at the July term, 1908, by which John B. Miller was charged with the sum of \$600, with interest thereon from the 14th day of April, 1882, and with one-fourth of the proceeds of the resale of the "Hog Back" tract.

Though the accounts of the trustees, which had been regularly settled and confirmed, were closely scrutinized by the parties in interest, neither in the court below nor in this court was the item of \$600, now in dispute, ever referred to. It appears in the original record, at page 124, under date of April 14, 1881, as a credit to the trustees of cash paid the administrator of Mary Miller; but it does not appear that the trustees charged themselves with that sum. If it was improperly omitted, it was a proper subject of surcharge and falsification, which the parties had ample opportunity to make.

Our procedure with respect to surcharge and falsification of settled accounts is liberal and simple. As far back as Shugart's Adm'r v. Thompson's Adm'r, 10 Leigh, 452, it was held, that where on an order of account proofs are adduced, which, though they do not sustain the specific objections taken to the bill, ascertain that the settlement may be justly surcharged in other respects, although according to the strictest and most formal practice the plaintiff may be required to amend his bill and urge therein the objections made to the settlement shown by the evidence, yet it is competent for the court to dispense with this proceeding, and permit the plaintiff to proceed in respect to the objections shown by the evidence in like manner as if they had been noticed by the bill; but, if the defendant objects that he was surprised by the new objections to the account, the court may and ought to give him time to combat them, and, if he urge the privilege he would have by answer to an amended bill to explain and defend the account in these respects, such privilege should be secured to him, by allowing him to file his affidavit containing such explanation and defense, and by giving to such affidavit the like credit

and effect as his answer containing the like matter would be entitled to."

In *Corbin v. Mills*, 19 Grat. 438, it is said: "The accounts of an executor, which have been regularly settled in the mode prescribed by law, are to be taken as prima facie correct. They are liable to be impeached on specific grounds of surcharge and falsification to be alleged in the bill; but the court will not decree an account, upon a general allegation that the settled accounts are erroneous. When an account has been ordered upon a proper bill, if an additional objection to the settled accounts is discovered in the progress of the cause, the plaintiff may raise the objection before the commissioner, with a proper specification in writing, and the defendant may meet the objection by an affidavit, which shall have the same weight as an answer would have had if the matter had been alleged in the bill." And that is the established mode of procedure in this state. *Dickinson v. Helms*, 29 Grat. 466; *Leake's Ex'r v. Leake*, 75 Va. 804; *Blackwell's Adm'r v. Bragg*, 78 Va. 540; *Davis v. Morris*, 76 Va. 34.

The accounts of the trustees, therefore, which were regularly settled before the county court of Rappahannock, are prima facie correct, except so far as they were surcharged and falsified in the mode indicated; and this remedy was open to any party in interest who felt himself aggrieved.

When the circuit court entered its decree, and that decree was appealed from and with respect to all items of surcharge and falsification was affirmed by this court, it was a finality, not only with respect to the particular items to which the attention of the court was called, but with respect to all the accounts which the trustees had settled before the institution of the suit.

"Every decision of the Court of Appeals, whether it be upon an interlocutory or a final decree, is in its nature final, * * * and the quality of finality is imparted to the decree appealed from, whether that decree was final or interlocutory." *Matthews v. Progress Distilling Co.*, 108 Va. 777, 62 S. E. 924; *Campbell's Ex'r v. Campbell's Ex'r*, 22 Grat. 649.

"Appellant therefore may well rely upon his plea of *res judicata*, which applies, except in special cases, not only to all matters actually adjudicated on the former hearing, but to every point which properly belonged to the subject of litigation, or which the parties, exercising reasonable diligence, might have brought forward at the time." *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894.

Every litigant should have opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity, and having failed to avail himself of it, he must accept the consequences. "It is to the interest of

the republic that there should be an end to controversy."

We are of opinion that the circuit court erred in charging the appellant with the sum of \$600 and accrued interest.

With respect to the other assignment of error, it appears to depend upon a question of fact. John B. Miller, the appellant, executed to Edward T. Jones a bond for \$400, of date February 5, 1903. On September 23d of that year, that bond, with its accrued interest, was paid. In Miller's deposition he states that this bond was the result of a settlement between himself and Mr. Jones, in which he was charged with \$341.51, which he claims was the one-fourth interest of Mr. Jones in right of his wife in the original sale of the "Hog Back" tract; a fee, for which Mr. Jones held him responsible, of \$25.43; and one-fourth of \$187.70 due Mr. Jones as administrator—making an aggregate of \$413.21. For some reason, which does not clearly appear from the record, the item of \$341.51 was reduced to \$318.81, making, together with the other items, \$390.51, to which was added \$9.49 for sundries, and the bond given for the aggregate sum of \$400, which has been paid as before stated.

Mr. Jones in his statement admits that the exhibit filed with Miller's deposition is in his handwriting, but says that he cannot recall how the figures were reached. Miller claims that Mr. Jones agreed not to hold him responsible for the profits on the resale of the "Hog Back" tract, because he (Jones) had thought that the sale made by the trustees, which was subsequently annulled by a decree of the Court of Appeals, was a good one, and that Miller should be held to it; but this Mr. Jones, in his statement referred to, denies. Mr. Miller's recollection of the transaction is in a measure corroborated by the depositions given by himself and R. E. Miller in this suit (see original record, pp. 399, 510), in which it is shown that Jones considered the price at which the land sold was a good one and more than he (Jones) or any one else would give for it; and these statements are nowhere denied in the record.

When we consider that the deposition of the appellant John B. Miller is clear and positive, that it is fortified by the production of a statement in the handwriting of Mr. Jones, and is corroborated by the attitude of the latter with respect to the sale of the "Hog Back" tract of land, as shown by the uncontradicted depositions of R. E. and John B. Miller, and that upon the other side there is the negative testimony of Mr. Jones, we are obliged to conclude that the bond of \$400 embraced the share of Mr. Jones in the proceeds of sale of the "Hog Back" tract, and was given in settlement of his interest in the purchase money.

It presents for decision a question in no respect involving the credibility of the par-

ties to the controversy. Doubtless both of them have stated the facts as they believe them to be, but for the reasons stated we are of opinion that the decree appealed from is erroneous in charging the appellant with the payment to E. T. Jones of one-fourth of the proceeds of the resale of the "Hog Back" tract.

The decrees of the circuit court must be reversed, and the cause remanded for further proceedings, to be had therein not inconsistent with this opinion.

Reversed.

(100 Va. 688)

RIVERSIDE RESIDENCE CO., Inc., v.
HUSTED.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. CANCELLATION OF INSTRUMENTS. (§ 32*) —
CONTRACT OF SALE—NATURE OF REMEDY.

A court of law cannot rescind a contract for the sale of real estate.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 32.*]

2. VENDOR AND PURCHASER (§ 342*) — CON-
TRACT — BREACH BY VENDOR — VENDOR'S
REMEDIES.

On breach of a contract by a vendor, the vendee may abandon possession and set up the breach as a defense when sued for the purchase price, or, if he has paid a part or the whole of the purchase money, he may sue at law to recover it, having abandoned the premises or restored them to the vendor, or he may sue in equity for a rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1018, 1019; Dec. Dig. § 342.*]

3. VENDOR AND PURCHASER (§ 334*)—BREACH
BY VENDOR—PURCHASE MONEY—RECOVERY.

Plaintiff purchased certain lots for a residence on installments. Plaintiff had paid over a third of the price when she discovered that defendant had permitted a race track corporation to remove the soil from the greater part of the lots, and excavate them. Held, that possession never having been delivered, and defendant having placed itself in such a position that it could not deliver the land sold in substantially the condition it was in when the contract was made without plaintiff's fault, she was entitled to recover the money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

Error to Law and Chancery Court of City of Norfolk.

Action by Lily B. Husted against the Riverside Residence Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

R. Randolph Hicks, for plaintiff in error.
Tazewell Taylor, for defendant in error.

BUCHANAN, J. The plaintiff in error, which was the defendant in the trial court, entered into an agreement with the defendant in error by which it sold and undertook to convey to her lots Nos. 6 and 7, in block No. 1, as laid out on map of the defendant

company of record in the clerk's office of the circuit court of Norfolk county, for the price of \$1,500, \$100 to be paid in cash, and monthly installments of \$37.50 thereafter, until the whole sum of \$1,500 was paid, at which time the defendant company was to convey the lots in fee simple, free from all liens, to the plaintiff. The latter paid the cash payment and monthly installments until she had paid the sum of \$587.50, but possession was never delivered to her. After the making of the agreement, the defendant, according to the allegations in the first count in the declaration, permitted, without the knowledge of the plaintiff, a race track corporation to enter upon and remove the soil from the greater part of the lots, the excavation varying in depth from a few inches to six feet, and, as the plaintiff claims, destroyed their value for the erection of buildings thereon, the purpose for which she purchased the lots.

When the plaintiff ascertained the condition of the lots by reason of the said excavation and removal, and that the defendant could not convey to her, as she claims, what she had agreed to purchase, she instituted her action of assumpsit to recover from the defendant what she had paid on the lots, with interest. There was a verdict and judgment in her favor for the amount claimed, and to that judgment this writ of error was awarded.

The first error assigned is to the action of the court in overruling the demurrer to the special count in the declaration.

The ground of that objection is that the count does not aver that the consideration of the contract wholly failed.

The agreement, in substance, so far as it is material to the questions involved in this case, is substantially set out in the count, and the amount she had paid on the purchase price. It then avers that since the making of the contract "the said defendant in disregard of the rights of the plaintiff has permitted and allowed certain other people, to wit, Boulevard Land Corporation and Jamestown Jockey Club, Inc., to enter in and upon said lots which the said defendant had contracted to sell to said plaintiff, and to excavate and carry off the soil thereof, to the great detriment and damage of said property, as a result whereof said property is largely destroyed so far as uses for which it was generally intended and for which it was specially intended by this plaintiff in purchasing the same; that said property at the time of said purchase was particularly adapted for residential purposes owing to the fact that the same was located upon the Elizabeth river, and the high character of the land constituting the same made it especially valuable and attractive, and this was the prime motive actuating the plaintiff in purchasing the same. By reason of the premises, the value of said property has

been greatly depreciated and destroyed, and especially is this so, so far as this plaintiff is concerned; that said acts were committed without her knowledge, sanction, or consent, she never having been let into possession of said property, and she has been making payments on said purchase in ignorance of the same. She further avers that it is impossible to restore the land to its original condition so as to adapt it to the uses for which she intended it, and that, therefore, there is a failure of consideration so far as said land is concerned."

A purchaser who buys real property, as was said in *Newberry v. Ruffin*, 102 Va. 73, 78, 45 S. E. 733, 734, "the title to which is bad, may choose between a variety of remedies for his relief, and by the remedy chosen he elects to affirm or disaffirm the contract. A court of law cannot rescind the contract, but a vendee may abandon the possession of the premises and set up the want of title as a defense when sued for the purchase money; or, if he has paid a part or the whole of the purchase money, he may sue in a court of law and recover it back, having in the meanwhile abandoned the premises or restored them to the vendor, or he may file his bill in equity on failure of the title, praying that the contract be in terms rescinded."

Where, as in this case, no possession was ever delivered, and the vendor has placed himself in a position, or has permitted himself to be placed in the position, without fault on the part of the vendee, that he cannot deliver the land sold in substantially the condition it was when the contract of purchase was entered into, he is really in no better condition than if the title to the property sold was bad, and it would seem to be clear that the vendee, who has paid a part or the whole of the purchase price, may elect to disaffirm the contract and sue at law and recover the purchase money paid by him.

It is said in 24 Am. & Eng. Enc. Law (2d Ed.) 644, 645, that "a total or substantial failure of the consideration in reliance upon which a party has entered into a contract constitutes ground for him to abandon the contract or treat it as rescinded. This ground of rescission or abandonment is strongly analogous to the nonperformance, and it is obvious that the two may frequently be identical. * * * When a party wishes to rescind a contract on the ground of failure of consideration, if the failure has been partial only and a subsisting executed part performance is in his hands, and there has been no fraud on the part of the other, rescission will not be allowed." See *Beetem v. Burkholder*, 69 Pa. 249; *Johnson v. Jennings*, 10 Grat. 4, 60 Am. Dec. 323; *Buena Vista Co. v. McCandlish, etc.*, 92 Va. 297, 23 S. E. 781.

The special count in the declaration, as we understand and construe it, avers a state of

Facts which, if true, shows that the plaintiff has never received anything under the contract of sale; that the defendant cannot convey what he agreed to convey; and that there is therefore a substantial if not a total failure of consideration. The demurrer to that count was therefore properly overruled by the court.

The next assignment of error is to the action of the court in giving the instruction asked for by the plaintiff.

The instruction objected to is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff cannot get the lots in substantially the physical condition in which they were when she contracted for same that then and in that event she cannot be made to take the same against her objection, and is entitled to the return to her, with interest, of so much money as she paid on said contract."

The court also gave the following instruction for the defendant: "The court instructs the jury that the plaintiff in this cause cannot recover unless the consideration of the contract shown in evidence wholly failed. If the jury believe from the evidence that the defendant agreed to sell to the plaintiff lots Nos. 6 and 7, in block 1, in the declaration mentioned, to be paid for in installments, and that deed to the property was not to be delivered until all of the installments are paid,

then the defendant has until the last installment falls due to restore said lots to substantially their original condition, if the same can be so restored, and, if from the evidence the jury believe that said lots can be so restored, the plaintiff cannot recover."

These instructions, the only instructions given, presented the respective contentions of the parties. There was no controversy as to the fact that there had been an excavation and removal of the surface of the lots, and that their physical condition had been materially changed. The only question really was whether or not the lots could be restored substantially to the condition they were in when the agreement to sell and purchase was made. That question was submitted to the jury as favorably to the defendant as it was entitled to have it submitted. There was evidence tending to sustain the contentions of each party, and sufficient, if the jury believed it, to support a finding either way—certainly to sustain a finding in favor of the plaintiff.

We are of opinion, therefore, that the court did not err to the prejudice of the defendant in instructing the jury; and we are further of opinion that it did not err in refusing to set aside the verdict in favor of plaintiff and grant a new trial.

The judgment complained of must be affirmed.

Affirmed

(83 S. C. 30)

BROWN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. June 9, 1909.)

1. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

A party cannot complain of the admission of evidence, over his objection, to establish a fact proved by testimony received without objection, in the absence of a showing that he was prejudiced thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

2. PRINCIPAL AND AGENT (§ 20*)—EVIDENCE OF RELATION.

Where a third person testified that he was sent by defendant to confer with plaintiff as to an adjustment of plaintiff's claim, the court did not err in permitting plaintiff to testify that the third person had charge of making settlements for defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 37, 38; Dec. Dig. § 20.*]

3. MASTER AND SERVANT (§ 231*)—INJURY TO SERVANT—RELIANCE ON CARE OF MASTER.

Where, in an action for injuries to a servant caused by a defective tool, there was no testimony that the master had delegated to plaintiff the duty of providing safe tools, an instruction that a servant may assume that the tools furnished are safe and suitable was not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.*]

4. TRIAL (§ 256*)—INSTRUCTIONS—REQUEST—NECESSITY.

Where a charge contains a correct proposition of law, the party desiring an additional charge must request it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

Appeal from Common Pleas Circuit Court of Anderson County; D. E. Hydrick, Judge.

Action by H. P. Brown against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bonham, Watkins & Allen, for appellant. Martin & Earle, for respondent.

GARY, A. J. The following statement is set out in the record: "This action was brought by the plaintiff, to recover of defendant \$1,000 damages, alleged to have been sustained by him by the falling of a rail on his foot April 1, 1907, whilst he was in the employ of defendant, as section foreman of a gang of hands, engaged at or near Pelzer, S. C., in laying rails; the specific act of negligence being that a pair of tongs in use by said gang broke, thus causing the rail to fall on plaintiff's foot. The case was tried before Judge Hydrick and a jury, at fall term of the court of common pleas for Anderson county, S. C., and resulted in a verdict for \$100, upon which judgment was entered. In due time the defendant gave notice of its intention to appeal." The defendant denied the allegations of the complaint,

and alleged that the injury suffered by the plaintiff was caused by his own lack of care, and that he negligently contributed to said injury.

The first exception is as follows: "Because the court erred in allowing plaintiff, after objection, to testify as to the manner of unloading rails with a rope, the same being inapplicable to any issue in the case, and the effect of such unloading being purely speculative, and a matter of opinion." This exception cannot be sustained for the reason that there was other testimony to the same effect, introduced without objection; and, further, it was not made to appear that said testimony was prejudicial.

The second exception is as follows: "Because his honor erred in permitting plaintiff to say, objection being made, that Mr. Martin had charge of making settlements; there being no scintilla of proof that Mr. Martin had authority to make settlements for respondent." This exception must be overruled, for the reason that Martin testified he was sent by the defendant to confer with the plaintiff, with reference to an adjustment of the claim.

The third exception is as follows: "Because it appearing that it was the duty of the plaintiff to inspect the tools with which he worked, it was error on the part of the circuit judge to charge as follows: 'The servant has a right to assume that the master has discharged the duty imposed on him by law for the safety of his servants. In other words, he may rely upon it that the tools and appliances furnished are safe and suitable, and that the working force is sufficient'; the error being that, it being shown that these duties had been delegated to the master, in this instance to the plaintiff, if there was any negligence on his part, he cannot complain, because his negligence contributed to the accident." There was no testimony tending to show that the duties therein mentioned had been delegated by the defendant to the plaintiff. Furthermore, the charge contained a sound proposition of law; and, if the defendant desired that there should be an additional charge, it was its duty to submit requests to that effect.

The fourth exception is as follows: "Because the circuit judge erred in limiting in his charge the defense to the single one of contributory negligence, which implies negligence on the part of the defendant, whereas defendant set up as a defense that plaintiff's own negligence brought about his injury." His honor, the circuit judge, stated clearly to the jury the issues raised by the pleadings; and, when the charge is considered in its entirety, it will be seen that it is free from the assigned error.

It is the judgment of this court that the judgment of the circuit court be affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(83 S. C. 28)

NORTON et al. v. COLUMBIA ELECTRIC ST. RY., LIGHT & POWER CO.

(Supreme Court of South Carolina. June 8, 1909.)

1. NEGLIGENCE (§ 82*)—CONTRIBUTORY NEGLIGENCE.

A charge that one cannot recover for personal injuries, if his negligence concurred with the negligence of the defendant and contributed to the injury as a proximate and immediate cause, is correct.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 82.*]

2. TRIAL (§ 255*)—INSTRUCTIONS—REQUESTS.

A charge, in an action for personal injuries alleged to have been caused by negligence and willfulness, that plaintiff cannot recover if his negligence concurred with the negligence of the defendant and contributed to the injury as the proximate cause, is not erroneous because it omits to charge that the doctrine of contributory negligence does not apply to a willful act, when no such charge is requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 637; Dec. Dig. § 255.*]

3. CARRIERS (§ 333*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—ALIGHTING FROM CAR.

A charge that it is negligence on the part of a passenger to step off of a moving street car, when the circumstances are such as to make the danger obvious to a person of ordinary prudence and sense, is correct.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1891; Dec. Dig. § 333.*]

4. TRIAL (§ 234*) — INSTRUCTIONS — SUFFICIENCY.

A charge that it is necessary for the plaintiff to prove the allegations of the complaint before he can recover is correct.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 234.*]

Appeal from Common Pleas Circuit Court of Richland County; C. G. Dantzler, Judge.

Action by Mary E. Norton and another against the Columbia Electric Street Railway, Light & Power Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Logan & Edmunds, for appellants. Barron, Moore & Barron, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff Mary E. Norton through the negligence and willfulness of the defendant. The allegations of the complaint, material to the questions involved, are as follows: "That on or about the 17th day of May, 1906, at about 7 o'clock in the evening, the plaintiff Mary E. Norton, having been received by the defendant as a passenger on one of its cars going north on Main street, endeavored to alight therefrom, said car being at said time standing still at or near the Transfer Station on Main street, at the corner of Gervais street, having stopped at said place for the purpose of taking on and letting off passengers, as these plaintiffs are informed and believe; and while alighting therefrom the

defendant negligently, carelessly, willfully, wantonly, and recklessly caused the same to be suddenly and without warning started forward, thereby throwing the plaintiff Mary E. Norton violently from said car to and upon the ground." The defendant denied the allegations of the complaint and set up the defense of contributory negligence. The jury rendered a verdict in favor of the defendant, and the plaintiff appealed.

The plaintiffs requested his honor, the presiding judge, to charge that, "when a party sets up contributory negligence on the part of the plaintiff, it admits negligence on its own part." In refusing the request he said: "If the jury conclude that the negligence of the plaintiff combined and concurred with the negligence of the defendant, and contributed to the injury as a proximate and immediate cause of it, of course then the plaintiff could not recover, if the jury so conclude." The appellant assigns error on the part of his honor, the presiding judge, "in so charging, and not instructing the jury, in any part of the charge, that the doctrine of contributory negligence, as laid down therein, had no application to a willful, wanton, or reckless act." The exception cannot be sustained, for the following reasons: (1) The charge stated correctly a general proposition of law. (2) The circuit judge was not requested to charge the proposition for which the appellant contends. (3) At the close of the general charge, the presiding judge said: "Now, Mr. Edmunds, you can select such propositions as you wish that I have not covered by my general remarks." And, although Mr. Edmunds called to his attention several propositions of law, he did not mention the one in question. These views dispose of the first, second, and third exceptions.

The next assignment of error is: "Because his honor erred, it is respectfully submitted, in response to defendant's second request to charge, which was as follows: 'It is negligence on the part of a passenger on a street car to step off of a car while in motion without giving notice of intention to alight therefrom, and, this being established, the plaintiff cannot recover'—in charging: 'I cannot charge you that, Mr. Foreman and gentlemen of the jury, in the phraseology of the charge. Now, when the circumstances are such as to make the danger of alighting obvious to a person of ordinary prudence and sense, then under those circumstances the plaintiff could not recover.'" The statement of the law by the presiding judge was correct in itself, as well as when considered in connection with the entire charge.

The last assignment of error is: "In charging the jury as follows (reads third request of defendant): 'Before the plaintiffs can recover in this action, the jury must be satisfied, by the preponderance of the testi-

mony, its greater weight, that the plaintiff attempted to alight from the car while it was standing still, and that, while she was attempting to alight from a standing car, it suddenly, and without warning, started forward, and she was thrown from the car, whereby she was injured—that is practically the allegation of the complaint; the complaint being: "That on or about the 17th day of May, 1906, about 7 o'clock in the evening, the plaintiff," etc." The facts upon which the request was based are practically set out in the complaint, and were sustained by the testimony of the plaintiff Mary E. Norton when examined as a witness. The ruling of the presiding judge simply meant that it was necessary for the plaintiff to prove the allegations of the complaint before she could recover, and in this we see no error.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(83 S. C. 41)

TOALE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. June 16, 1909.)

TELEGRAPHS AND TELEPHONES (§ 54*)—TRANSMISSION OF MESSAGE—CONTRACT LIMITING LIABILITY.

A telegram, which was delivered for transmission, recited that the company transmitted and delivered messages only on conditions limiting its liability, "which have been assented to by the sender of the following message," and that it would not be liable for delays in transmission, or delivery, where a claim was not presented in writing within 60 days. *Held* that the words quoted are as effectual to bind the sender to such condition as if it had contained the words "which are now assented to by" the sender, "one of the parties to the contract."

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

Appeal from Common Pleas Circuit Court of Aiken County.

Action by P. P. Toale against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

See, also, 76 S. C. 248, 57 S. E. 117.

W. H. Barrett and Davis, Gunter & Gyles, for appellant. Hendersons, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff by reason of the defendant's failure to deliver a telegram. The facts are stated in the opinion of the court, upon the former appeal in this case, which is reported in 76 S. C. 248, 57 S. E. 117. The testimony shows that the plaintiff requested the defendant's agent to hand him a blank, in order that he might write the message, which he desired to have transmitted; that the agent did not hand him the blank in use by the initial office, but one in use at the office of delivery.

The following is a copy of the telegram which the plaintiff delivered to the agent of the company for transmission: "The Western Union Telegraph Company, Incorporated. 23,000 offices in America. Cable service to all the world. This company transmits and delivers messages, only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station, for comparison, and the company will not hold itself liable for errors or delays, in transmission or delivery, of unrepeatable messages, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days, after the message is filed with the company for transmission. This is an unrepeatable message, and is delivered by request of the sender, under the conditions named above. Robert C. Clowry, President and General Manager. Sent by C. D. Rec'd by R. D. Check 14 Paid 33c. Send. Dated Jan. 22, 1904. To J. B. Corbitt, Postmaster, Perry, S. C. Have horse and buggy ready for Mr. Vann and myself arrival of freight train. P. P. Toale." Indorsed on back: "RXRd (ch) 8:30 p. m."

The form of the blank in general use by the initial office contained the following provisions: (1) "Send the following message, subject to the terms on the back hereof, which are hereby agreed to." (2) "The company will not be liable for damages in any case, where the claim is not presented in writing, within sixty days after the message is filed with the company for transmission."

The defendant interposed the defense that no claim for damages was presented in writing to the defendant within 60 days after the filing of the message for transmission. The jury rendered a verdict in favor of the plaintiff for \$500, and the defendant appealed.

His honor the presiding judge charged the jury that the contract offered in evidence does not on its face amount to a contract to make a claim within 60 days, or be barred. This charge is made the basis of the principal assignment of error. The plaintiff testified as follows: "By the Court: Q. Mr. Toale, you see that printed matter up there on that blank? A. Yes. Q. Did you read that when you signed that message? A. No, sir. Q. Your attention called to it? A. No. Q. The agent say anything to you about that printed matter, at the head of the blank? A. No, sir. Q. What did you suppose it was? A. I took it to be some condition which the company required to be carried out. I had not read it, and did not know anything about it. I did not think it had any bearing on the message, or otherwise I should have asked." In the case of *Young v. Tel. Co.*, 65 S. C. 93, 43 S. E. 448, the court quotes with approval the following, from 25 Enc. of Law,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

804, 805 (1st Ed.): "Ordinarily a party is not bound by any rule or regulation by which a carrier seeks to limit his liability, unless the same has been brought to his notice, but in the case of telegraph companies, where the message blanks are so arranged that a party in affixing his signature to the message signs a printed contract, it is conclusively presumed that he thereby assents to the terms of such contract, and is bound by them, although he may not have read or noticed them, or even been able to read them. In the absence of fraud or imposition a party to a contract, which has been voluntarily signed and executed by him, with full opportunity for information as to the contract, cannot avoid it on the ground of his own ignorance, or omission to read it." Continuing, the court says: "The cases of *Bethea v. R. R. Co.*, 26 S. C. 92, 1 S. E. 372, and *Daniels v. R. R. Co.*, 62 S. C. 1, 39 S. E. 762, sustain this principle. If, therefore, the plaintiff wrote the message on a blank of the defendant, containing the stipulation aforesaid, it was binding on him."

This principle is not contested by the plaintiff's attorneys, who, in their argument say: "It has been frequently decided, and we most freely admit the proposition, that if the sender signs a blank, embodying a contract, which includes a 60-day stipulation, then the plaintiff is bound by the same, although he fails to read the contract, and although he was absolutely ignorant of its contents." They, however, insist that the principle just stated is inapplicable to the facts of this case; and the proposition for which they contend is thus stated in their own language: "We submit that the gist of this decision (*Young v. Tel. Co.*, 65 S. C. 93, 43 S. E. 448) is that, if a sender signs a blank, in which the important words 'Send the following message subject to the terms printed on the back thereof which are hereby agreed to' are included having expressly stipulated that he agreed to the terms referred to, then he would be held to be bound thereby, even though he were ignorant of what the terms were; but, in the absence of such contracting words, he is not bound. In other words, it is the familiar law of contract over again, namely, that a party who signs a contract without reading it is bound nevertheless, but to apply to this case, and by analogy, we submit that, if the blank signed does not constitute a contract, then the sender is not bound." The plaintiff's attorneys rely upon the italicized words in the following language, which we quote from the last-mentioned case: "If he wrote the message on a blank of the Postal Telegraph Company, and delivered it to the defendant to be forwarded, it must be conclusively presumed that he did not intend to enter into a contract with the Postal Telegraph Company, but with the defendant. If he did not intend to enter into a contract

with the Postal Telegraph Company, its name may be regarded as struck out of the blank. When he delivered to the defendant a written message on a form, in which he directed it to send the message *subject to the terms and conditions printed on the back thereof, and which he in express terms agreed to*, he was as much bound by the stipulations therein as if he had used one of its blanks." These italicized words were not used for the purpose of limiting the general rule, which had already been stated, but to emphasize the fact that there was an express agreement, manifesting an intention to adopt the provisions in the blank originally intended for the use of the Postal Telegraph Company, and to make them applicable to the contract with the Western Union Telegraph Company. That case is conclusive of the question under consideration. When a contract recites the fact that a party thereto has agreed to certain conditions, it is binding, without further stating that he now agrees to them. And, as the plaintiff himself was the sender of the message, the words of the telegram "which have been assented to by the sender of the message" are as effectual to bind the plaintiff as if it had contained the words "which are now assented to by P. P. Toale, one of the parties to the contract." The exceptions raising this question are sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the complaint be dismissed.

(83 S. C. 90)

GREENVILLE CAROLINA POWER CO. v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of South Carolina. June 18, 1909.)

On rehearing. Denied.

For former report, see 64 S. E. 518.

PER CURIAM. After careful consideration the court is unable to discover that any material question of law or fact has been overlooked or disregarded.

It is therefore ordered that the petition herein be dismissed, and the order staying remittitur, heretofore granted, be revoked.

(65 W. Va. 606)

WALDRON et al. v. WALLER et al.

(Supreme Court of Appeals of West Virginia. April 27, 1909. Rehearing Denied June 9, 1909.)

1. DEEDS (§ 181*)—ALTERATION BY PARTY—EFFECT.

If, after execution, a deed for land be altered by the grantee or by his privy so as to make it describe land not granted thereby, its operation as an executed contract is not affected, and the title vested by it is not disturbed. The effect of such unauthorized alteration is to deprive the party making it of all

future benefits of an executory nature or obligation which he might have derived under the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 553; Dec. Dig. § 181; * Alteration of Instruments, Cent. Dig. §§ 122-132.]

2. DEEDS (§ 181*)—ALTERATION—EFFECT UPON RIGHTS OF PARTIES.

Such unauthorized alteration of a deed will not entitle the grantor by a suit in equity to set aside his deed and be reinvested with the title to the land conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 553; Dec. Dig. § 181; * Alteration of Instruments, Cent. Dig. §§ 122-132.]

3. DEEDS (§ 51*)—ACKNOWLEDGMENT (§ 7*)—ALTERATION — REDELIVERY — REACKNOWLEDGMENT.

If, after it has been executed and delivered, a deed for land, with the consent of the grantors, be altered so as to make it describe a larger boundary, in order to make it effective to convey the additional land it should be redelivered, and, if it has been acknowledged before the alteration, it should be again acknowledged.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 97; Dec. Dig. § 51; * Acknowledgment, Cent. Dig. § 257; Dec. Dig. § 7.*]

4. REFORMATION OF INSTRUMENTS (§ 47*) — PROCEEDINGS AND RELIEF.

In a suit by a grantor to set aside a deed and be reinvested with the title to the land conveyed on the ground that the same has been altered without his consent, the grantee therein, on his cross-bill answer, charging that the land covered by the alteration represents the land actually purchased and paid for, and of which possession was given, and on which valuable improvements have been made, with the knowledge and consent of the grantor, may have specific execution of the original contract, and the grantor decreed to make a new deed correcting the mistake in the original deed, and, in default thereof by him, have a commissioner appointed to make, execute, and deliver such corrected deed on his behalf.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 198; Dec. Dig. § 47.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County.

Bill by Hester A. Waldron and another against Sarah A. Waller and others. Decree for defendants, and complainants appeal. Modified, and as modified affirmed.

G. R. C. Wiles, for appellants. Douglas W. Brown and Stokes & Bronson, for appellees.

MILLER, P. Hester A. and M. H. Waldron, May 2, 1906, sued Sarah A. Waller and her four infant children in the circuit court of Mingo county, seeking to set aside and vacate a certain deed made by them April 13, 1904, to the said Sarah A. Waller and George Waller, her husband, and to have the title to the lots conveyed reinvested in them, by which deed, in consideration of \$1 in hand paid and acknowledged, and the further sum of \$100 to be paid in six months, evidenced by note, they released and quit-claimed to said grantees all their right, title, and interest in and to a certain lot of land in

Fairfax, Mingo county, conveyed to them December 8, 1902, by A. J. Gauze and wife, describing it by metes and bounds; and also purporting to convey with covenants of general warranty a certain lot adjoining the first, bounded as follows: "Beginning at a stake on the line of the Norfolk & Western Railway right of way, at a point 36 feet from the line of the lot now owned by the said Eva Deskins; thence with the line of said right of way 25 feet to a stake, running in a northwesterly direction; thence south 61.30 degrees and 5 minutes west about 150 feet to the water edge of Tug river; thence with the meanders of said river to a bunch of grape vines at the corner of the lot now owned by the said Sarah A. Waller, standing near the water edge; thence with the line of said lot to the beginning"—the object of said deed being, as recited on its face, to settle and compromise a chancery suit then pending in said court, involving a dispute as to a boundary line of said lots; and also seeking to set aside another deed made May 26, 1904, by said George Waller to the said Sarah A. Waller, and her said infant children, conveying to them the same lot, and for general relief. On final hearing March 8, 1907, on bill, answer of Sarah A. Waller, and separate answer of said infant defendants, by guardian ad litem, and depositions taken and filed, the court below, being of opinion that the plaintiffs were not entitled to the relief prayed for, dismissed their bill, and they have appealed.

It is conceded with respect to the deed of April 13, 1904, as originally executed and delivered, one of the calls in the boundary of the last lot conveyed, which reads, "thence south 55 degrees and 5 minutes west about 150 feet to the water edge of Tug river," was changed before recordation so as to read, "thence south 61.30 degrees and 5 minutes west about 150 feet to the water edge of Tug river," and that as recorded it has on its face, following the acknowledgment, a memorandum made April 23, 1904, by the county surveyor, of a resurvey of the lot conveyed, changing said course from "S. 55° 5' " to "S. 61.30° W." However, in the deed from George R. Waller to Sarah A. Waller and children, made May 26, 1904, the description of the lot is the same as in the original.

The only evidence taken on behalf of defendants is the testamentary of Gaujot, the surveyor who made the resurvey, who says, respecting this survey and the change made by him in the deed: That on the day he resurveyed the lot and made the change in the description, and made the memorandum thereof on the deed, he received a message to come to Naugatuck, and when he got there he found the Wallers wanted him to run out the true course of the lot which he

understood had been recently purchased by them from the Waldrons; that he did the surveying in the presence of M. H. Waldron, and in running these courses and distances he found that the change in the course as shown in the memorandum and made by him on the deed was necessary; that Waldron was present at the time and consented that the change should be made, and, when made, that he consented to the redelivery of the deed, and was present when he redelivered the deed to the Wallers; that he took supper with the Waldrons the same evening and heard Waldron talk the matter over with Mrs. Waldron and tell her he had made the change in the deed, and heard her say, "It was all right with her"; that before making the resurvey they waited for Waldron to come, and when he came he pointed out the monuments to him by which to make it; and that the making of the change in the deed was perfectly satisfactory to the Waldrons.

Besides their own depositions, the plaintiffs took the testimony of Henry P. Clark, a relative, and of their son, E. H. Waldron. Waldron admits his presence at the survey, as well as that of Clark, but denies that he consented to the change, and both he and Mrs. Waldron deny the alleged conversation the same evening in the presence of Gaujot, as testified to by him, and they also deny that she then consented to the change as made, or that either of them knew the change had been made until a short time before suit brought, but on the contrary, Waldron testifies (his testimony being objected to by defendant for incompetency) that in a conversation with George Waller, now deceased, he refused his request to make the change, but did say to him that, if Mrs. Waldron wanted to change it, he could get her to make a new deed. Mrs. Waldron admits that her husband was her agent, and acted for her in the transaction with the Wallers. The witness Clark admits he carried the chain for Gaujot in making the resurvey, that Waldron was present, but that he heard him say to George Waller he would not make a new deed, or change it, that he should go and see Mrs. Waldron, and if she would change it it would be all right. He admits that when the resurvey was being made there seemed to be no dispute as to the lines, and that after Gaujot got through his surveying Waldron seemed satisfied.

It does not appear from any evidence in the case what was the real object of making the change in the deed. It is intimated in the evidence of the surveyor that the change was necessary in order to make it close; but in the answer of Mrs. Waller calling for affirmative relief, and which she asks may be treated as a cross-bill, and to which there was no special replication controverting the allegations thereof, she alleges: That the

strip of land purchased by her and her husband was not correctly described in the deed as originally made; that the change or alteration made therein by Gaujot was necessary to make it conform to the contract of purchase; that the land covered by the deed as changed and altered is the exact lot of land which the plaintiffs sold to her and her husband; that the change was made in the deed with the knowledge and consent of the plaintiffs, and without any fraudulent purpose or intent on the part of the grantees; that since then she has placed on the property large and valuable improvements, costing many hundreds of dollars, and has been in the actual possession and occupancy of the property described with the full knowledge and acquiescence of the plaintiffs therein until the institution of this suit; and that they are now seeking, with fraudulent purposes and by means thereof, to obtain from her and her children, for the paltry sum of \$100, the original purchase money tendered, property worth thousands of dollars.

What then are the rights of the parties? The bill seems to have been framed and to proceed upon the theory that where a deed of conveyance has been altered by or at the instance of the grantee, in a material matter, such alteration not only destroys the deed, but also entitles the grantor to be re-invested with the title to the land as conveyed. This, however, is not the law. As stated by Mr. Devlin (1 Devlin on Deeds, § 460): "The true rule seems to be that if the deed is altered after execution by a party claiming some benefit under it, or by his privity, its operation as an executed contract is not affected." And that: "Titles vested by it are not disturbed, but the party making the alteration is deprived of all future benefits that he might have derived from it, and cannot enforce any executory obligation contained in it." When the title to land has once vested, any alteration in the deed, made by the grantee, though material, will not deprive him of his title or reinvest it in the grantor. If anything is destroyed by the alteration, it is the deed, and not the title. A deed may be altered, mutilated, changed, or wholly destroyed so as to be no longer competent evidence, or capable of being introduced in evidence, yet the title vested by the grant is not thereby destroyed. 1 Devlin on Deeds, § 461a, and cases cited; 2 Cyc. 721, 722, and cases; Seibel v. Rapp, 85 Va. 30, 6 S. E. 478; Vaughn v. Moore, 89 Va. 925, 17 S. E. 326; Grayson v. Richards, 10 Leigh (Va.) 57; Ferguson v. Bond, 39 W. Va. 561, 20 S. E. 591. This is not a case like that of Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515, and cases of that class, relied on by plaintiffs, where an altered instrument is offered in evidence by a party in support of some right of action claimed by him un-

der it. In such a case the material alteration in the instrument deprives the holder responsible for it of any executory rights or right of action thereon, and destroys its evidential force and effect. 1 Devlin on Deeds, § 460; Burgess v. Blake, 128 Ala. 105, 28 South. 963, 86 Am. St. Rep. 78, and monographic note.

But what effect may be given to a deed so materially altered as to the property not originally covered or conveyed by it? The authorities we think make it clear that, although such alteration may have been with the consent of the grantors, the deed cannot operate to invest in the grantee land not covered by the original grant, without a redelivery of the deed by them, and, if it has been acknowledged before the alteration, the deed should be again acknowledged. 1 Devlin on Deeds, § 462a, citing among other cases, Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. The evidence of the surveyor in this case tends in a slight degree, but we think not sufficient, to show a redelivery of the deed to the grantees after the alteration was made by him, and there is no claim that after the modification of the deed it was reacknowledged, and only by a reacknowledgment by Mrs. Waldron, a married woman, could she be divested of her title in the land not covered by the original deed.

But could and should any relief have been granted plaintiffs on their bill? It is clear they cannot, as prayed for, be reinvested with the title to the land covered by their original deed. They have not framed their bill with the view of removing a cloud from the title to that part of the lot not covered by the original deed, and we do not think that on the bill and evidence and the prayer for general relief they are entitled to any such relief.

But is Mrs. Waller upon her cross-bill answer entitled to have the alleged mistake in the original deed now corrected so as to recover the lot according to the altered description therein, and according to the original contract, as she alleges it? She specifically alleges in her answer that the original contract covered the lot as now described in the altered deed and for which she and her husband paid full consideration, and were put in the actual possession of the property, and that they have placed valuable improvements thereon, with the knowledge, consent, and acquiescence of the plaintiffs. These allegations of her answer are not controverted by the plaintiffs, and, if constituting good grounds for relief and well pleaded, must be taken as true. We think the allegations of this answer sufficient, for if the contract was as alleged, and there was a mistake in the original deed, and defendants have been in possession of and improved the lot with

the knowledge, consent, and acquiescence of the plaintiffs, there has been such partial execution of the original contract as to entitle defendants to specific execution thereof, and to a correction of the deed in conformity thereto, and to be quieted in their right and title to the lot.

A decree will therefore be entered here, in modification of the decree appealed from, that the plaintiffs do within 30 days from the date this cause is redocketed in the circuit court make, execute, and deliver to defendants a deed of correction describing the last-mentioned lot therein according to the description thereof contained in the original deed of April 13, 1904, as recorded, and that, if they shall fail to do so, then that a special commissioner be appointed by the circuit court for that purpose, who shall make, execute, acknowledge, and deliver to defendants such a deed for and on behalf of plaintiffs; and the cause will be remanded to the circuit court for the purpose of seeing that the mandate of this court is faithfully executed; and the appellees, who have substantially prevailed here, will have costs incurred in this court, as well as in the circuit court, whose decree, except as modified, will be affirmed.

(65 W. Va. 384)

BUTCHER'S HEIRS et al. v. KUNST et al.
(Supreme Court of Appeals of West Virginia.
March 23, 1909. Rehearing Denied June 9, 1909.)

1. APPEAL AND ERROR (§ 84*)—DECISIONS REVIEWABLE—FINALITY.

Where an appeal from a judgment or order of a county court appointing, or refusing to appoint, an administrator has been allowed by, and docketed in, a circuit court, and the person appealing has right of appeal, the order of dismissal thereof by the circuit court, as improvidently awarded, will be treated as a final judgment, from which a writ of error will lie to this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 528-547; Dec. Dig. § 84.*]

2. EXECUTORS AND ADMINISTRATORS (§ 18*)—PERSONS ENTITLED TO ACT—NONRESIDENT.

A distributee of the estate of one dying intestate in this state, and who would, if a resident of this state, be entitled to precedence in administration, and as the law was prior to 1903 would, notwithstanding such nonresidence, have been entitled to administer on such estate, is now by amendment of chapter 13, p. 83, Acts 1903 (section 3258, Code 1906), wholly disqualified to act as such administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 65; Dec. Dig. § 18.*]

3. EXECUTORS AND ADMINISTRATORS (§ 20*)—APPOINTMENT—REVIEW—PERSONS ENTITLED.

But though such nonresident distributee be disqualified by nonresidence to act as administrator, nevertheless his interest as distributee entitles him to be heard, by protest, objection, and advice in the appointment of a proper and competent person, with right of appeal to the circuit court, and writ of error to this court.

where there has been any abuse of the discretion of the court below in such appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 102; Dec. Dig. § 20.*]

4. APPEAL AND ERROR (§ 333*)—DEATH OF PLAINTIFF IN ERROR—EFFECT.

On the death of such nonresident distributee pending a writ of error brought by him to this court, though such death be suggested on the record of this court, and order be made reviving the cause in the name of his next of kin or next friend by whom the writ of error is prosecuted, the case may be heard and disposed of here on its merits upon the writ of error as originally awarded, without reference to such death, as provided by section 3900, Code 1906.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1846-1850; Dec. Dig. § 333.*]

5. EXECUTORS AND ADMINISTRATORS (§ 17*)—FAILURE OF DISTRIBUTE TO APPLY—APPOINTMENT OF CREDITOR.

By authority of section 3258, Code 1906, if no distributee of an estate apply for administration within 30 days from the death of the intestate, the county court may grant administration to a creditor, or to any other person, without waiting for an adjudication as to the sanity or insanity of a resident or nonresident distributee thereof, the statute imposing no such limitations on the appointing authority.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

6. EXECUTORS AND ADMINISTRATORS (§ 23*)—TWO GRANTS OF ADMINISTRATION.

While the general rule is that there cannot be two valid grants of administration on the same estate at the same time, within the same state jurisdiction; and the second is a nullity while the first continues, yet such rule is inapplicable to the case of a temporary commitment of such estate to the sheriff as curator thereof, pending the determination of the right of administration by the county court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 128, 129; Dec. Dig. § 23.*]

7. EXECUTORS AND ADMINISTRATORS (§ 17*)—ADMINISTRATION—PERSONS ENTITLED.

While the county court may rightfully require evidence of a creditor's claim as a condition precedent to his appointment as administrator of an estate, yet, as the statute authorizes the appointment of any other person, if such appointee be not in fact a creditor, if he be otherwise competent to act, his appointment will not be invalid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

8. EXECUTORS AND ADMINISTRATORS (§ 20*)—REVIEW—DISCRETION OF COURT.

An order of the county court appointing an administrator, whether distributee, creditor, or other person, will not be set aside on writ of error to this court, unless it plainly appears that there was abuse of the discretion of the county court in making such appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 102; Dec. Dig. § 20.*]

9. JUDGMENT (§ 9*)—VALIDITY—DISQUALIFICATION OF JUDGE.

The rule in this state is that a judgment pronounced by a judge disqualified by personal interest to give judgment is not void, but voidable only, as being a decree not according to law, and to be set aside only when brought

under review, and objection taken at the proper time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 237-239; Dec. Dig. § 9.*]

10. QUESTION NOT DECIDED.

Quære: Where two of three commissioners of a county court are interested so as to be disqualified by reason thereof to give judgment in the matter of appointment of an administrator, there being no provision of law for calling in another commissioner, and no other tribunal with jurisdiction to make such appointment, would not they, ex necessitate, have jurisdiction to sit in judgment?

(Syllabus by the Court.)

Error from Circuit Court, Taylor County.

Contest to determine the right and priority to administration of the estate of Adolphus Armstrong, deceased, between Louisa Butcher and others and G. H. A. Kunst and others. From the final order of the county court appointing Kunst administrator of the estate, Louisa Butcher and such others appealed to the Circuit court, which court dismissed the appeal, and Louisa Butcher and such others bring error. On death of said Louisa Butcher pending hearing on writ of error, said cause was revived and proceeded in by George Woofter and others as heirs and next of kin. Affirmed.

Dent & Dent, B. F. Bailey, and C. P. Guard, for plaintiffs in error. John L. Hechmer, for defendants in error.

MILLER, P. This case had its origin in a contest over the right and priority of administration of the estate of Adolphus Armstrong, deceased, begun in March, 1907, in the county court of Taylor county, and continued on appeal of Louisa Butcher by George Woofter and others, her next of kin, to the circuit court of said county, from the final order of the said county court appointing, on motion of creditors and others, G. H. A. Kunst, administrator of said estate. The case is here upon a writ of error to the judgment of the said circuit court dismissing said appeal.

On June 18, 1908, since the case was docketed here, the death of Louisa Butcher, pending this writ of error, being suggested on motion of said Woofter and others, it was ordered that the case be revived and proceeded in in their names in place of said Louisa Butcher. On final hearing, September 4, 1908, said Kunst moved the court as follows: First, to require plaintiffs in error to mature the case as to L. E. Matz, not served with process; second, to require plaintiffs in error to amend their petition so as to bring in as defendants Eugene Sommerville and L. E. Matz, the latter in his representative capacity; third, to set aside the order of revival herein, and, in support thereof, exhibited a certified copy of the will of said Louisa Butcher, and of the order of the county court of said Taylor county appointing

W. B. Lynch executor; fourth, to dismiss the writ of error and supersedeas, on the ground that the judgment appealed from, dismissing the appeal as improvidently awarded, is not a final judgment on the principles of the cause, from which an appeal lies to this court. So far as the record shows, Matz has no individual interest to subserve, wherefore not a necessary party. He appeared by petition in the county court as foreign guardian of the said Louisa Butcher, appointed by the probate court of Monroe county, Ohio, which court also adjudged her an imbecile, and incapable of taking care of and preserving her property, and also joined in the motion of creditors to appoint said Kunst administrator. The death of Louisa Butcher annulled the authority of the said Matz as a representative of deceased, and therefore he is no longer a necessary party. In the county court Eugene Sommerville appeared by petition, claiming right of administration by virtue of a power of attorney and nomination therein of said Louisa Butcher, and also filed a protest in writing against the appointment of any other person. He did not appeal from the order appointing said Kunst, and has not appeared to cross-assign errors in this court. The question of Sommerville's right of administration and the questions presented by the other motions are all involved in the merits of the controversy presented upon this writ of error, if the judgment below was final, so as to give us jurisdiction, and need not be separately considered.

The order of the circuit court was that the appeal be dismissed as improvidently awarded. It is argued on behalf of Kunst that this order was, in effect, only a refusal of the appeal, and not an adjudication of the rights of the parties, and that, no appeal having been applied for or allowed by a judge of this court, as provided by section 3634, Code 1906, and there being no final adjudication by the circuit court, this court is without jurisdiction of the case, and the writ of error should be dismissed. We do not think this position well founded. An appeal was allowed by the circuit court; and, if appellant Louisa Butcher had right of appeal from a judgment denying her right and priority of administration, or right to nominate said Sommerville, or right of protest against the appointment of said Kunst, she had right of appeal to the circuit court, by virtue of section 1261, Code 1906, and to writ of error to this court by virtue of section 4038, Code 1906, entitling her to a writ of error to the judgment or order of the circuit court in controversy concerning the probate of a will or the appointment of a personal representative, guardian, committee, or curator. In *Bridgman v. Bridgman*, 30 W. Va. 212, 216, 3 S. E. 580, a like order of the circuit court dismissing an appeal was treated as equivalent to the affirmation of the order of the county court, and we think we should so treat the judgment in

this case. The dismissal of the appeal, so far as the record shows, could have been upon no other ground except want of error in the judgment of the county court. That judgment was final, and determined the right of administration as between the contestants. And although the motion may not have been well founded, and the court may have given a wrong reason for its judgment, it must necessarily be treated as final and conclusive, and from which a writ of error may be prosecuted to this court.

So far as the record shows, Louisa Butcher was the sole heir and distributee of the estate of Adolphus Armstrong. She was a very old woman, some 80 years of age, and being of weak mind, insane, according to her West Virginia next of kin, and an imbecile in the judgment of her appointees, Sommerville and Wilson, and of the probate court of Ohio and being about to come into possession of an estate of some \$200,000 or \$300,000, it was natural that she should suddenly develop many friends, next of kin, and without kinship, ready and anxious, voluntarily or involuntarily, to help her manage and dispose of it. Sommerville and his co-appointee, Wilson, were quick in securing a power of attorney from her, making them her agents to collect, manage, sell, and convey said property, and nominating them as administrators of the estate of said Armstrong. Woofter and others, her West Virginia friends and next of kin and prospective heirs, were naturally interested, and on their motion in said county court, prior to the appointment of said Kunst, the estate of said Armstrong was by said county court, pending the question of the right and priority of administration and the appointment of a personal representative, committed to the sheriff, as curator thereof, and who, so far as this record shows, is now in charge of it. In the proceedings before the county court these two sets of friends and representatives were opposed to each other, and there was a third friend, Matz, who, having had himself appointed guardian in Ohio, took the side of Kunst, joining in the motion of creditors for his appointment as administrator. Sommerville and Wilson on the one side, and Woofter and others, appellants, on the other, though hostile, in the proceedings before the county court, claim right of priority of administration by right of nomination of said Louisa Butcher and of her supposed rights to precedence as sole distributee; and it is by virtue thereof that Woofter and others appeared and protested before the county court, and afterwards appealed to the circuit court, and are now prosecuting this writ of error.

Two questions are presented, the answers to which will settle the controversies between these two sets of conflicting claimants, and will also, for the most part, also settle the controversies between them and the said Kunst. The first question is, Had Louisa

Butcher, as distributee of said estate, the right of administration or the right of nomination as claimed? Second, if she had not such right, had she, by virtue of her interest in said estate, right of protest, and advice in the appointment of an administrator, and right of appeal from the adverse judgment? Prior to the amendment of section 4, c. 85, Code 1899 (Acts Leg. 1903, p. 83, c. 13) now section 3258, Code 1906, if sole heir and distributee, and a competent person, she would have had precedence in right of administration, but by that amendment, being a nonresident, that right was wholly taken away. That amendment added the proviso: "That no person not a resident of this state shall be appointed or act as such personal representative, unless the decedent be a nonresident of the state at the time of his death, and names in his will a nonresident as his executor." It is quite evident that counsel on both sides in this controversy have overlooked this amendment. Nor do we know of any law giving her right of nomination or appointment of a resident administrator. Without such authority given by statute her nomination would not bind the court in exercising sound discretion in the appointment of some suitable person. 18 Cyc. 92. The statute is plain, and does not call for interpretation. Its terms clearly precluded Louisa Butcher, a nonresident, from administering said estate, and her appointees and next of kin acquired no rights under her to administer thereon. This answers the first question.

The second question we answer in the affirmative. Being the sole distributee, she was vitally interested in the proper and the just administration of the estate, and, though herself disqualified by law to administer, she had the right to be heard on protest against the appointment of an improper or disqualified person, and to appeal from any order of the county court in which there should be any abuse of its discretion, and, if aggrieved by the judgment of the circuit court dismissing her appeal, she has the right to a writ of error thereto from this court.

Whether or not Woofter and others, her next friends and distributees of her estate, were entitled, on suggestion of her death, to have had this cause revived in their names we need not decide; for, without such suggestion, we think the case may be heard and disposed of here on its merits, upon the writ of error as originally awarded, without reference to her death, for it is provided by section 3900, Code 1906, that "if, in any case of appeal, writ of error, or supersedeas, which is now or may hereafter be pending, there be at any time in an appellate court, suggested or relied on in abatement, the death of a party, or any other fact, which, if it had occurred after verdict in an action, would not have prevented judgment being entered (as if it had not occurred) the appellate court may, in its discretion, enter

judgment or decree in such case as if the said fact had not occurred."

Coming then to a consideration of the errors assigned, the first is that the county court had no authority, prior to an adjudication of the sanity or insanity of Mrs. Butcher, simply because 30 days from the date of the death of the intestate had expired, to appoint a creditor administrator. But the statute puts no such limitation upon the court. Said section 3258, Code 1906, provides that "if no distributee apply for administration within thirty days from the death of the intestate, the court may grant administration to one or more of his creditors, or to any other person." Nor does the statute impose any other condition precedent to the appointment of a creditor. If the sole distributee be insane, as appellants have treated Mrs. Butcher, she would be wholly incompetent, if a resident and otherwise qualified, to administer the estate.

Next it is claimed that the court was without authority, without good cause shown and notice to him, and had no right or authority to revoke the powers of the curator, and on motion of a creditor appoint him administrator. This proposition is based upon the general rule that there cannot be two valid grants of administration on the same estate at the same time, within the same state jurisdiction, and that the second appointment is a nullity while the first continues. Counsel cite 18 Cyc. 113, and *Hutcheson v. Priddy*, 12 Grat. (Va.) 85. But we do not understand this rule to be applicable where, as in this case, and as set forth by appellants in their petition for appeal to the circuit court, the estate has been committed to the sheriff temporarily, until proper administration thereof can be determined and settled. This, we think, has been the practice in this state and in Virginia. Such temporary appointment, pending the appointment of a permanent administrator, is, in effect, an appointment pendente lite, to act only during the continuance of the litigation that was the occasion of his appointment, and his powers cease with the termination of the suit or proceeding. 11 Am. & Eng. Ency. Law, 803, note 2, and cases cited. No notice to the curator therefore was required.

Next it is said that it is necessary for a creditor applying for administration to establish, by affidavit or otherwise, the nature, character, and amount of his debt, and that his debt is not fictitious. A probate court we perceive might very properly require satisfactory proof of the creditor's claim as a condition precedent to his appointment, but the statute gives right to appointment of any other person, and though the appointee be not a creditor in fact, if he be, in the judgment of the court, a proper person, he is not disqualified or incompetent to act.

Next it is said that the right of a distributee to administer the estate, the estate being solvent, is paramount to that of a cred-

itor. This, in general, is a correct proposition. The answer to it, however, as applied to this case is that no distributee, qualified and competent, has applied for administration. But it is not applicable to the case in hand. It is said that by the death of Louisa Butcher the rights of appellants to administer the estate of Armstrong have become fixed and determined, and that we should now reverse the judgment below, appointing Kunst, and let them, or one of them, in to administer said estate. But they are not distributees of the estate of Armstrong. Louisa Butcher, if sole distributee of that estate, became invested with the title thereto before her death, and appellants can in no sense be said to be distributees thereof, entitling them to preference in the administration of his estate. The personal estate of Armstrong, after payment of his debts, must go from his administrator into the hands of the executor or administrator of Louisa Butcher, subject to the payments of her debts and specific legacies, if any, and not directly to her legatees or distributees. But suppose the death of Louisa Butcher did give right of administration to appellants, would they not first be required to make application to the county court therefor? Certainly this court cannot settle their rights in the first instance. This is an appellate court. Section 3239, Code 1906, among other things provides that "if after administration is granted to a creditor, or other person than a distributee, any distributee, who shall not have before refused, shall apply for administration there may be a grant of probate or administration in like manner as if the former grant had not been made, and the said former grant shall thereupon cease." The word "may" in this statute was held in *Hutcheson v. Priddy*, supra, to mean "must." This case and *Hunt v. Wilkinson*, 2 Call (Va.) 49, 1 Am. Dec. 534, cited therein, are authority also for the proposition that no notice to the curator of the appointment of a permanent administrator is required.

Lastly it is affirmed that the order of the county court is absolutely void, for the reason that John Henry, president of the county court, is a stockholder of the First National Bank, one of the petitioning creditors, and on whose motion Kunst was appointed administrator, wherefore interested. The record of the judgment appealed from does not show that either of the commissioners who presided at the time of the appointment of Kunst were stockholders, or otherwise interested in said bank. But it is sought to make this appear by a supplemental petition filed by appellants in this court, and the record of certain supplemental proceedings filed therewith, had before said court, on the petition of said bank and others to revoke the authority of the curator of said estate, and finally heard thereon, and upon the cross-petitions of said curator seeking to have his appointment confirmed, and of said Woofter

asking that the appointment of said Kunst be revoked, and that he as a distributee be appointed to administer said estate. This record shows that upon the hearing of said several petitions on April 30, 1907, by the two commissioners, said Henry having retired, the court refused to set aside the order appointing Kunst, and that said two commissioners, not being able to agree to the confirmation of said curator, the further consideration of that matter was postponed. No appeal was taken from this judgment to the circuit court, and certainly we have no jurisdiction to grant or entertain a writ of error directly to that judgment of the county court. We are cited by counsel to *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513, and to 17 Cyc. 734, for the proposition that a stockholder of a corporation cannot sit in judgment in an action in which his corporation is a party, such interest being sufficient to disqualify him, and for the further proposition that a decree or order of appointment of a judge of probate thus disqualified is absolutely void. While the latter proposition seems to be the law in some jurisdictions, in this state a different rule obtains. As was said in *Findley v. Smith*, 42 W. Va. 299, 305, 28 S. E. 370, 372: "In this state, where there is no statute bearing directly on the point, such a decree is not void, but only voidable, as being a decree not according to law, and to be set aside when brought under review, and upon objection taken." If upon this writ of error we were permitted to look into the supplemental record, we would see it there stated that two of said commissioners, namely, Morrow and Henry, are stockholders in said bank. The question would then be presented whether, there being no other tribunal having jurisdiction of matters of probate of this character, these commissioners, though interested, would not ex necessitate have jurisdiction to sit in judgment. See *Coal Co. v. Doolittle*, 54 W. Va. 210, 230, 231, 46 S. E. 238. In the Massachusetts case cited another probate judge was called to preside. No provision for this is made in our law so as to call in other commissioners. That case was an appeal from the judgment of another judge, refusing to set aside and vacate a prior appointment because the judge presiding was interested. But we cannot consider the supplemental record on this hearing, and the judgment there complained of is not before us. The record of the judgment which we have before us shows no abuse of the discretionary power of the county court to make the appointment of the defendant in error. It is true that in the protest of Woofter and others against the appointment of Kunst, filed in the county court, it was charged, and sworn to, on information and belief, that Kunst, for certain reasons alleged, was not a proper person to appoint; but this protest was not evidence, and the record fails to show that any proof of these charges was

offered. Besides the court had other papers and documents before it. It may have heard evidence not in the record for all we know.

We are therefore of opinion that the judgment of the circuit court and the order of the county court should be affirmed.

(109 Va. 706)

SHREVE v. NORFOLK & W. RY. CO. et al.
(Supreme Court of Appeals of Virginia. June 10, 1909.)

RAILROADS (§ 72*)—CONSTRUCTION OF DEED—CONDITION OR COVENANT.

The provision in a deed of land to a railroad company that it is made "in consideration of the said railroad company agreeing to erect and maintain a depot on the land conveyed" is not a condition subsequent, entitling the grantor to recover the land in ejectment on a failure of the company to erect such depot, but is only a covenant or agreement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

Error to Circuit Court, Tazewell County.

Action of ejectment by R. W. Shreve against the Norfolk & Western Railway Company and others. Defendants had judgment, and plaintiff brings error. Affirmed.

Greever & Gillespie, for plaintiff in error.
Henry & Graham and S. D. May, for defendants in error.

CARDWELL, J. This litigation arises out of the following state of facts: On the 19th day of August, 1889, Geo. W. Gillespie and wife were the owners in fee simple and in the possession of about 400 acres of land in one boundary, situated in the rich lands, on Clinch river, Tazewell county, Va., and by deed of that date they conveyed two parcels of the 400 acres, aggregating about 3 acres, to the Norfolk & Western Railway Company, the granting clause being as follows:

"Witnesseth, that in consideration of the said the Norfolk & Western Railroad Company agreeing to erect and maintain a depot on the land conveyed by this deed, the said George W. Gillespie and Barbara E. Gillespie, his wife, do grant unto the said the Norfolk & Western Railroad Company for depot and railway purposes all those two certain tracts, pieces or parcels of land, lying in Tazewell county, state of Virginia, situate in the rich lands."

The covenants contained in the deed are general and in this language:

"And the said George W. Gillespie and Barbara E. Gillespie do covenant that they will warrant generally the property hereby conveyed, that they have the right to convey the said lands to the said Norfolk & Western Railroad Company, that the said Norfolk & Western Railroad Company shall have quiet possession of the said lands free from encumbrances; that they will execute

such further assurances of the said lands as may be requisite, and that they have done no act to encumber the said lands."

The Norfolk & Western Railway Company claims and holds under successive conveyances from the Norfolk & Western Railroad Company the title vested in the Norfolk & Western Railroad Company by the deed of August 19, 1889, and at the point of the location of the land the railroad had been built, and the Norfolk & Western Railroad Company and its successor to the title has had possession of the land ever since the deed was made in August, 1889, up to the institution of this suit—or, as one witness says, "ever since it was staked off."

By deed dated April 14, 1890, Gillespie and wife conveyed the remainder of their boundary of the 400 acres of land to the Tazewell Land & Improvement Company, in which conveyance the three acres theretofore conveyed to the Norfolk & Western Railroad Company is expressly excepted, but the conveyance, after reciting that "the land company had purchased the land conveyed and are engaged in laying out in a town and expect to expend large sums of money in the improvement and building up of said town, relying on the said agreement of the N. & W. Rd. Co. to comply with their said contract to wit, to erect and maintain a depot on said two pieces of land," contains this clause:

"Now, in consideration of the premises, and for the consideration aforesaid, the parties of the first part hereto do hereby grant, assign and transfer unto the party of the second part hereto, all their right, title and interest in and to said contract between themselves and said Norfolk and Western Railroad Company. This assignment and transfer of said contract is without recourse on the parties of the first part."

By deed of June 24, 1904, the Tazewell Land & Improvement Company conveyed to R. W. Shreve the land acquired by it under the said deed from Gillespie and wife, which deed to Shreve contains this clause:

"There is also excepted and reserved from this conveyance any right, title, and interest in three acres of land in two parcels conveyed by George W. Gillespie and wife to the Norfolk & Western Railroad Company for depot and railroad purposes by deed dated the 19th day of August, 1889, * * * but the said party of the first part grants, conveys, assigns, and transfers to said Robert W. Shreve, any right, title, claim or interest which the said party of the first part now holds under and by virtue of the deed from George W. Gillespie and wife to said company, dated the 14th day of April, 1890.
* * *

There has never been any depot house built on the two lots in question, but there

was a section house erected on the lots, and switches and sidings placed on them, and the railway company has never refused to build a depot on the premises, but has repeatedly stated that it would do so as soon as the business at that point (the name of which is Doran) was of such magnitude as to warrant it; and this action of ejectment was brought by R. W. Shreve in 1907 against the Norfolk & Western Railway Company to recover the possession of the said two parcels of land.

At the trial of the cause, upon the plea of the general issue—not guilty—both parties agreed to submit the matters of law and fact to the judge of the court for decision; and the court at its December term, 1907, rendered judgment in favor of the defendant, to which judgment this writ of error was awarded.

The learned and exhaustive arguments for both plaintiff in error and defendant in error have taken a very much wider range than our view of the case would require, and we shall not attempt to review the numerous authorities to which we have been cited as bearing upon the questions: First, whether the language and stipulations of the deed of August 19, 1889, from Gillespie and wife to the Norfolk & Western Railroad Company, constitute and make a condition subsequent, to be performed by defendant in error; and, second, if such is the true construction of the deed, and that condition subsequent has not been performed but has been broken, has plaintiff in error the right to recover the land in this his action of ejectment?

In our view of the case the primary and controlling question is whether or not the language of the deed by clear and unmistakable terms affixes to the grant in the deed a condition subsequent, upon the breach of which the land and the right of re-entry thereon reverted to the grantors, or whether the language of the deed relating to the consideration is a naked promise, and, at most, only a covenant.

It will be observed that the deed in question does not, as is the usual form, affix to the grant a condition subsequent, but the only language used to indicate an intention to attach a condition to the absolute grant of this land to the grantee is that the grant is "in consideration of the said Norfolk & Western Railroad Company agreeing to erect and maintain a depot on the land conveyed. * * *" No time is mentioned when this promise or agreement is to be carried out, nor is there any specification as to character or quality of the depot to be erected and maintained; nor is there expressed a reservation of title to the land in the grantors by reversion upon the breach of the promise or agreement made by the grantee, nor any intimation of the right to re-enter upon the land upon the breach of the promise or agree-

ment to erect or maintain a depot on the premises.

In the brief of counsel for plaintiff in error it is conceded to be too well settled to admit of citation of authority that "conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates; and the vigorous exacting of them is a species summum jus, and in many cases hardly reconcilable with conscience."

It is also recognized that "in the construction of every instrument, where the courts are asked to say whether the language used creates a covenant or a condition, the intention of the parties governs. If the parties to the instrument say upon its face that there is to be a forfeiture if its terms are not complied with, then the forfeiture is declared regardless of results; and the converse is equally true."

So, as stated in *Union Stockyards Co. v. Packing Co.*, 140 Fed. 701, 72 C. C. A. 195, in determining the intention of the parties, and whether the terms of the instrument create a covenant or a condition, it becomes necessary to consider "the language employed, the situation of the parties, their relation to the subject of the transaction, and the object in view."

We have already adverted to the language employed in the deed, and we will now look in that connection to "the situation of the parties, their relation to the subject of the transaction, and the object in view."

The undisputed and pertinent facts to be considered in this connection are that, shortly after the Clinch Valley Division of the Norfolk & Western Railroad Company was completed, there was some indication that a depot would be needed at Doran. The railroad company was looking out for a place to locate the depot when it became necessary to erect it, and Gillespie, under whom plaintiff in error claims, who owned, as stated, about 400 acres of land at that place, conceiving the idea, doubtless, that a town might be laid out and built up there, making a depot at Doran not only desirable, but necessary, offered to give the railroad company a lot of land necessary for the railroad's purposes if it would erect and maintain a depot there, and the railroad company accepted the proposition, and a deed was drawn to that effect. This is, as counsel for plaintiff in error say, the plain import of the language used in the deed; and they further say "that a depot was not necessary at the time the conveyance was made, and perhaps has not been necessary since is claimed by the company and established by the record." In other words, Gillespie voluntarily offered to give the land needed for a depot at Doran, and the railroad company accepted the offer; the only binding effect being predicated upon the promise or covenant on the part of the railroad company to build and maintain the depot when the conditions at that point, in the economical

and successful operation of the railroad as a public service corporation, required it.

As counsel for plaintiff in error further say, "both parties to the deed knew that railroad companies could only erect depots at those places where the needs of the public required them," and the point at Doran was not an exception to that rule. But, although the loss to Gillespie of the increase in the value of the residue of his 400-acre tract of land resulting from the public needs not requiring a depot at Doran may be ever so great, this does not so change the rule of construction of his deed under which plaintiff in error seeks to maintain this action of ejectment to recover the land conveyed. Neither the language of the deed in question nor the subsequent conveyance of the residue of the 400-acre tract of land indicates an intention on the part of Gillespie that the title to the 3 acres conveyed to the railroad company for a depot site should revert to him in the event that no depot was built thereon. Not only is there no language used in his deed to the railroad company to declare a forfeiture in that event, but when read in the light of his subsequent conveyance to the land company, in which he expressly excepts therefrom the 3 acres theretofore conveyed to the railroad company and only assigns to the land company such right, title, or interest as he had "in and to said contract between themselves and the said Norfolk & Western Railroad Company," and this "assignment and transfer" too "without recourse" to the grantors, it cannot be doubted that Gillespie regarded that he only held a covenant on the part of the railroad company to erect and maintain a depot at Doran, and did not consider that the title and possession of the land would revert to him in the event that the public needs did not warrant the erection and maintenance of the depot contemplated. If such was not the construction of the conveyance, as understood by the grantors, it is inconceivable that they would have omitted therefrom language plainly declaring that the title and possession of the land conveyed was to revert to them in the event that a depot was not erected and maintained on the land granted.

Almost the identical question presented here—i. e., the comparative weight and standing to be given in a court of law to a promise or covenant, and a condition subsequent—was considered by this court in *King v. N. & W. Ry. Co.*, 99 Va. 625, 39 S. E. 701, and there the stipulations in the conveyance which were the subject of litigation were construed as covenants, and not conditions. The court, speaking through Harrison, J., and after a statement as to the contentions of the parties and the settled rule of law governing in construing the conveyances, said: "We are of opinion that the language employed in the deeds under consideration is apt language to create a fee simple, and that the superadded words under the author-

ities amount to covenants rather than conditions. The deeds are not voluntary, as contended, but are based upon the benefits to accrue to the reserved property of the grantor by reason of the use of the granted premises as a railroad terminal. Hence they must be interpreted as any other deeds based upon a valuable consideration. The language is to be taken most strongly against the grantor, and most favorably to the grantee."

The features of the conveyance under consideration in that case were stronger in favor of a construction that a condition, and not a covenant, was intended by the contracting parties, than are those contained in the deed we now have under consideration. In fact, the language in the deed before us in apt words creates a fee simple in the land granted, and there are no superadded words declaring in express terms or by clear implication, or in any terms whatever, that the nonperformance of the promise and agreement of the grantee stated to be the consideration moving the grantor to make the conveyance should operate as a forfeiture of the land, giving the grantors the right to re-enter and possess themselves of it. In such a case, as is also said in the opinion just cited, the courts will incline to construe the language of the deed as creating only a covenant and not a condition, thus adopting the more benignant construction upholding the instrument, and leaving the parties to pursue their appropriate remedies for a breach of covenant.

The principles of law adverted to are fully recognized in *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17, and in *Alex. & Wash. R. Co. v. Chew*, 27 Grat. 547, where they are discussed at some length; the opinion saying: "When the grantor seeks to destroy an estate which he himself has created, it must plainly appear that the act is within the very terms of the condition and breach. It is not sufficient to show mischiefs and even losses which might have been provided against had they been foreseen. The fact that they were not and could not have been anticipated may be a sufficient reason for the failure to provide a remedy; but they cannot justify the courts in so enlarging the operation of the covenant as to make them a ground of forfeiture."

They are discussed, also, by the leading text-writers and commentators of the law, and the uniform view taken is in accord with the decided cases mentioned above and to follow. 1 *Sharswood & Budd's L. Cas.* in the *Amer. L. of R. Prop.* p. 123 et seq.; 4 *Kent's Com.* (2d Ed.) pp. 122-129; 2 *Min. Inst.* (4th Ed.) pp. 265, 266; 2 *Minor on R. Prop.* § 529; 2 *Dev. on Deeds*, § 970, and notes.

In *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262, the deed conveying land contained these words: "This conveyance is made upon the condition that the said strip of land shall be forever kept open and used

as a public highway and for no other purpose." Held to create a covenant, and not a condition subsequent, as claimed by the plaintiff; the opinion saying: "The clause in question is merely a declaration of the purpose for which the land conveyed was to be used and improved, to wit, as a highway. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out, nor does it reserve to the grantors and their heirs the right in that event to re-enter on the land and resume possession of it as of their former estate. Moreover, the purpose declared is in its nature general and public, and not one inuring specially to the benefit of the grantors. Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified."

It is very true that the court in that case quotes the statute governing such conveyances, but that fact does not detract from the force of the discussion of the general principles controlling in determining whether the language used in a conveyance of land should be construed as creating a covenant or a condition subsequent.

In *Rawson v. Inhabitants of School Dist. No. 5*, 7 Allen (Mass.) 125, 83 Am. Dec. 670, the opinion by the court, Bigelow, C. J., after stating that a deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law *ex proprio vigore* imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated, and that conditions are not to be raised readily by inference or argument, says: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

"If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus it is said in *Duke of Norfolk's Case*, Dyer, 138b, that the words 'ea intentione' do not make a condition, but a confidence and trust. See, also, *Parish v. Whitney*, 3 Gray (Mass.) 516, and *Newell v. Hill*, 2 Metc. (Mass.) 180, and cases cited.

But, whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed will not of itself make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab convenienti* only, or on considerations of supposed hardship or want of equity."

We are of opinion that the deed under review does not admit of the construction contended for by plaintiff in error, but that its language creates only an agreement or covenant on the part of the grantee, and that the judgment of the circuit court in favor of defendant in error in this action of ejectment is plainly right.

Having taken this view of the case, it is unnecessary to consider the remaining question, whether upon the breach of a condition subsequent annexed to a grant of land an assignee of the grantor's right to recover the land can maintain an action of ejectment.

The judgment of the circuit court is affirmed.

Affirmed.

(109 Va. 737)

WASHINGTON, A. & MT. V. RY. CO. v. TAYLOR.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. MASTER AND SERVANT (§§ 101, 124, 125*)—OBLIGATION OF MASTER.

A master must use ordinary care to provide reasonably safe and suitable appliances for his servants, and must inspect the same from time to time and use ordinary care to discover and repair defects; but, unless he knows or by the use of ordinary care ought to have known that an appliance has become defective, he is not liable for an injury resulting therefrom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 172, 173, 174, 180-184, 192, 235-242, 243-251; Dec. Dig. §§ 101, 124, 125.*]

2. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF.

Where the breach of duty assigned on the part of a master was its negligence in permitting a trolley pole on a car to get out of repair, there could be no recovery for injuries to a servant struck by the pole falling from the car, unless it was proved that the trolley pole was out of repair, that the defect was the proximate cause of the accident, and that the master knew or ought to have known of the defect by the use of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—DECLARATION—SUFFICIENCY.

Where the breach of duty relied on for a recovery for a personal injury is the failure to keep premises in reasonably safe repair, the declaration must aver either that defendant had

notice of the unsafe condition or set out facts from which such notice will necessarily be inferred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

4. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—DECLARATION—SUFFICIENCY.

A declaration in an action for injuries to a track hand struck by a trolley pole falling from a passing car, which alleges that the master negligently failed to exercise reasonable care by allowing the pole to get out of repair, that, as the car passed plaintiff, the pole became unfastened and fell, striking plaintiff, knocking him down, etc., is defective for failing to expressly aver that the defect in the pole was the cause of the injuries or to set out facts justifying such an inference.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

5. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—DECLARATION—SUFFICIENCY.

Where every allegation of fact in a declaration in an action for injuries to a servant may be true without rendering the master liable for the injuries sustained, the declaration is clearly bad.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

Error to Circuit Court, Alexandria County.

Action by David H. Taylor against the Washington, Alexandria & Mt. Vernon Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

James R. & H. B. Caton and Moore, Barbour & Keith, for plaintiff in error. Samuel P. Fisher and John M. Johnson, for defendant in error.

BUCHANAN, J. The amended declaration upon which the case was tried is as follows:

"David H. Taylor, plaintiff, complains of the Washington, Alexandria & Mt. Vernon Railway Company, a corporation under the laws of the state of Virginia, who was summoned to answer the plaintiff of a plea of trespass on the case, for this, to wit, that heretofore, to wit, on the 27th day of June, 1907, the said defendant was engaged in operating an electric railway within the state of Virginia and through the county of Alexandria, in which said county the injury hereinafter complained of occurred; that said plaintiff before and at the time of said injury was employed by the said defendant as a track hand to work upon and keep in order the roadbed and track of the said defendant upon which its cars and trains were run, and thereupon it became the duty of the defendant to exercise reasonable care to protect the plaintiff from injury from its cars and trains while working upon its said roadbed, yet said defendant did not exercise reasonable care to protect the plaintiff from injury from its cars and trains while working on said roadbed, but carelessly and negligently

failed so to do by not keeping in order, but allowing to become out of repair, a certain trolley pole on one of its cars, so that on the day and year aforesaid, in the county aforesaid, while the said plaintiff was working on the south bound or west track, when a certain train thereon approached, and the said plaintiff and his fellow workmen moved a safe distance to the side of the train to allow the said train to pass, and, as the said train was passing them, the said trolley pole attached to the motor car of the same became unfastened or detached from the said car in some manner unknown to the plaintiff, and fell over the side of the said car on which the said plaintiff was standing and struck the said plaintiff, knocking him down, and at the same time the rope from said trolley pole fastened to said motor car became entangled about the body of the said plaintiff and dragged or jerked him under, or his right leg beneath, the wheels of the rear car of the said train, and the rear car and the wheels thereof passed over the said leg, whereby the said plaintiff's said right leg was so greatly bruised, mashed, torn, and mangled that it became and was necessary to amputate the said leg below the knee. Wherefore, by reason of the injury to the said plaintiff, he has sustained damages to the extent of \$5,000, and therefore he brings his suit."

The defendant's demurrer to the declaration was overruled, and upon the trial there was a verdict and judgment in favor of the plaintiff.

The first error assigned is to the action of the court in overruling the demurrer to the declaration.

The principal objection made to the declaration is that it does not aver that the defendant knew or ought in the exercise of ordinary care to have known of the alleged defective condition of the trolley pole, the fall of which caused the plaintiff's injuries.

While it is the plain duty of the master to use ordinary care to provide reasonably safe, sound, and suitable appliances and instrumentalities for the use of his servants, and to examine and inspect the same from time to time, and to use ordinary care to discover and repair defects, still, unless he knows or in the use of ordinary care ought to have known that such machinery or appliances have become defective or unsafe, he is not liable for injuries resulting therefrom. Va. & N. C. Wheel Co. v. Chalkey, 98 Va. 62, 66, 34 S. E. 976, and authorities cited; N. & W. R. Co. v. Jackson's Adm'r, 85 Va. 489, 8 S. E. 370; Va. Portland Cement Co. v. Luck, 103 Va. 434, 435, 49 S. E. 577.

As the only breach of duty assigned in the declaration on the part of the defendant was its negligence in permitting the trolley pole to get out of repair, there could be no recovery in the case, unless it was made to appear,

not only that the trolley pole was out of repair and that defect was the proximate cause of the accident, but that the defendant knew, or ought in the use of ordinary care to have known, of its defective condition. Since it was necessary to prove this, it was also necessary to allege it.

This was expressly held in *N. & W. R. Co. v. Jackson's Adm'r*, supra, in passing upon the declaration in that case. One of the objections made to the first count in the declaration in that case and sustained by the court was that it did not aver that the alleged defects in the push pole were known to the defendant, or ought to have been known to it.

In *Va. Portland Cement Co. v. Luck*, supra, in passing upon the demurrer to the declaration, while not expressly stated, it is clearly implied that, where the breach of duty relied on for a recovery is the failure to keep the premises in reasonably safe repair, the declaration must aver either that the defendant had notice of the unsafe condition of the premises, or set out facts from which it was necessarily to be inferred that the company was aware of the unsafe condition of its premises. See pages 434, 435 of 103 Va., 49 S. E. 577.

Neither is it expressly averred that the defect in the trolley pole was the cause of the plaintiff's injuries; nor can this necessarily be inferred from the facts stated.

Every allegation of fact in the declaration may be true, and yet the defendant may not be liable to the plaintiff for the injuries suffered by him. Where that is the case, the declaration is clearly bad.

We are of opinion, therefore, that the court erred in overruling the demurrer; that its judgment must be reversed, the verdict set aside, the demurrer to the amended declaration sustained, and the cause remanded with leave to the plaintiff to amend his declaration, if he be so advised, and for further proceedings not in conflict with the views expressed in this opinion.

Reversed.

CARDWELL, J., absent.

(109 Va. 702)

SCHNURMAN'S EXECUTRIX v. BIDDLE & CO. et al.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. BANKRUPTCY (§ 151*)—CUSTODY OF PROPERTY—TRUSTEE.

Title to a bankrupt's property vests in the trustee, and he alone can sue to recover it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig. § 151.*]

2. EXECUTORS AND ADMINISTRATORS (§ 26*)—APPOINTMENT—BOND WITH SECURITY—DISCRETION OF COURT.

Code 1904, § 2642, provides that, where the will directs that an executor shall not give security, the court or clerk shall not require it,

unless, on the application of any interested person, or upon its own knowledge, it thinks security should be required. Plaintiff was adjudicated a voluntary bankrupt and died without having been discharged, and his executrix, who, under the will, was not required to give security, applied for a discharge. Creditors of the bankrupt moved to require the executrix to give bond which she resisted on the ground that all of his creditors, including the moving parties, had filed their claims in the bankruptcy proceedings, and that the petitioning creditors had no interest in the property now in her hands, it being property not belonging to the bankrupt at the time of adjudication, and that there was nothing to show that the bankrupt's estate would not be discharged from bankruptcy. *Held*, that the chancery court as a probate court had a wide discretion under the statute which would not be interfered with unless plainly abused, and that there was no abuse of discretion in requiring the widow to give bond to preserve the estate pending the bankruptcy proceedings for those interested therein.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 26.*]

Error to Chancery Court of Richmond.

Proceedings by Biddle & Co. and others against Henry Schnurman's executrix. Order revoking defendant's powers as executrix upon her refusal to execute a bond with sureties as required by order of court, and she brings error. Affirmed.

O'Flaherty & Fulton, for plaintiff in error.
Stern & Stern, for defendants in error.

KEITH, P. Schnurman was adjudicated a bankrupt at Richmond November 9, 1907. The appellees Biddle & Co. and others were named by him in his schedules as his creditors, and proved their debts. He never applied during his lifetime for his discharge in bankruptcy, and died April 10, 1908, leaving a will in which his wife was named as executrix, and requesting that no security be required of her on her bond as such. She qualified in the chancery court of the city of Richmond on April 17, 1908, giving a bond without security in the penalty of \$8,000. On May 25, 1908, the appellees moved the court to require the executrix to give security, and the court entered an order that on June 1st she should execute a bond in the penalty of \$2,500 with security.

The executrix denied the right of the creditors, Biddle & Co. and others, to move the court for security on her bond as executrix; it being admitted that they were creditors of Henry Schnurman, deceased, on debts arising prior to the filing of the petition in bankruptcy by her testator. She further proved that Henry Schnurman filed his petition in bankruptcy in the United States court for the Eastern district of Virginia; that with this petition he filed all schedules required by law, and among them the schedule showing all the assets and estate of the bankrupt, and the names and addresses of all of his creditors, including among them the parties making the motion for security on her bond;

that on the 9th day of November, 1907, Schnurman was duly adjudicated a bankrupt under the acts of Congress relating to bankruptcy (Act March 2, 1867, c. 176, 14 Stat. 517, as amended by Acts July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]; Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1024]); that he surrendered all his property and fully complied with all the requirements of all acts and all orders touching his bankruptcy; and that said proceedings in bankruptcy have been and still are pending in the District Court of the United States. On June 1, 1908, she, as executrix, filed her petition in the bankrupts' court, praying that the estate of her testator might be decreed to have a full discharge of all debts provable against it, except such debts as are excepted by law from such discharge, and that on the same day the judge of the district court "ordered that a hearing be had upon the petition on the 15th day of June, 1908, and that all known creditors and other persons in interest may appear and show cause, if any they have, why the prayer of the petition should not be granted."

The executrix, further answering, states that she is advised that the creditors of Schnurman have all filed their claims in the bankruptcy proceeding, and will participate with the other creditors in the proceeds arising from the bankrupt's estate; that she had complied with the law and executed a bond as required by the chancery court by its order, and had collected all the estate as far as she knows, as shown by the appraisal of the estate adopted by her as an inventory, to wit, the proceeds of an insurance policy No. 112842 in the Fidelity Mutual Life Insurance Company of Philadelphia upon the life of Henry Schnurman, amounting to \$1,743.28, and that she has proceeded to pay and is paying the debts of Schnurman arising since his adjudication as a bankrupt; that she is advised that the parties above named, who it is admitted were creditors of Henry Schnurman at the time of his adjudication in bankruptcy, have no interest in this estate in her hands; that they cannot claim anything more than the trustee or assignee in bankruptcy can claim, and the trustee in bankruptcy is making no claim for this money; that she is advised that, under the bankruptcy laws of the United States, the creditors of the bankrupt have an interest only in such property as the bankrupt had at the time of his adjudication as a bankrupt; and that such creditors have no interest whatever in the estate now in her hands, and, if the right of the creditors did depend upon the discharge of the bankrupt's estate, which she denies, there is nothing before this honorable court to show that the bankrupt's estate will not be discharged from bankruptcy.

On the 3d day of June, 1908, the executrix declining to execute a bond with surety, her

powers were revoked, and the case is before us upon her petition for a writ of error to that order.

Section 2642 of the Code of 1904 provides that: "Where the will directs that an executor shall not give security, the court or clerk shall not require it of him, unless on the application of any person interested, or upon its or his own knowledge it or he thinks security ought to be required."

Schnurman was adjudicated a bankrupt during his lifetime upon his own petition. He died without having been discharged. His widow and executrix has applied for a discharge, but that, so far as this record discloses, has never been granted. The whole subject is before the District Court of the United States. It and it alone can determine whether or not the estate of the decedent will ever be entitled to a discharge from its indebtedness. The order appealed from was merely to preserve the estate of the bankrupt, whatever it might be, for the benefit of whom it might concern. The chancery court, sitting as a court of probate, is under the section above referred to clothed with a wide discretion, the exercise of which should not be interfered with except in a case where it has been plainly abused.

It is true that the title to all the property of a bankrupt vests in the trustee, and that the trustee alone can sue to recover it; but the proceeding under review is in no sense for the recovery of property. It is merely an application to the court to require security to be given for the safety of a fund in which the applicants deem themselves interested. The court could have taken the same action at the instance of its clerk, or as a result of its own knowledge upon the subject.

We are of opinion that the court has not exceeded in its order the proper exercise of the discretion with which it is clothed; and its judgment is affirmed.

Affirmed.

(100 Va. 645)

MCCROREY v. GARRETT.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. HIGHWAYS (§ 80*)—RIGHTS OF PUBLIC—CONTROL.

Public highways, whether in the country or in the city, belong entirely to the public at large, both as to the surface and to the portion above and below it, and the supreme control over them is in the Legislature.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 288, 290; Dec. Dig. § 80.*]

2. HIGHWAYS (§ 153*) — OBSTRUCTION IN HIGHWAY—NUISANCE.

An unauthorized obstruction, which unnecessarily impedes or incommodes the lawful use of a highway, is a nuisance at common law.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 299, 417, 419; Dec. Dig. § 153.*]

3. MUNICIPAL CORPORATIONS (§ 693*)—AWNING OVER STREET—LIABILITY OF OWNER FOR INJURY.

Unless justified by legislative authority, the owner of an awning, maintained over a public street, becomes an insurer as to persons lawfully using the street, maintaining the awning at his own peril, and a person injured thereby while free from blame may recover from the owner, regardless of the owner's negligence in its construction and maintenance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1494; Dec. Dig. § 693.*]

4. EVIDENCE (§ 576*)—EVIDENCE AT FORMER TRIAL—ABSENCE OF WITNESS.

The absence upon a second trial of a witness who testified in the former trial, caused by sickness, is not ground for admitting the stenographic report of his testimony in the former trial; but a continuance should be asked if his testimony is material.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2401-2405; Dec. Dig. § 576.*]

Appeal from Law and Chancery Court of City of Norfolk.

Action by A. E. Garrett against J. G. McCrorey. Judgment for plaintiff, and defendant appeals. Affirmed.

M. R. Peterson and Thos. H. Willcox, for appellant. Starke, Venable & Starke, for appellee.

HARRISON, J. This action was brought by A. E. Garrett to recover of J. G. McCrorey damages for injuries sustained by him from the falling of an awning which was maintained by the defendant over the pavement in front of his store on Main street in the city of Norfolk.

The record shows that the defendant was the lessee of a storehouse situated on the north side of Main street, in the city of Norfolk, in which he conducted a mercantile business. On the front of said store he had erected an adjustable awning, called "Coyle's frame," 50 feet in length and weighing 250 pounds. The flaps of the awning were elevated above the street 7 feet, and the awning when lowered projected from the building over the sidewalk about 5 feet. On the day of the accident, a high wind was blowing, and, as the plaintiff was walking along the north side of Main street, the awning fell and struck him, causing the injuries complained of.

The trial resulted in a verdict and judgment for \$2,000, which we are asked to review.

The first assignment of error is that the lower court improperly overruled the defendant's demurrer to the first count of the declaration. The second assignment of error is that the court refused to grant for the defendant an instruction which is set out in bill of exceptions No. 3. The third ground of objection is to the action of the court in giving for the plaintiff an instruction which is set out in bill of exceptions No. 4.

These three assignments of error involve but one question, and they will therefore be considered together. The question presented by each is whether or not a person maintaining a movable awning in front of his place of business in a city owes the duty of safety to the public using the street, and is liable to a person who, without fault on his part, is injured by its fall, regardless of the care or skill observed in its construction and maintenance; in other words, that the test of liability is not the lack of proper care on the part of the owner of the awning, but the fact of resulting injury, through no fault of his, to the party using the street.

It is well settled that public highways, whether they be in the country or in the city, belong, not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature. It is also an established general rule that any unauthorized obstruction which unnecessarily impedes or incommodes the lawfulness of a highway is a nuisance at common law. *City of Richmond v. Smith*, 101 Va. 181, 43 S. E. 345.

So far as the right of the public to travel unmolested over the highway is concerned, the dominion of the people is absolute, and is not confined to obstructions on the surface of the street, but extends with equal emphasis to encroachments upon the public right either below or above the surface. Indeed, an obstruction above the street that may injure the traveler is more dangerous than one on the ground, because the latter is more readily seen and avoided.

In *Wood on Nuisances* (3d Ed.) vol. 1, § 275, the principle governing cases of this nature is stated as follows: "As has been previously stated, every person in traveling upon a public street has a right to absolute safety, while in the exercise of ordinary care, against all accidents arising from obstructions of or imperfections in the street, and this applies as well to what is in the street as to what is over it." Further this author says: "It would seem that all signboards, cornices, blinds, awnings, and other things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom except such as are attributable to inevitable accident."

In *Elliott on Roads and Streets*, § 647, it is said: "It is not necessary, in order to constitute a nuisance, that there should be an actual physical obstruction to the public use upon the surface of the highway, for its use may be rendered as dangerous by objects above the way as by obstructions upon the surface." And at section 613 it is said: "So, too, they are liable for negligently suffering

awnings or structures to project over sidewalks and thus cause injury to those rightfully using the street." See, also, Dillon on Municipal Corporations, vol. 2, § 1033. The doctrine announced by these authors is supported by reason and authority. *Tarry v. Ashton*, 1 Q. B. Div. 314; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Congreve v. Smith*, 18 N. Y. 79; *Clifford v. Dam*, 81 N. Y. 52; *O'Hanlin v. Carter Oil Co.*, 54 W. Va. 510, 46 S. E. 565, 86 L. R. A. 893; *Bohen v. City of Waseca*, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564; *McHarge v. Newcomer*, 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N. S.) 298.

In *Congreve v. Smith*, supra, it is said: "The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above, or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisances, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise; the act being wrongful."

In the case of *Clifford v. Dam*, supra, it is said: "The public are entitled to an unobstructed passage upon the streets, including the sidewalks of the city." And in speaking of the obstruction in that case the court said: "It was not necessary to prove negligence. The action was not based upon negligence but on a wrongful act for which the defendants were responsible."

These authorities, and others that might be cited, lead to the conclusion that, unless justified by legislative authority, the owner of an awning erected and maintained over a public street becomes as to persons lawfully using the street an insurer. He maintains the same at his own peril, and any one receiving an injury from such awning, being himself free from blame, has a good cause of action against the owner thereof, regardless of the question of his negligence in the construction and maintenance of such awning.

We are therefore of opinion that the three assignments of error under consideration are not well taken.

The only remaining objection that we need notice is that taken to the action of the court in refusing to permit the defendant to introduce the stenographic report of the testimony of Dr. S. E. Brown, taken at the first trial of the case; the ground for the introduction of the stenographer's notes being that Dr. Brown was ill and unable to attend.

This court has held, in a recent case, that where a witness has died between two trials,

who was cross-examined by the attorney for the commonwealth at the first trial, his testimony at the first trial may be proved on the second; but this case recognizes that different principles apply where the witness who testified at the former trial is living. *Parks v. Commonwealth*, 109 Va. —, 63 S. E. 462.

In the case at bar the record shows that the absent witness was confined to a hospital in the city of Norfolk with an attack of typhoid fever. The defendant knew when the case was called for trial that this witness was absent and could not be present at that trial, but nothing was said until the trial was in progress, when the offer was made to introduce the stenographer's notes of this witness' testimony taken at a former trial. If the evidence of this witness was material, the defendant should, when the case was called, have moved for a continuance in order that he might secure the presence of the witness at some subsequent time, and not have waited until the trial was in progress to substitute for the living witness the stenographer's notes of his evidence at a former trial. This is not permissible under our practice. See *Wise Terminal Co. v. McCormick*, 107 Va. 376, 58 S. E. 584.

We find no error in the judgment complained of, and it must be affirmed.

Affirmed.

CARDWELL, J., absent.

(109 Va. 639)

LYNCHBURG MILLING CO. v. NATIONAL EXCHANGE BANK OF LYNCHBURG.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. TRIAL (§ 150*)—DEMURRER TO EVIDENCE.

A demurrer to evidence does not invade the province of the jury as triers of disputed facts, but simply calls on the court to determine whether as matter of law the evidence, though true, warrants a judgment for demurree.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 346; Dec. Dig. § 150.*]

2. BILLS AND NOTES (§ 523*)—OWNERSHIP OF DRAFT—EVIDENCE.

Circumstances in evidence in garnishment proceedings for the proceeds of a draft drawn by defendant on plaintiff in favor of the C. bank, and by it sent to garnishee bank, with bill of lading for grain shipped by defendant attached, for collection, are not inconsistent with the prima facie ownership of the payee under the negotiable instruments law (Code 1904, § 2841a24), supported by defendant's letter to garnishee, put in evidence by plaintiff, declaring the fund to be the property of the C. bank; the circumstances being that the C. bank, which was not a party to the proceedings, asserted no claim therein, that defendant waived protest and notice, that after the draft had been dishonored, and returned to the C. bank, plaintiff wrote defendant to return it and it would be honored, that when it came back the second time there was attached a penciled memorandum bearing defendant's initials, "Please send

back and present again," and that the C. bank stamped on the bill of lading that it was not responsible for the quantity, quality, or delivery of the grain, and indorsed the draft without recourse.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 523.*]

8. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR.

Exclusion of evidence which could not have affected the result was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

Error from Corporation Court of Lynchburg.

Garnishment proceedings by the Lynchburg Milling Company against the National Exchange Bank of Lynchburg. Judgment for garnishee. Plaintiff brings error. Affirmed.

Harrison & Long, for plaintiff in error.
Caskie & Coleman, for defendant in error.

WHITTLE, J. The plaintiff in error, the Lynchburg Milling Company, brought an action of assumpsit against the White & Rumsey Grain Company of Chicago, Ill., for the recovery of \$550, at the same time issuing an ancillary attachment and designating the defendant in error, the National Exchange Bank of Lynchburg, Va., as being indebted to and having effects of the defendant in its possession.

The Exchange Bank answered, denying the suggestion, but stated by way of explanation that it had received from and on account of the Continental National Bank of Chicago a draft drawn by the defendant, the White & Rumsey Grain Company, on the plaintiff, the Lynchburg Milling Company, in favor of the Chicago bank for \$533.35, for collection, to which draft a bill of lading was attached for a car load of oats shipped by the defendant to the plaintiff; that the draft was paid by the plaintiff to respondent, and the amount placed to the credit of the Chicago bank, but the fund was not remitted because of the pendency of the attachment. Whereupon the plaintiff suggested that the garnishee had not fully answered, and a jury was impaneled to inquire whether the amount in the hands of the Exchange Bank was the property of the defendant, the White & Rumsey Grain Company, or of the Chicago bank.

At the conclusion of the testimony for the plaintiff on that issue, the Exchange Bank demurred to the evidence, and to a judgment sustaining the demurrer this writ of error was allowed.

The first assignment of error involves the action of the court in compelling the plaintiff to join in the demurrer to the evidence.

The plaintiff insists that it had an absolute right to a trial by jury under the statute, of which it was deprived by the court's action in requiring it to join in the demurrer. But that assignment is founded on a misconception of the office of a demurrer to evi-

dence. It does not invade the province of the jury as triers of disputed facts; but, assuming that the evidence demurred to is true, the court is called on to determine whether such evidence as a matter of law warrants a judgment for the demurree. In other words, it is a supervisory power over jury trials, invoked and exercised by the courts, whose duty it is to decide questions of law arising upon undisputed facts.

In 6 Ency. of Pleading and Practice, 439, it is said: "There is nothing in this practice which is in contravention of jury trial"—citing *Hopkins v. Nashville, etc., Ry. Co.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354.

That case contains an exhaustive review of the authorities, and shows that the practice obtains in about one-half of the states of the Union, while in the United States courts and the courts of other states much more drastic methods prevail, such as directing verdicts and ordering nonsuits. The practice has come down to us from the common law, and is too thoroughly embedded in our jurisprudence to admit of serious question.

The next assignment ascribes error to the ruling of the court in sustaining the demurrer to the evidence.

As remarked, the sole issue of fact was whether the avails of the draft in the hands of the Exchange Bank were the property of the White & Rumsey Grain Company or of the Chicago bank.

The negotiable instrument act (Va. Code 1904, § 2841a24) declares that "every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

The Lynchburg Milling Company can stand on no higher ground in respect to this litigation than the maker of the draft, the White & Rumsey Grain Company, would have occupied at the suit of the Chicago bank. In either case, under the statute, the Chicago bank would prima facie be deemed a holder for value.

In addition to this prima facie presumption, the Lynchburg Milling Company put in evidence a letter written by the White & Rumsey Grain Company to the Exchange Bank in which it expressly declares that the fund in controversy is "the property, not of our company, but of your correspondent, the Continental National Bank."

In the case of *Oeters v. Knights of Honor*, 98 Va. 201, 205, 206, 35 S. E. 356, in discussing the effect of certain letters from the defendant to the plaintiff, Keith, P., in delivering the opinion of the court, observes: "They could not have been introduced by the defendant, but when offered by the plaintiff were, of course, admitted. The statements made in them were clearly relevant to the issue before the jury, are uncontradicted by

any evidence in the record, and are, therefore, to be taken as tending to prove the facts stated in them. We need not undertake to measure and define their exact probative force and effect. It is enough that they are declarations of the defendant offered by the plaintiff, and are germane to the issue"—citing *Downer & Co. v. Morrison*, 2 Grt. 238, 250.

In this state of the case the burden rested upon the plaintiff to prove that the White & Rumsey Grain Company was the owner of the fund and that the Chicago bank held the draft, not for value, but for collection merely. If that had been the true theory of the case, the Chicago bank would have had no interest in concealing the fact, and the deposition of one of its officers would have put the question at rest.

The plaintiff, however, did not undertake to disprove the prima facie title of the Chicago bank by direct evidence, but chose rather to rely on certain circumstances as tending to sustain its contention. For instance, it was said that the Chicago bank had not asserted claim to the fund or employed counsel to maintain it. But the fact must not be lost sight of that the bank was not a party to the litigation, and, doubtless, preferred to leave the defense to the White & Rumsey Grain Company, which was a party, and would have been liable over to the payee in the event the fund was held subject to the plaintiff's attachment. In its correspondence with the Exchange Bank, the Chicago bank uniformly claimed the proceeds of the draft, and acted under the advice of counsel in Chicago.

Our attention has also been called to the circumstances that the drawers waived protest and notice, and that, after the draft had been dishonored and returned to the Chicago bank, the plaintiff wrote the defendant to return the draft and it would be promptly honored. When the draft came back the second time, there was a slip attached with a pencil memorandum bearing the initials of the White & Rumsey Grain Company, "Please send back and present again," and also that the Chicago bank stamped on the bill of lading that it was neither responsible for the quantity, quality, nor delivery of the goods, and indorsed the draft without recourse.

We do not regard these circumstances inconsistent with the Chicago bank's bona fide ownership of the draft. The drawer, a wholesale grain company, resided in Chicago, and the draft was drawn on a customer in a distant state. In the event the draft was not paid, the Chicago bank would have had ready recourse against the drawer, and it seems to us that its action was not incompatible with ordinary business methods and the dictates of common prudence.

Lastly, the ruling of the court in excluding certain correspondence between the Lynchburg Milling Company and the White & Rumsey Grain Company is made the ground of exception.

The excluded letters, if admissible, possessed very little probative value, and could not have affected the result, so that the error, if error there was, in excluding the letters, was harmless.

Upon the whole case the judgment is plainly right and must be affirmed.

Affirmed.

(109 Va. 676)

POTOMAC POWER CO. v. BURCHELL et al.
(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. EMINENT DOMAIN (§ 320*)—PROCEEDINGS BY WATER POWER COMPANY—PAYMENT OF COMPENSATION—EFFECT AS TO ACQUIREMENT OF TITLE.

In view of Code 1887, § 1079 (Code 1904, p. 584), relating to condemnation proceedings, and providing that, on payment into court of the sum awarded as compensation for land, the title shall vest in a company taking land in fee simple, where it appears that money was paid into court by a water power company, and the commissioners' report was confirmed by consent, and that the compensation awarded was ordered to be paid to the attorney of the owner of the land taken, whatever title he had vested by force of the proceedings in the company in fee simple.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 852; Dec. Dig. § 320.*]

2. EVIDENCE (§ 397*) — PAROL EVIDENCE — VARYING OR CONTRADICTING A WRITTEN CONTRACT.

A plain and unambiguous contract in writing is within the direct terms of the rule which forbids parol evidence to vary or contradict a written instrument.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

3. EMINENT DOMAIN (§ 317*)—PROCEEDINGS BY WATER POWER COMPANY—CONTRACT DIVESTING TITLE—CONDITIONS SUBSEQUENT.

The title to land condemned by a water power company having vested in the company by force of the statute and the terms of the contract between the company and the landowner, any provision or stipulation in the contract by which the title was to be divested is to be regarded as a condition subsequent.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 317.*]

4. DEEDS (§ 155*) — MEANING — "CONDITION SUBSEQUENT."

A "condition subsequent" is one to be performed or fulfilled after the vesting of the estate, and the intent of which is to defeat it.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 488-495; Dec. Dig. § 155.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1402-1404; vol. 8, p. 7610.]

5. DEEDS (§ 155*)—CONDITIONS SUBSEQUENT AS NOT BEING FAVORED IN LAW.

Conditions subsequent are not favored in law because they tend to destroy estates.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 488-495; Dec. Dig. § 155.*]

6. DEEDS (§ 167*)—CONDITION SUBSEQUENT—BREACH—RELIEF IN EQUITY.

A contract between the owner of land and a water power company proceeding to condemn it provided that, on payment of the money by the commissioners into court, it should be considered as a complete satisfaction and answer to all objections on the part of the owner, and that the report was to be confirmed and the title to the land vested in the company. It then provided that the company before using the land for any purpose should pay the owner \$100 within five years, and that, if it failed to do so within such time, the title should revert to the owner. *Held*, that the provision for the reversion of the title on failure to pay was, in contemplation of a court of equity, a penalty or forfeiture, the object of which is to secure the payment of money, against which a court of equity would relieve.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 574; Dec. Dig. § 167.*]

7. DAMAGES (§ 85*)—PENALTY FOR NONPERFORMANCE OF CONTRACT.

The general principle is that, whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty only as accessory, and intended only to secure due performance or damage really incurred by nonperformance.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-185; Dec. Dig. § 85.*]

8. EQUITY (§ 24*)—RELIEF AGAINST PENALTIES FOR NONPERFORMANCE OF CONTRACT.

The true test by which to ascertain whether relief against a penalty for nonperformance of a contract can be had in equity is whether compensation can be made, and, if it cannot be made, equity will not interfere, but, if it can, it will grant relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 69-76; Dec. Dig. § 24.*]

9. EQUITY (§ 24*)—RELIEF AGAINST PENALTY TO SECURE PAYMENT OF MONEY.

If a penalty provided for in a contract is merely to secure payment of money, courts of equity will relieve the party on payment of the principal and interest.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 69-76; Dec. Dig. § 24.*]

Appeal from Circuit Court, Fairfax County.

Suit by the Potomac Power Company against Landon Burchell and others to quiet title. From a decree for defendants, plaintiff appeals. Reversed.

Moore, Barbour & Keith, for appellant.
Norton & Boothe, for appellees.

KEITH, P. The Potomac River Power Company in June, 1898, gave notice that it would on the 18th of the ensuing July apply to the county court of Fairfax for the appointment of five disinterested freeholders, pursuant to section 1085 of the Code of 1887 (Code 1904, p. 586), to ascertain a just compensation to the owners thereof for such land as was proposed to be taken by that company for its purposes.

In accordance with this notice, five freeholders were appointed, who, acting in obedience to the order of court, returned their report, dated the 31st of October, 1898, in which they stated that they had ascertained

that the sum of \$150 would be a just compensation for the land taken.

At the January term, 1899, of Fairfax county court, it appearing that the Potomac Power Company had paid into court the sum of \$150 ascertained by the commissioners, the matter was referred to W. P. Moncure, a commissioner of accounts, to report as to its distribution, and it was further ordered "by consent of parties that the report of the commissioners filed herein be and the same is hereby confirmed and recorded together with the plat that accompanies it in the deed books of this county, and this matter is continued."

At the ensuing February term the following order was entered:

"Potomac River Power Co. v. N. W. Burchell, etc.

"The report of W. P. Moncure, commissioner of accounts, is now filed in this cause. No exceptions being made to same, the said report is now confirmed. And the court doth adjudge and order that out of the money in his hands the clerk to pay the costs and commissions incident to this case and the balance to pay to C. Vernon Ford, attorney for N. W. Burchell, and take his receipt for the same. And this order is final."

There the matter rested until January, 1905, when the Potomac Power Company, the successor of the Potomac River Power Company, filed its bill, in which it shows that on the 9th of January, 1899, it entered into a contract in writing with Norval L. Burchell, in which it was set forth and agreed that the power company had instituted proceedings to acquire for its purposes by condemnation a certain parcel of land in said county containing three acres, more or less; that commissioners had allowed Burchell the sum of \$150 for said land; that Burchell excepted to their report; that it was finally agreed that, upon the payment into court of the sum of \$150, the exceptions to the report of commissioners should be withdrawn, the court to dispose of the money as might be proper and the report confirmed; that the title acquired by said company, however, in said condemnation proceedings, should be subject to the condition that said company should pay Burchell the further sum of \$100 before using said land for its purposes or any purpose; and that such payment should be made on or before five years from the date of the agreement, and, in event the payment should not be made in the time specified, then the title of said company to revert to Burchell, and the said company to convey by special warranty to Burchell the title acquired by the condemnation proceeding, but upon payment by said company to Burchell of said sum of \$100 within the time specified its title to

said parcel of land should become absolute and unconditional so far as Burchell and his heirs should be concerned, and Burchell was then to convey the said parcel of land to the said company, its successors and assigns, with special warranty, free of all liens and incumbrances which might be placed thereon by said Burchell. The bill further shows that Burchell died some time prior to January 9, 1904, a nonresident of the state of Virginia; that he had never made any demand on the complainant for the payment of said sum of \$100, and that, up to the time of filing the bill, no executor or administrator of his estate had qualified in Virginia, so that there was no one to receive the money due to him or his estate; that complainant is ready and desires to make the payment, with interest if it is proper; that Burchell left surviving him his widow and several children, his heirs at law; that complainant was willing to have waived, though it did not do so, the legal requirement that the \$100 should be paid to the personal representative of Burchell, and was willing to make payment to the widow and heirs at law, and take a deed from them, but was afterwards advised that Edward Burchell, one of the children, was non compos mentis; that no deed had ever been tendered to complainant in accordance with the agreement, and complainant prays that the cloud resting upon its title by reason of the provisions of the agreement of the 9th of January, 1899, between the Potomac Power Company and Burchell be quieted, and that complainant may have such other relief as his case requires.

The defendants answered this bill at length. They admit that Burchell was at the time he entered into said agreement and at the time of his death, which occurred in January, 1899, a nonresident of the state of Virginia, and that, so far as they are informed, he never made any demand upon the complainant, and that no executor on the estate of Burchell had ever qualified in Virginia. They deny that there was any obligation upon Burchell or upon his executor to make any demand upon the Potomac Power company for the payment of the sum of money in question, and further aver that at all times within the five years mentioned in the agreement Landon Burchell, who acted for his father in the preparation of said agreement, and who is the executor and trustee under his will, resided in the city of Washington, and was prepared and authorized to accept the money in controversy, if there had been any desire upon the part of the power company to make payment of it.

That Burchell at the time the commissioners reported and fixed the compensation at the sum of \$150 had promptly excepted upon the ground that the amount allowed was totally inadequate, and that he was preparing to show that said parcel of land on account of its peculiar location was of

value largely in excess of the sum fixed by the commissioners; that after Burchell had filed his exceptions, in order to avoid protracted and costly litigation, an agreement was reached between the power company and Burchell, a copy of which is filed with plaintiff's bill. The answer states the defendants' view of the negotiations which led up to the contract filed with the bill at great length; the substance of it being that the sum of \$100 provided for in the contract was not considered by Burchell as representing the value of the property, which it is claimed was and is, greatly in excess of said sum, but that the real purpose and intention of said agreement was to give to the power company an option during the period of five years, by force of which upon the payment of \$100 within the time limited the title of Burchell to the three acres of land was to be divested, and the deed was then to be made by Burchell conveying it with special warranty to the Potomac Power Company.

A good deal of evidence was taken in support of this view, which resulted in the decree of the circuit court of Fairfax by virtue of which a commissioner was appointed with instructions to convey to Landon Burchell, to be held by him in trust in accordance with the terms of the will of Norval W. Burchell, all the right, title, and interest acquired by complainant and those under whom it claims under the condemnation proceeding in accordance with the agreement of January 9, 1899; and from that decree an appeal was allowed by this court.

Reference is made in the record to the source of Burchell's title as having been founded upon a sale for delinquent taxes assessed against the Chesapeake & Ohio Canal Company, which had at one time owned the land in controversy; but we have not thought it necessary to discuss that question, as that corporation is not named as a defendant in the bill, and is taking no part in this litigation. We have set forth in detail the condemnation proceeding in the county court of Fairfax, for upon the legal effect of that proceeding this whole controversy rests.

By section 1079 of the Code of 1887 (Code 1904, p. 584) it is provided that "the sum so ascertained to be a just compensation may be paid to the person entitled or into court. * * * Upon such payment the title to * * * the land for which said compensation is allowed shall be absolutely vested in the company in fee simple."

In *Southern Ry. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570, it is said: "The payment of the fund into court was a condition precedent to the vesting of the title, and, as soon as it was paid, the title did vest absolutely."

It appears from the condemnation proceeding in this case that the money was paid into court, and that the report of the commissioners was confirmed by consent of the

parties, and not only that, but it further appears that the sum ascertained by the commissioners was by order of the court paid to the attorney of N. W. Burchell, the owner of the land taken. Whatever title Burchell had by force of this proceeding vested in the Potomac Power Company in fee simple.

The contract of January 9, 1899, is in writing. It is plain and unambiguous, and is within the direct terms of the rule which forbids us to receive parol evidence to vary or contradict a written instrument. *Towner v. Lucas*, 13 Grat. 705; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544.

The contract recites: "Whereas the commissioners appointed by said court to ascertain a just compensation to be paid the owner or owners of said land duly and regularly made their report to said court, and therein and thereby assessed and fixed the amount to be paid by said company for said land at \$150, and

"Whereas, the said N. W. Burchell, claiming to be the owner of said land, is dissatisfied with the amount so allowed, and has filed exceptions thereto and has agreed in consideration of this agreement to withdraw his said exceptions and consents to the confirmation of the said report:

"Now, therefore, this agreement witnesseth, that the parties hereto have agreed and do hereby covenant and agree to and with each other as follows:

"First. That, upon the payment of said sum of one hundred and fifty dollars into said court, such payment shall be considered as a complete satisfaction and answer to all objections and exceptions to said report, and thereupon the said report to be confirmed by a consent order vesting in said party of the second part title to said land, the said sum of \$150 to be disposed of by the court as it may determine right and proper.

"Second. That the title so to be acquired by the said party of the second part as aforesaid shall be subject to this condition: that the party of the second part shall pay to the said Burchell the further sum of one hundred dollars before using said land for its purposes or any purpose, provided that such payment of said additional one hundred dollars shall be made on or before five years from this date, and in the event the said party of the second part shall fail to make such further payment of one hundred dollars within the time aforesaid, then and in such event, all title acquired by party of the second part to said land as aforesaid shall revert to said Burchell, and the party of the second part shall and will convey unto the said Burchell, with special warranty, all the right, title, and interest acquired by it under said condemnation proceedings."

This contract recognizes in explicit terms the force and effect given to condemnation proceedings by section 1079 of the Code of 1887 upon the title to land where the terms

of the statute have been complied with, and, if any added force could be given to the statute by agreement of parties, it is to be found in the terms of this contract, which declares that the payment of \$150 into court should be considered as a complete satisfaction and answer to all objections, and that thereupon the report was to be confirmed by a consent order vesting in the party of the second part title to the land. The title having vested, any provision or stipulation in that contract by which the title was to be divested is to be regarded as a condition subsequent.

A condition subsequent is one which is to be performed or fulfilled after the vesting of the estate, and the intent of which is to defeat it. 2 Minor, 266. And it is well settled that conditions subsequent are not favored in law because they tend to destroy estates. *People's Pleasure Park Co. v. Rohleder*, 109 Va. —, 61 S. E. 794.

The contract having already provided that upon the payment of the money awarded by the commissioners into court it should be considered as a complete satisfaction and answer to all objections on the part of Burchell, and that the report was to be confirmed and the title to the land vested in the power company, it was then provided that, before using the land for its purposes or any purpose, the power company should pay to Burchell the further sum of \$100 within five years from the date of the agreement, and that, if it failed to make such further payment within the time aforesaid, the title of the power company should revert to Burchell.

In the contemplation of a court of equity, the provision that, upon the failure to pay the specified sum within the time limited, the title should revert to Burchell, is a penalty or forfeiture, the object of which is to secure the payment of money, against which a court of equity will relieve.

"The general principle now adopted is that, whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance or the damage really incurred by the nonperformance. In every such case the true test by which to ascertain whether relief can be had in equity is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon paying the principal and interest." 2 Story's Eq. Jur. § 1314.

In *Hacket v. Alcock*, 1 Call, 533, it is said: "A court of equity will always relieve against a penalty, where compensation can be made."

In *Nelson v. Carrington*, 4 Munf. 332, 6 Am. Dec. 519, it is said: "Equity is not fond of taking advantage of forfeitures arising

merely from a lapse of the time specified; and it is the constant course of courts of equity to relieve against such forfeitures on making adequate compensation."

In the case of *Asher v. Pendleton*, 6 Grat. 628, Pendleton and Asher had purchased a tract of land at public auction jointly upon credit and under a written contract between them, which provided that, if Pendleton failed to pay all or any portion of his share of the purchase money so that Asher had to pay it, Asher should have the whole land, and repay to Pendleton any portion of the purchase money he had paid. Pendleton failed to pay and Asher paid in full. It was held by the court that this provision was a penalty against which a court of equity would relieve.

The condition upon which a court of equity grants relief against a forfeiture or penalty is that compensation for nonperformance can be made; and in this case it is easy of ascertainment. The stipulation not performed was for the payment of \$100 in cash on or before a given day in January, 1907. The money was not paid, and as was said by this court in *Bethel v. Salem Imp. Co.*, 93 Va. 354, 25 S. E. 304, 33 L. R. A. 602, 57 Am. St. Rep. 808: "The measure of damages for a failure to pay money is, with few exceptions, the principal sum with legal interest thereon from the time the payment was due."

In *Selden v. Camp*, 95 Va. 527, 28 S. E. 877, Judge Harrison, speaking for the court, says: "Mere default in the payment of money at a stipulated time generally admits of compensation, and hence the time of payment is rarely of the essence of the contract, and when time is not of the essence of the contract, and compensation can be made, courts of equity can grant relief even against the failure to perform punctually conditions precedent."

We have then this case: By force of the condemnation proceedings in the county court of Fairfax, the title to the land involved in this litigation was vested in the Potomac Power Company. The contract of January 9, 1899, between Burchell and the Potomac Power Company, is fully set out in the writing filed as an exhibit with the bill. There is no suggestion of any fraud, accident, or mistake with respect to the terms of this contract; and, being plain and unambiguous, it is within the rule which excludes parol evidence to vary or contradict a written instrument. The stipulation contained in the contract with respect to the payment of \$100 within five years, and, in the event that it was not paid within that time, that the title which had vested in the power company should revert to Burchell, is a penalty or forfeiture, the nonperformance of which admits of compensation, and against which a court of equity will relieve.

From all of which it follows that the de-

cree of the circuit court of Fairfax must be reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

(109 Va. 556)

FARMERS' MFG. CO. v. WOODWORTH.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACTS.

A contract in writing, complete on its face, cannot be altered by parol evidence of inconsistent agreements previously or contemporaneously made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

2. EVIDENCE (§ 434*)—PAROL EVIDENCE AFFECTING WRITINGS—INCOMPLETE CONTRACTS.

A partnership wrote to plaintiff, stating that it would build a steel structure as per plans submitted. Plaintiff accepted the proposition. The plans referred to were blueprints drawn to no scale, and containing no specifications. Defendant's company erected the device, but it was condemned as unsafe. Held, in an action for breach of contract, that parol evidence was admissible to show that plaintiff was ignorant of the mechanism of the machine to be built; that defendant's company were mechanical experts; that plaintiff submitted the model to them, and that they submitted a plan of the device, and assured plaintiff that, if built according to that plan, it would meet the specified requirements, and that the machinery would be safe; that plaintiff gave the contract to defendant relying upon such warranties; that the machinery was wholly worthless; and that the representations made to induce plaintiff to enter into the contract were false.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 434.*]

3. WITNESSES (§ 152*)—COMPETENCY—DEATH OF PARTY TO CONTRACT.

An agent of a corporation is not rendered incompetent to testify as to a contract by the death of a member of a partnership with whom the contract was made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 658, 659; Dec. Dig. § 152.*]

Error to Circuit Court, City of Norfolk.

Action by the Farmers' Manufacturing Company against A. L. Woodworth. Judgment for defendant and plaintiff alleges error. Reversed.

Jeffries, Wolcott & Wolcott, for plaintiff in error. V. H. Kellum and Brooke & Brooke, for defendant in error.

WHITTLE, J. The plaintiff in error, the Farmers' Manufacturing Company, applied to the late firm of T. W. Godwin & Co., of which the defendant in error, A. L. Woodworth, is the surviving partner, to manufacture for it an amusement device called a "revolving parachute," the general design of which is described as follows: "A circular platform was to be elevated by means of a revolving upright screw, or shaft, driven by electric power applied to machinery at its base. As this shaft revolved the plat-

form was forced upward, and when it reached the top of the shaft was stopped, and the platform released and left free to descend by gravitation, revolving around the shaft."

Numerous interviews were had between the parties touching the construction of this contrivance, which culminated in the following correspondence:

"Norfolk, Va., July 3, 1906.

"J. Frank East, Esq., Norfolk, Virginia.

"Dear Sir: We beg to advise you that we will build the steel structure, with sixty feet of screw as per plans submitted and erect the same on the foundation prepared by you, * * * for the sum of five thousand (\$5,000) dollars. It is further understood that you are to transport all the material, taking the same from our works and delivering the same at the point and alongside the foundation where the structure is to be erected, * * * and free of cost to the builders. That the structure shall be ready for delivery at our works by the 15th of September, 1906. The brake and air cushion shall be efficient for the purpose intended. The tower roof shall be of galvanized metal and oval in form. The two approaches for reaching the floor of the observation tower shall be inclosed. All black iron work to be covered with two coats of mineral paint. The structure and mechanism to be built on the lines of the illustrated model submitted.

"Respectfully submitted,

"T. W. Godwin & Company."

"Norfolk, Va., July 10, 1906.

"Virginia Iron Works, (T. W. Godwin & Company), Norfolk, Virginia.

"Dear Sir: We are in receipt of your favor of the 3rd, reference to building the steel structure and accept proposition, and ask that work proceed with all possible dispatch.

"Yours respectfully, Farmers' Mfg. Co.,
"By J. Frank East."

When completed, the structure was erected on the grounds of the Jamestown Exposition Company, but it proved unsatisfactory, and was condemned by the mechanical expert of that company, whose duty it was to inspect and pass on all structures set up on the grounds. It was pronounced unsafe and dangerous to human life, and its operation within the grounds forbidden.

Thereupon this action of assumpsit was brought by the plaintiff in error against Woodward, surviving partner of himself and T. W. Godwin, deceased, to recover damages for their alleged breach of contract in connection with the construction of the machine. To a judgment on behalf of the defendant this writ of error was allowed.

There are three counts in the declaration, which may be thus summarized:

(1) That the plaintiff was ignorant of the nature and mechanism of the machine and how it ought to be built so as to operate properly, and whether it could be used with safety to human life, and so constructed that the platform would ascend and descend in 10 minutes (that being the speed agreed on in order to make it a financial success). That T. W. Godwin & Co. were mechanical experts and skilled in such matters, and the plaintiff submitted the model to them and explained the purposes for which the device was intended, telling them that it must be so constructed as to be capable of being operated with safety and within the time limit prescribed, and that, unless assured that these essentials could be attained, the plaintiff did not desire the machine to be made. That the manufacturers submitted a plan of the device, and assured the plaintiff that, if built according to that plan, it would meet the specified requirements, and promised and warranted that, if they were awarded the contract of construction, the machine would be safe and suitable for the purpose mentioned. That the plaintiff, relying upon these warranties, and in consideration thereof, gave the contract to T. W. Godwin & Co. That the warranties were broken in the particulars set forth in the declaration, and the machine was wholly worthless for the purposes intended.

(2) The second count is founded upon the false representations of T. W. Godwin & Co. as to a fact within their knowledge as experts that the machine, if constructed by them according to the plans submitted, could be operated without danger to human life and at the required speed, and would be suitable for the uses contemplated. That, relying upon these representations, the plaintiff entered into the contract, and that the representations were false and the machine worthless.

(3) The third count alleges the breach of an implied warranty on the part of the manufacturers, that the machine contracted for would be reasonably suitable for the purposes intended, which purposes were known to them—and also the fact that the plaintiff relied on their judgment and skill in the construction of the device.

The plaintiff set out circumstantially what it expected to prove under the several counts of the declaration; but, upon objection, the court excluded the evidence, being of opinion that the correspondence contained in the letters of July 3 and 10, 1906, constituted a complete written contract between the parties, the terms of which it was not permissible to vary or add to by parol evidence. The trial proceeded upon that theory; and naturally resulted in a verdict for the defendant.

The legal proposition is not controverted that a contract in writing, complete on its face, cannot be altered or contravened by

parol evidence of inconsistent agreements and undertakings previously or contemporaneously made. *Towner v. Lucas*, 13 Grat. 705; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544; *Carlin v. Fraser*, 105 Va. 216, 53 S. E. 145.

The rule is thus stated in *Slaughter v. Smither*, supra: "If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or add to its terms is not admissible."

In the instant case, however, it is obvious from the letters themselves, read in connection with the plans to which they refer, that there were necessarily other provisions of the contract which do not appear on the face of the writings. The letter of July 3, 1906, which composes the body of the alleged written agreement, is of the most general character, and bears internal evidence of the fact that, to be intelligible, it must be read in the light of outside matters in the minds of the parties. The agreement to build "the steel structure," dissociated from previous negotiation as to the particular structure contemplated by the parties and to which it manifestly refers, contains no intimation of what was really in the minds of the contracting parties. "Structure" is a term of general signification, and, in the absence of explanatory words, conveys no definite idea of what is intended.

Nor is the situation materially aided by inspection of the plans referred to in the letter. They are drawn to no scale and contain no specifications, but are blueprints presenting merely in general outline tracings of the proposed device.

In fine, it would not be possible for one possessed of no information other than that supplied by the alleged written agreement to form an intelligent idea of the contemplated structure.

The rule of exclusion of parol evidence has no application where it is apparent from the writing itself that it does not embody the entire agreement. In such case, the writing being incomplete, it must be supplemented by other evidence, not to contradict or vary its terms, but to establish the real contract between the parties.

Besides, parol evidence was admissible under the second count of the declaration to prove the alleged false representations made by T. W. Godwin & Co. to induce the plaintiff to enter into the contract. Such evidence would be equally admissible, whether the contract were written or verbal. *Grim v. Byrd*, 32 Grat. 293, 300; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Herron v. Dibrell*, 87 Va. 289, 296, 12 S. E. 674; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; *Grosh v.*

Ivanhoe, etc., Co., 95 Va. 161, 27 S. E. 841; *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588; *Guarantee Co. v. National Bank*, 95 Va. 480, 491, 28 S. E. 909.

It follows from the foregoing views that the case must be tried de novo along essentially different lines; and that fact renders it unnecessary to notice subordinate assignments of error upon questions which may not arise at the next trial.

So, also, with respect to the allegations of the third count of the declaration. If a proper case shall arise for the application of the doctrine of implied warranty of fitness of the machine for the purpose for which it was intended, the jury can be instructed upon that aspect of the case.

The defendant in error assigns as cross-error the action of the court in admitting the testimony of the witness East. It is insisted that, Godwin being dead, East was rendered incompetent to testify by the terms of the statute.

East was the agent of the plaintiff, and this court held in the case of *Mutual Life Insurance Co. v. Oliver*, 95 Va. 445, 28 S. E. 594, that the agent of a corporation contracting for his principal is not rendered incompetent to testify by reason of the death of the other contracting party.

For these reasons, the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

(109 Va. 615)

HUNTER et al. v. HICKS et al.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. DEEDS (§ 124*)—CONSTRUCTION—ESTATES CONVEYED—FEE SIMPLE.

A husband deeded land and personal property to a trustee for the benefit of his wife, giving the wife power by the deed to sell the property and dispose of the proceeds as she might see fit with the co-operation of the trustee, who was required to execute such instruments as the wife should direct. If the wife should die before the husband, the grant of the property remaining was to cease, but she was to have power to dispose of one-half of it, the husband reserving the right if he died before his wife to dispose of one-half of the property then remaining by will. *Held*, that the wife took an absolute title to the property conveyed, the reservation to the husband being void for repugnancy to the first estate conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-355, 416-428; Dec. Dig. § 124.*]

2. DEEDS (§ 142*)—ESTATE CONVEYED—RESERVATIONS—VALIDITY.

The reservation to the husband of one-half of the property remaining was void for uncertainty.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 142.*]

Error to Circuit Court of City of Norfolk.

Action by Robert I. Hunter and others against W. H. Hicks and others. A demurrer to the declaration was sustained, and plaintiffs bring error. Reversed.

The declaration was as follows:

"Robert I. Hunter, Newtie E. Hunter and Louise E. Shanks complain of W. H. Hicks and the Calvert Mortgage & Deposit Company of Baltimore City, of a plea of trespass, for this, to wit, that on the 2d day of March, in the year 1871, one Isaac R. Hunter was seised and possessed of that certain tract, piece or parcel of land lying and being in the county of Norfolk, near the city of Norfolk, at the town of Huntersville, which was the place and residence where the said Isaac R. Hunter then resided, and bounded on the north by the lots formerly owned by Reynolds and Hinton, on the south by other land of the said Isaac R. Hunter and Mrs. Barnes' land and others, on the east by other land of the said Isaac R. Hunter, and on the west by Lambert's Point Road, containing by estimation five acres, and also of another tract of land, adjoining that above described, containing about 40 acres, also in the said town of Huntersville, and, being so seised and possessed of said two tracts of land, the said Isaac R. Hunter executed and delivered to one V. O. Cassell, trustee, a certain deed, in the following words and figures, to wit:

"This deed made this 2nd day of March Anno Domini one thousand eight hundred and seventy one, between Isaac R. Hunter of the first part, V. O. Cassell trustee of the second part and Martha Louisa Hunter wife of the said Isaac R. Hunter of the third part.

"Witnesseth that in consideration of the love and affection which the said Isaac R. Hunter hath and beareth for his wife the said Martha Louisa Hunter, and for and in consideration of the sum of five dollars, to the said Isaac R. Hunter in hand paid by the said V. O. Cassell trustee the receipt whereof is hereby acknowledged, he, the said I. R. Hunter doth grant unto the said V. O. Cassell trustee the following property with general warranty with its appurtenances to wit: viz.: that certain tract piece or parcel of land lying and being in the county of Norfolk near the city of Norfolk, at the town of Huntersville, and is the place and residence where the said I. R. Hunter now resides and bounded as follows: on the north by the lots formerly owned by Reynolds & Hinton, on the south by said Hunter's land and Mrs. Barnes' land and others, on the east by Hunter's land, and on the west by Lambert's Point Road, containing by estimation five acres. Also the balance of the land owned by the said Isaac R. Hunter in the town of Huntersville, consisting of about forty acres and adjoining the land hereinbefore described. Also the stock on the said lands consisting of four horses, and ten hogs. Also the following personal property, one rockaway, one cart & gear, farming utensils, household & kitchen furniture consisting of six beds, five

bedsteads, three dozen chairs, four tables, one piano, four looking glasses, and a pot of crockery, three stoves, one side board, one bond for twenty five hundred dollars dated August 31st, 1869, payable in installments of one and two years, executed to said I. R. Hunter by H. J. Reynolds, and I. W. Hinton. Also a note for four hundred and fifty dollars executed by Wm. Taylor to said Isaac R. Hunter dated the 25th day of Jan., 1871, payable two years after date. Also a note for four hundred and fifty dollars executed by Wm. Taylor to said I. R. Hunter dated 26th day of Jan., 1871, payable three years after the date thereof. To have and to hold the said property hereinbefore described unto the said trustee upon trust, that he the said trustee shall permit the said Martha Louisa Hunter, to occupy possess and enjoy the said property, and the rents issues and profits thereof to take for and during the term of her natural life, for her support and family free and clear of and from all manner of charge and incumbrance of her said husband; it being the express intent and meaning of these presents that the said property is conveyed to the said trustee to hold exclusively and absolutely for the benefit of said Martha Louisa Hunter as though she was a femme sole, free and clear entirely of and from any marital rights whatever of her said husband, except as hereinafter provided for. But if at any future time it shall by the said Martha Louisa Hunter be thought proper for her interest to sell the said property in whole or in part for her benefit then and in that event it is agreed on the part of said grantor and trustee and the third party hereto that the said Martha Louisa Hunter shall have full power to sell and dispose of the property hereinbefore described and to execute proper deed or deeds of conveyance for the same, through and by said trustee, or other writing, transfer or delivery at any time in the same manner and make such disposition of the proceeds of the sale as she may think proper, and also through said trustee to collect the said notes, and deliver them to the makers or other proper person and dispose of their proceeds always however and in all cases with the co-operation and assent of the said V. O. Cassell trustee who on his part agrees to execute such instruments as may be needful in the premises as the said Martha Louisa Hunter may direct by her becoming a party to and signing said instrument. And the said Martha Louisa Hunter may also if she think proper with the proceeds as aforesaid purchase other property real or personal through and by her said trustee, and the deed made to said trustee for her sole benefit, and to be held upon the same terms as the other property herein mentioned. If the said Martha Louisa Hunter should depart this life leaving her said husband the grantor in this deed surviving then this grant as to the property then remaining is to cease and determine, but she shall have

power and full authority is hereby given her by instrument in the nature of a last will and testament to dispose of one half of the property hereinbefore described or hereafter acquired as aforesaid then remaining but if the said Isaac R. Hunter should die first then and in that event he hereby expressly reserves to himself full power and authority to dispose of the other half of the property then remaining hereinbefore described or hereafter acquired by his last will and testament in such manner and to such persons as he shall or may think proper, by his said will. And it is further agreed between the parties aforesaid that V. O. Cassell the trustee as aforesaid, shall be responsible and liable only for such money or property as may come into his possession under the deed and not otherwise;—and in the same manner as above stated incumbrances may be created upon the said property such as are consistent with the true intent and purposes of this deed; that is to say money may be borrowed and deed of trust executed as aforesaid given to secure the same upon the land hereinbefore described. The said trustee is to have and receive two and one half per cent. upon the matters of this trust.

"There is a deed of trust now standing to H. M. Bowden trustee to secure Rebecca B. Tunis the payment of a bond for \$2,100 executed by said I. R. Hunter. Now it is the intention of the grantor in this deed to liquidate the debt secured in said deed, and this deed is made subject to said deed.

"Witness the following signatures and seals:

"I. R. Hunter, [Seal.]
 "Martha L. Hunter, [Seal.]
 "V. O. Cassell, Trustee. [Seal.]

"By this said deed the said Martha Louisa Hunter, the wife of the said Isaac R. Hunter, acquired title to the property mentioned in said deed in fee simple, and subsequently the said Martha Louisa Hunter departed this life intestate, leaving surviving her as her only heirs at law her four children, Emily L. Hunter, Armie N. Hunter, and the said Robert I. Hunter and Newtie E. Hunter, whereupon the said land descended to the said Emily L. Hunter, Armie N. Hunter, Robert I. Hunter, and Newtie E. Hunter, in fee simple, an undivided one-fourth interest to each. The said Emily L. Hunter, who subsequently intermarried with and survived one Joseph R. Spratley, by her last will and testament, duly admitted to probate, devised her undivided one-fourth interest in said land to the said Newtie E. Hunter, and the said Armie N. Hunter, who subsequently intermarried with one Joseph D. Gaskins, afterwards departed this life intestate, whereupon her undivided one-fourth interest in said land descended to her only child and heir at law, to wit, the said Louise E. Shanks, subject to the estate therein as tenant by the curtesy of the said Joseph D. Gaskins, which was by him, by his deed bearing date on the 15th day of

August, 1904, released and conveyed to the said Louise E. Shanks under and by her then name of Louise E. Sobral, and by reason of the premises, that heretofore, to wit, on the 1st day of January in the year 1907, the said plaintiffs were seised and possessed in fee simple absolute, the said Newtie E. Hunter as to an undivided one-half part or interest, the said Robert I. Hunter as to an undivided one-fourth part or interest, and the said Louise E. Shanks as to the remaining one-fourth part or interest, of a certain lot, piece or parcel of land, situate, lying, and being on the western side of Amelia street, between Lee and North streets, in the village of Huntersville, in Tanner's Creek Magisterial District of the county of Norfolk, in the state of Virginia, known, numbered, and designed as lot numbered twenty-four (24) on the plat filed in the suit of I. R. Hunter versus J. D. Gaskins, lately depending in the corporation court of the city of Norfolk, marked 'Plan of a Part of Huntersville,' and also recorded in the clerk's office of the said county of Norfolk, in map book No. one (1), at page thirty (30), which said lot is bounded, with reference to said plat, as follows, to wit: Beginning on the western line of a street which is now called Amelia street, opposite the site of the late residence of the said Isaac R. Hunter, deceased, at a point distant in a southerly direction measured along the said western line of Amelia street, twenty-eight (28) feet from the intersection of the said western line of Amelia street with the southern line of North street; running thence, in a southerly direction, along the said western line of Amelia street, twenty-eight (28) feet; thence in a westerly direction, parallel with the said southern line of North street, ninety-nine (99) feet; thence in a northerly direction, parallel with the said western line of Amelia street, twenty-eight (28) feet; and thence, in an easterly direction, parallel with the said southern line of North street, ninety-nine (99) feet, to the point or place of beginning, which said lot, piece, or parcel of land is part of the same land that was conveyed by the deed of the said Isaac R. Hunter hereinbefore set out, and acquired by the said Robert I. Hunter, Newtie E. Hunter, and Louise E. Shanks as hereinbefore mentioned. And the said plaintiffs say that, they being so seised and possessed of the said lot of land, the said defendants W. H. Hicks and the Calvert Mortgage & Deposit Company of Baltimore City afterwards, to wit, on the 2d day of January, in the year 1907, entered into said premises and exercised acts of ownership thereon and claimed title thereto, and that they, the said defendants, W. H. Hicks and the Calvert Mortgage & Deposit Company of Baltimore City, unlawfully withhold from the said plaintiffs the possession thereof, to the damage of the said plaintiffs of five hundred dollars (\$500). And therefore they bring their suit," etc.

The assignments of demurrer were as follows:

"(A) That as shown by said declaration, the plaintiffs claim title to the land therein set out and described under a certain deed in said declaration set out from Isaac R. Hunter to V. O. Cassell, trustee, which deed in a certain cause lately pending in this court, entitled Robert I. Hunter et al. v. Henry C. Cooper et al., wherein the said plaintiffs in this cause were plaintiffs and the defendants in this cause were defendants, was construed, and by a decree entered therein by this court on its chancery side the said plaintiffs were declared not entitled to the land set out and mentioned in the bill filed in said cause, of which the lot of land set out and mentioned in the said declaration filed in this cause is a part. The bill in said cause of Robert I. Hunter et al. v. Henry C. Cooper et al., the petition of the said the Calvert Mortgage & Deposit Company of Baltimore City, its answer and demurrer, the decree filing said demurrer and answer, and the final decree therein and herewith filed marked 'Exhibit No. 1.'

"(B) Because, as shown by the deed aforesaid, from Isaac R. Hunter to V. O. Cassell, trustee, set out in said plaintiff's declaration, it appears that it was the intention of the said Isaac R. Hunter to grant unto the said trustee for the benefit of Martha Louisa Hunter only a life interest in the land conveyed, with a power to sell by and with the co-operation and assent of the said V. O. Cassell trustee during her lifetime, and not to create a fee-simple estate in the said Martha Louisa Hunter, and that, by signing and sealing the said deed, Martha Louisa Hunter agreed to all the provisions thereof, and that, therefore, at the death of said Martha Louisa Hunter under the terms, limitations, and agreements contained in the said deed all interest of the said Martha Louisa Hunter in said land ceased and determined.

"(C) That, under the said deed aforesaid, set out in said declaration, from Isaac R. Hunter to V. O. Cassell, trustee, Martha Louisa Hunter, under whom the plaintiffs claim, took only a life estate in the lands set out in said deed, of which the lot claimed in this cause forms a part, which life estate upon the death of the said Martha Louisa Hunter ceased and determined.

"(D) That under the deed aforesaid set out in said declaration from Isaac R. Hunter to V. O. Cassell, trustee, the plaintiffs have no title to the land sought to be recovered in this action.

"(E) Because the said declaration does not show that the plaintiffs at the time of the filing of said declaration were entitled to recover the said lot of land set out in said declaration.

"(F) Because of the decision in the suit of Robert I. Hunter et al. v. Henry C. Cooper et al. the title to the lot of land sought to

be recovered in this action is res adjudicata, and the said plaintiffs in that suit cannot recover in this action the lot of land sought to be recovered in that cause."

Leo Judson, for plaintiffs in error. Wm. McK. Woodhouse (Hugh C. Davis and Hugh W. Davis, of counsel), for defendants in error

KEITH, P. This is an action of ejectment brought by Robert I. Hunter and others against W. H. Hicks and others to recover a tract of land lying in the county of Norfolk.

There was a demurrer to the declaration, which was sustained by the circuit court, and judgment entered for the defendants, and that judgment is before us upon a writ of error.

The decision of the case involves a construction of a deed which is copied into the declaration, to which the defendants in the circuit court assigned six grounds of demurrer, designated as A, B, C, D, E, and F. Specifications "A" and "F" were overruled; B, C, D, and E were sustained, and the correctness of the judgment turns upon whether or not Martha Louisa Hunter took a fee simple or a life estate in the land conveyed to her by the deed from Isaac Hunter.

By the deed Martha Louisa Hunter is given full power to sell and dispose of the property covered by it, "and make such disposition of the proceeds of sale as she may think proper, and also through said trustee to collect the said notes, and deliver them to the makers or other proper person and dispose of their proceeds, always, however, and in all cases, with the co-operation and assent of the said V. O. Cassell, trustee, who on his part agrees to execute such instruments as may be needful in the premises as the said Martha Louisa Hunter may direct by her becoming a party to and signing said instrument. And the said Martha Louisa Hunter may also, if she think proper, with the proceeds as aforesaid purchase other property, real or personal, through and by her said trustee, and the deed made to said trustee for her sole benefit, and to be held upon the same terms as the other property herein mentioned. If the said Martha Louisa Hunter should depart this life leaving her said husband, the grantor in this deed, surviving, then this grant as to the property then remaining is to cease and determine, but she shall have power and full authority is hereby given her by instrument in the nature of a last will and testament to dispose of one-half of the property hereinbefore described or hereafter acquired as aforesaid then remaining; but if the said Isaac R. Hunter should die first then and in that event he hereby expressly reserves to himself full power and authority to dispose of the other half of the property then remaining, hereinbefore described or hereafter acquired, by his last will and testament."

We have then a case where the grantee, Mrs. Hunter, under the deed from her husband, took property which she was authorized to sell and to dispose of the proceeds as she might think proper, and of what might remain at her death she had the power to dispose of one-half by her last will and testament.

We are of opinion that the case is fully covered by the decisions of this court.

"The cases cited clearly establish that whenever it is the intention of the testator that the devisee shall have an unrestrained power of disposition over the property devised, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with, and repugnant to, the estate given to the first devisee, although the will shows that it was the testator's intention in respect to the property given to the first taker that 'what may remain of the same,' or 'whatever may remain at his death,' or 'so much thereof as may be in existence at his death,' or 'such part as he may not appropriate,' or 'what may be on hand at his death,' should go to another. Such intention must fall on account of its uncertainty, and the first taker acquires the absolute property." *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, and cases there cited. See, also, *Honaker v. Duff*, 101 Va. 675, 44 S. E. 900; *Johnson v. Smith*, 108 Va. 725, 62 S. E. 958; *Rolley v. Rolley's Ex'r*, 109 Va. —, 63 S. E. 988; *Randall v. Harrison* (decided at the present term) *infra*, and cases referred to in those opinions.

It follows that the judgment of the circuit court must be reversed.

Reversed.

(109 Va. 686)

RANDALL et al. v. HARRISON et al.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

WILLS (§ 616*)—CONSTRUCTION—ESTATES CREATED.

A will gave testator's wife for life all his real and personal estate that should be left after paying his debts, with power, however, to use any and all of the principal as well as the interest of such remaining property, if necessary to supply her necessities, and provided that, if anything was left after the wife's death, it should go to certain others. *Held* that, subject to testator's debts, the wife took a fee-simple estate in the real estate and an absolute estate in the personal property.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.*]

Appeal from Circuit Court, Cumberland County.

Bill by John P. Branch against Harriet H. Harrison, individually and as executrix of Randolph Harrison, Jane R. H. Randall, and others. Decree for complainant, and defendant Randall and another appeal. Affirmed.

Willis B. Smith and R. T. W. Duke, for appellants. W. H. Mann, Christian, Gordon & Christian, B. B. Woodson, and Wm. M. Smith, for appellees.

WHITTLE, J. This appeal involves the construction of the following clause of the will of Randolph Harrison, deceased:

"I give and bequeath to my dear wife, Harriet H. Harrison, for and during her natural life, all my estate real and personal that may be left after paying my just debts. And as I know the unstable and fluctuating value of real estate in Virginia and the difficulty of selling landed property at anything like a fair valuation, and that there may be yet a further shrinkage, so that there may not be enough left from the proceeds after paying my debts and defraying all charges to give her, the said Harriet H. Harrison, a decent maintenance from the interest in such residue (if it should be necessary to sell all my property); and as I deeply regret having induced my wife to relinquish her right of dower to secure a debt of six thousand dollars (\$6,000.00) due Messrs. Wyman and Byrd, I hereby empower her, my wife before named, to use any and all of the principal, as well as the interest of the amount that may be left as above stated after settling up my estate, but it is my wish and injunction, which I know will be faithfully carried out by my dear wife, that the principal of any amount left from my estate be drawn upon only to supply her own necessities. I hold that property should revert to the source whence it came; accordingly it is my desire that anything that may be left after the death of my wife should be divided amongst my brothers and sister J. N. Harrison, and the children of my brother B. H. Harrison, per stirpes."

The circuit court decreed that, subject to the debts of the testator, his widow took a fee-simple estate in the lands and an absolute estate in the personal property whereof he died seised and possessed.

The principle here involved has been so repeatedly decided by this court that we feel that further discussion of it can serve no good purpose. The case is ruled, and the decree of the circuit court sustained, by a long line of decisions, of which *May v. Joynes*, 20 Grat. 692, *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, *Robertson v. Hardy's Adm'r*, 23 S. E. 766, 2 Va. Dec. 275, *Brown v. Strother*, 102 Va. 145, 47 S. E. 236, *Hawley v. Watkins*, 109 Va. —, 63 S. E. 560, *Rolley v. Rolley*, 109 Va. —, 63 S. E. 988, and *Hunter v. Hicks* (decided at the present term) 64 S. E. 988, are illustrations.

The decree appealed from follows these precedents, and must be affirmed.

Affirmed.

HARRISON, J., absent.

(132 Ga. 703)

ATHENS MUT. INS. CO. v. EVANS.

(Supreme Court of Georgia. June 18, 1909.)

1. INSURANCE (§ 328*)—CONDITIONS OF POLICY—TRANSFER OF TITLE.

Where, when a policy of fire insurance was issued upon a house, the title thereto was in the insured, and the policy contained a condition that, unless provided otherwise by agreement indorsed thereon or added thereto, it should become void "if any change, other than by the death of the insured," took place in the title of the subject of insurance, the subsequent conveyance by the insured of the title to another to secure the payment of a debt due him for the construction of the house, without the consent of the insurer, indorsed on or added to the policy, was such a violation of the inhibition against a change in the title as by the terms of the policy rendered it void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 800, 801; Dec. Dig. § 323.*]

2. INSURANCE (§ 376*)—POLICY—WAIVER OF CONDITIONS.

Where the policy also provided that "no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached," the agent representing the company when the policy was issued had no power to bind the company by then giving a parol permission for the making of such security deed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952-955; Dec. Dig. § 376.*]

3. EVIDENCE (§ 397*)—PAROL EVIDENCE—WRITTEN CONTRACT.

In the absence of fraud, accident, or mistake, the terms of a written contract cannot be varied by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

4. INSURANCE (§ 131*)—PAROL AGREEMENT.

As the law of this state requires that a contract for fire insurance shall be in writing, such a contract cannot be made partly in writing and partly in parol.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 205; Dec. Dig. § 131.*]

5. INSURANCE (§ 377*)—CONDITIONS OF POLICY—TRANSFER OF TITLE—ESTOPPEL.

Where a policy contained the above-mentioned provisions and the property insured was a house, which the insurance company, at the time the policy was issued, knew the insured was under a moral and legal obligation to convey to another to secure the payment of a debt contracted for its construction, the issuance of the policy with such knowledge did not estop the company, when an action was brought upon the policy to recover for a loss, from insisting that the policy was rendered void when such a conveyance of the insured property was made without the consent of the insurer thereto having been obtained and expressed as the policy required.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 986; Dec. Dig. § 377.*]

(Syllabus by the Court.)

Error from Superior Court, Taliaferro County; J. N. Worley, Judge.

Action by O. L. Evans against the Athens Mutual Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

Evans brought suit upon a fire insurance policy against the Athens Mutual Insurance Company. The substance of the petition was as follows: On December 4, 1906, one Quinn was the agent of the defendant company, and authorized in its behalf to make contracts of insurance, and to sign and issue policies of insurance for it. Upon that date he in behalf of the company approached the plaintiff, and sought to get him "to enter into a contract of insurance against fire upon" a described house of his. Quinn was told by plaintiff "that he had just had said house built by C. H. Golucke & Son * * * at a cost of some \$750, and had not paid therefor, but still owed them, and was to pay them in monthly installments thereon, and that he had agreed with them that they should hold a deed to said premises to secure them till said debt was paid." To this "Quinn replied that that would not interfere with * * * petitioner's insuring said property, and that the same would protect both petitioner and said Goluckes, and thereupon petitioner agreed that the defendant should insure said house for said purposes and under said circumstances, with other property, for three years for a premium of \$14, the insurance on said house to be \$500." Thereupon Quinn, for defendant, issued to petitioner the policy of insurance upon said property, a copy of which was attached to the petition as an exhibit, and petitioner paid the premium therefor. The house had been built for petitioner by Golucke & Son under an agreement "that the price therefor should be secured to them by a deed to said premises, and said Golucke & Son had at the time of said insurance fully performed their part of said agreement, and were then entitled to have their security deed." On December 31, 1906, petitioner, in pursuance of his obligation so to do, "which had been fully made known to Quinn in the issuance of said policy as aforesaid, * * * did execute to said Golucke & Son a security deed upon said property to secure the balance of his said indebtedness, agreeing therein to keep said house insured in a sum not less than \$500 so long as said debt remained unpaid." After the execution of this security deed, petitioner remained in possession of the premises in his own right until the destruction of the house by fire. The premises were worth much more than the amount of the debt due Golucke & Son. Petitioner had a valuable interest in the property, and the entire loss would fall upon him if the house was destroyed by fire while uninsured. Petitioner "is illiterate, unable to read, and unlearned

in the law, and was unaware that his policy would be vitiated by a change in the title of the property insured, and was unaware that the policy given him was not adapted in its provisions to the protection against loss both of himself and said Golucke & Son, as promised by said Quinn, but expected and believed that it would protect both. There was "in equity no change or incumbrance * * * put upon the title to said property by the execution of said deed that was not upon it when said policy was issued, and any condition written in said policy, rendering the same void by reason of the execution of said deed, was fully waived by the defendant in issuing said policy under the circumstances stated." In October, 1907, without fault on the part of petitioner, the house was destroyed by fire, and at that time it was worth \$800. Petitioner duly notified defendant of his loss, and offered to make the formal proofs thereof required by the policy; but defendant expressly waived the same, "and disclaimed any liability on the policy by reason of said deed to Golucke & Son, and for no other reason."

The policy sued on, as shown by the copy thereof attached to the petition, provided: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * if any change, other than by death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise." The concluding stipulation in the policy was as follows: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The defendant demurred generally and specially. The special demurrer attacked the petition in so far as it attempted to set up a parol agreement prior to the written contract, and not in accordance therewith, without alleging that anything was left out of the policy by fraud, accident, or mistake; and the allegation of a waiver, so far as the security deed was concerned, of that clause

of the policy with reference to a change in the interest, title, or possession of the subject of insurance, upon the ground that the policy expressly provided against such a waiver by the language before quoted. The demurrers were overruled, and the defendant excepted.

T. F. Mell, for plaintiff in error. Samuel H. Sibley, for defendant in error.

FISH, C. J. (after stating the facts as above). 1. The law to be applied to the facts alleged in the petition is well settled, although its application to these facts makes this a hard case for the defendant in error. When the insurance policy was issued, the legal title to the property insured was in Evans, and, according to a provision in the policy, there it had to remain during the period of time covered by the contract, in order for the policy to still continue in force, unless he died in the meantime, or by agreement of the insurance company, indorsed on or added to the policy, a change in the title was allowed. This is clear from the stipulation in the policy that, unless otherwise provided by agreement indorsed thereon or added thereto, it should be void, "if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment, or by voluntary act of the insured, or otherwise." After the issuance and acceptance of the policy, the title to the property insured was changed by the holder of the policy by his conveying the same to the Goluckes to secure an indebtedness which he owed them for its construction. Unless, therefore, the contentions of the defendant in error as to waiver or estoppel be sound, the execution and delivery of this security deed without the consent of the insurance company indorsed on or added to the policy violated the inhibition as to any change in the title of the property and rendered the contract of insurance void. *Phoenix Ins. Co. v. Asberry*, 95 Ga. 792, 22 S. E. 717; *Orient Ins. Co. v. Williamson*, 98 Ga. 464, 25 S. E. 560.

2. As the effect of the above-mentioned provision of the policy was to prohibit any change in the title of the property, without the written consent of the insurer indorsed on or added to the policy, it would seem of itself sufficient to show that the agent of the company who acted for it when the policy was issued had no power to give a mere parol permission for a transfer of the title. But the policy in its concluding clause dealt directly with the question of waiver, as follows: "This policy is made and accepted subject to the foregoing stipulations and conditions, * * * and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of

this policy; except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." It is clear that under this provision the agent of the insurance company could not have orally waived the condition rendering the policy void, if any change should be made in the title to the property, without the consent of the company expressed as the policy required, even if he had, as is not the case here, in express terms undertaken to do so. He had no power to talk away any provision or condition expressed in the policy. They were all beyond the reach of any oral declaration or representation which he might make. The rulings made in *Morris v. Orient Ins. Co.*, 106 Ga. 472, 33 S. E. 430, and *Lippman v. Aetna Ins. Co.*, 108 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62, are directly in point here. In each of those cases the policy of insurance contained the same restriction upon the power of a representative of the insurance company to waive any provision or condition of the policy as that above quoted from the policy now under consideration, and in each it was provided that, unless otherwise provided by agreement indorsed on or added to the policy, the same should be void, if the insured then had, or should thereafter procure, any other contract of insurance on the property covered in whole or in part by the policy. It was held in both cases that a mere oral permission to the insured by the agent who issued the policy to take out additional insurance given at the time of issuing the policy was not binding upon the company, and did not estop it from setting up as a defense to an action upon the policy that the insured, in violation of its terms, had taken out additional insurance.

3, 4. Counsel for the defendant in error admits that, under these decisions, Quinn, the agent of the company, could not have orally waived a future forfeiture, but contends that the policy does not set forth the true contract between the parties, and that, without reformation, the contract ought to be enforced, not according to its plain and unambiguous terms as written, but according to the intention of the parties at the time it was made, and that their intention then was that Evans, the insured, should have the right to execute the security deed in question. As we understand counsel, this contention is based upon the allegations of the petition as to the conversation which occurred between Evans and Quinn, the agent of the company, prior to the issuance of the policy. There is nothing in the petition

which shows that there was any agreement by the company, or even by Quinn, its agent, that the provisions of the policy should be otherwise than as they are. It is merely alleged that Quinn was informed by Evans that he had the house built by C. H. Golucke & Son, at a cost of some \$750, and still owed them therefor, and had agreed that they should hold a deed to the premises, to secure them, until this debt was paid; and that thereupon "Quinn replied that that would not interfere with [Evans] insuring the property, and that the same would protect both [him] and said Goluckes." This falls far short of an allegation that Evans and Quinn agreed that the policy should contain a provision authorizing Evans to convey the property to Golucke & Son for the purpose here indicated. From the petition it appears that Evans merely stated certain facts to Quinn, and he simply expressed his opinion that the existence of those facts would not interfere with Evans' insuring the property, and that, if he did, the policy would protect both himself and Golucke & Son. But, even if there were positive allegations in the petition that there was an oral agreement between these parties that Evans should have the right to change the status of the title of the property as he afterwards did, we have seen that the agent of the insurance company could not thus waive the condition as to the forfeiture of the policy upon a change of title not made in conformity to the requirements of the policy. Again, it is well settled that, in the absence of fraud, accident, or mistake, none of which is alleged, all parol negotiations and agreements prior to or contemporaneous with the execution of a written contract are either merged therein or annulled thereby, and the writing alone must be considered as the contract between the parties.

There is, however, another firmly established rule, the existence of which is fatal to this contention of the defendant in error, and that is, that a contract which a statute requires to be in writing cannot exist partly in parol and partly in writing. The law of this state expressly requires a contract of fire insurance to be in writing, and such a contract is not valid unless it is in writing. Civ. Code 1895, §§ 2022, 2089; *Clark v. Brand*, 62 Ga. 23; *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. 812; *Planters' Ass'n v. De Loach*, 113 Ga. 802, 39 S. E. 466; *Delaware Ins. Co. v. Penn. Fire Ins. Co.*, 126 Ga. 380, at page 389, 55 S. E. 330, 333. As was said by Mr. Justice Lumpkin in the case last cited: "Under our statute, it is contemplated that the whole contract of insurance shall be in writing." So, even if the agent had possessed unrestricted powers as to the making of the contract of insurance, and it had been alleged that by fraud, accident, or mistake an agreement that the insured might transfer the title of the property to Golucke & Son had been left out of the policy, the contract

would have to be reformed before this agreement could become a part of the same. There is no effort whatever to reform or change in any particular the written contract, but the alleged right to recover is based upon the policy as it stands, and the effect of one of its stipulations as applied to the facts is sought to be obviated by the mere oral statement of the agent of the insurer as to what the legal effect of the policy would be relative to these facts.

5. It is further contended that the petition shows that the insurance company through its agent who represented it in the transaction with Evans knew that the house which was the subject-matter of insurance had been built by Golucke & Son for Evans upon credit under an agreement which provided that he was to make them a deed to the premises to secure the debt thus created, and that the contractors had fully performed their part of this contract and Evans was indebted to them for the erection of the house; and therefore that the policy was issued by the company with full knowledge on its part that Golucke & Son were entitled to receive this security deed from Evans, and that he was both morally and legally bound to execute and deliver the same to them. Hence it is sought to bring this case within the well-settled rule that, although a policy of insurance may contain a provision which declares it to be void if a specified condition exists when it is issued, yet if the agent of the insurance company who represented it in the transaction with the insured knew, at the time the contract was entered into, that such condition did then exist, the policy will, so far as this provision is concerned, be held to be valid and enforceable. The knowledge of the agent who acts for the insurer when the policy is issued of existing conditions which enter into the validity of the contract is the knowledge of his principal; and, if the policy is issued with knowledge of a fact or condition which by a stipulation in the contract would render it void, the insurer is held to have waived the existence of such fact or condition in its application to the provisions of the policy. Otherwise the insurer would knowingly issue and accept pay for a policy void in its very inception, thereby practicing a fraud upon the insured. *Mechanics' Ins. Co. v. Mutual Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92. In the present case, however, the policy was not under facts known to the insurer, according to its terms, void when it was issued. On the contrary, it was then perfectly valid; for, if the house had been without fault of the insured destroyed by fire in the interval of time between the issuance of the policy and the making of the security deed to Golucke & Son, the company would have been liable to the insured under its contract. It was

the subsequent act of the insured which invalidated the policy. It matters not that this was an act which he was morally and legally bound to perform, and that the agent of the insurer knew this when the policy was issued. The company issued the policy with a promissory warranty on the part of the insured, implied by his acceptance of the same with the condition as to subsequent change of title therein, that the title should remain as it then was, unless changed with the consent of the company expressed by indorsement upon or addition to the policy. If it be granted that the company knew, through knowledge imparted to its agent, that sooner or later Evans was bound to make the security deed to the contractors who built the house for him, he, on the other hand, knew that, in order to execute this deed without thereby rendering the policy void, he must first obtain the written consent of the company expressed in the manner pointed out by the policy. If he had applied for this consent and it had been refused, he could have surrendered the policy and collected from the company the difference between the amount of the premium which he had paid on the customary short rate for the time during which the policy remained valid; for the policy provided for its cancellation "at any time at the request of the insured, or by the company giving five days' notice of such cancellation," and that if it should be canceled, "or become void or cease, the premium having been actually paid, the unearned portions [should] be returned on surrender of this policy or last renewal, this company retaining the customary short rate," unless it should be canceled by the company giving notice, in which event the company should retain only the pro rata premium.

Counsel further contends that "substantially and in the eye of equity there was no change in the title" when the security deed was made; that "the deed was but an evidence of a perfect equitable right to the title that Golucke had when the policy was issued; and that was recognized and waived by Quinn in issuing the policy." It is unsound to contend that because, under the facts alleged, the Goluckes, having fully performed their part of the contract with Evans, had the right to enforce specific performance of his agreement to convey the title of the property to them as security for the debt which he owed them, there was therefore no real substantial change in the title when this deed was made. There had to be specific performance by Evans, either voluntarily or at the behest of the law, before the title could vest in the Goluckes.

It follows that the court erred in overruling the demurrer.

Judgment reversed. All the Justices concur.

(132 Ga. 698)

LEE v. McCARTY et al.

(Supreme Court of Georgia. June 17, 1909.)

1. REVIEW ON APPEAL.

The undisputed evidence required a finding for the defendant; and if there were any errors in some of the rulings of the court, or inaccuracies in the charge, they were not such as to necessitate a new trial.

2. SECONDARY EVIDENCE—FOUNDATION.

Sufficient foundation was laid, as to the loss of the deed under which defendant prescribed, to admit secondary evidence thereof.

3. REFUSAL TO ALLOW AMENDMENT OF PETITION—NEW TRIAL.

A refusal to allow an amendment to a petition and sustaining a demurrer thereto furnishes no ground for a motion for a new trial. *Turner v. Barber*, 131 Ga. 444, 62 S. E. 587; *Hawkins v. Studdard*, 132 Ga. —, 63 S. E. 852; *Leathers v. Leathers*, 132 Ga. —, 63 S. E. 1118.

(Syllabus by the Court.)

Error from Superior Court, Crawford County; W. H. Felton, Judge.

Action by L. T. Lee against C. S. McCarty and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Robert L. Rodgers, for plaintiff in error.
H. A. Mathews, for defendants, in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(132 Ga. 698)

COURSON v. PEARSON.

(Supreme Court of Georgia. June 17, 1909.)

1. APPEAL AND ERROR (§ 616*)—DISMISSAL—GROUNDS.

As the "general grounds" of a motion for a new trial, complaining that the verdict is contrary to the evidence, without evidence to support it, etc., contain no recital of fact requiring certification by the trial judge, they need not be approved by him in order to be considered (*Harris v. State*, 120 Ga. 196, 47 S. E. 573); and therefore the lack of such approval furnishes no cause "to strike" the original motion for a new trial, or the amended and properly approved motion therefor, or to dismiss the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 616.*]

2. EVIDENCE (§ 94*)—TRIAL (§ 205*)—BURDEN OF PROOF—INSTRUCTIONS.

Where there is no affirmative defense, or no plea in the nature of confession and avoidance, the burden of proof is upon the plaintiff, and he is not entitled to recover, unless, in the opinion of the jury, the preponderance of the evidence is in his favor. The charge excepted to was not in harmony with this principle, and, under the facts of the case, placed upon defendant an unauthorized burden, and was cause for a new trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 116, 117; Dec. Dig. § 94;* Trial, Cent. Dig. § 496; Dec. Dig. § 205.*]

(Syllabus by the Court.)

Error from Superior Court, Hancock County; Jos. N. Worley, Judge.

Specific performance by Henry Pearson against T. N. Courson. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Burwell, for plaintiff in error. R. L. Merritt, for defendant in error.

FISH, C. J. 1. The ruling stated in the first headnotes needs no elaboration.

2. This was an action for the specific performance of a contract for the sale of land. The plaintiff's contention was that the defendant, by agreement, was substituted for plaintiff's original vendor, and was, under the terms of the agreement, bound to convey to plaintiff, upon his payment to defendant of the balance of the purchase price, all of which plaintiff alleged had been paid. Defendant denied such agreement, and contended that, at the instance of plaintiff, he purchased the land from plaintiff's vendor, upon plaintiff's agreement to rent the land from defendant at a stated rental, and that the amounts paid by plaintiff had been paid as rent, and not as purchase money. On the trial each party submitted evidence tending to support his contention. The court instructed the jury as follows: "The plaintiff in all civil cases is required to make out his case by the preponderance of the evidence. So that if you believe from the preponderance of the evidence that [plaintiff's] contention is made out prima facie, then he would have the right to recover in the case as made. I charge you, in addition to that, that if the plaintiff has made out a prima facie case, and the defendant undertakes to set up a different contract from that, it becomes the duty of the defendant to set up his contention by a preponderance of the testimony, before he would be entitled to recover. * * * If you should conclude that he [plaintiff] has made out his contention by a preponderance of the testimony, that would be a prima facie case that would entitle him to recover. If defendant has undertaken to set up a different contention, you will apply the same rule to it, and say whether or not he has made it by preponderance of the testimony." These instructions put an unauthorized onus upon the defendant, and were calculated to mislead the jury to his prejudice, and were therefore cause for a new trial in his behalf. "The burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential." Civ. Code 1895, § 5160. And where, as in this case, there is no affirmative defense, or no plea in the nature of confession and avoidance, the burden of proof lies upon the plaintiff; and, after all the evidence for both parties has been submitted, the plaintiff is not entitled to recover unless, in the opinion of the jury,

the preponderance of the evidence is in his favor.

Judgment reversed. All the Justices concur.

(132 Ga. 676)

PIKE BROS. LUMBER CO. v. MITCHELL
et al.

(Supreme Court of Georgia. June 15, 1909.)

MECHANICS' LIENS (§ 249*)—FORECLOSURE—PARTIES—RELIEF IN EQUITY.

In order to foreclose a materialman's lien for material furnished a contractor to be used in improving the property of another, it is necessary that the materialman have judgment against the contractor in a previous action, or the contractor must be sued concurrently in the foreclosure proceedings with the owner of the property improved. If the contractor be adjudged a bankrupt, so that no judgment in personam can be had against him in an action at law, his immunity from liability to a personal judgment will not give the materialman a right to foreclose his lien in equity against the property improved.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 249.*]

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by the Pike Bros. Lumber Company against E. D. Roberts and Mrs. M. B. B. Mitchell. Judgment for defendants, and plaintiff brings error. Affirmed.

E. T. Moon and Frank Harwell, for plaintiff in error. A. A. Thompson, F. M. Longley, and W. G. Post, for defendants in error.

EVANS, P. J. The petition of Pike Bros. Lumber Company, a corporation, against E. D. Roberts and Mrs. M. B. B. Mitchell, to foreclose a materialman's lien, was dismissed on demurrer. The material averments of the petition are: Roberts contracted to improve certain described real estate belonging to Mrs. Mitchell. The plaintiff furnished to the contractor, between May 30, and July 22, 1907, certain materials, of the value of \$387.33, which were used by the contractor in making the improvements. On July 22, 1907, the plaintiff filed and caused to be recorded its lien, pursuant to Civ. Code 1895, § 2804. On August 6, 1907, Roberts on his own petition was adjudged a voluntary bankrupt. The prayer is for a decree fixing the amount due by the contractor to the plaintiff for the materials used in the improvements, and a judgment is rem for this amount against the real estate which was improved. No judgment in personam is prayed against the contractor.

The plaintiff in its petition admits that because Roberts had been adjudged a bankrupt it could not maintain an action at law against him and the real estate owner to enforce its statutory lien for materials fur-

nished the contractor and used in improving the real estate of Mrs. Mitchell. It is for this reason it alleges it is entitled to relief in equity, which can be afforded by granting the prayer of the petition. The admission that the plaintiff could not recover at law is based on the well-settled rule that, before a materialman's lien for materials furnished to a contractor to improve the real estate of another can be foreclosed, there must be a judgment for the price of such materials in his favor against the contractor, or the contractor must be sued concurrently with the owner of the property improved in the foreclosure proceedings. *Clayton v. Farrar Lumber Co.*, 119 Ga. 37, 45 S. E. 723. The reason of the rule is that the landowner should not be called on to pay a debt he did not contract, and for which his property is liable only by force of a statute, until the materialman has established by judgment, in a proceeding to which the contractor is a party, that the contractor owes to him the amount for which he is seeking to assert his lien. The landowner's liability to the materialman, who sells his contractor on the latter's responsibility, is not primary but collateral, and dependent wholly upon compliance with the statute which creates the liability. In the suit to enforce his lien the materialman may be defeated by proof that the debt has been discharged by payment. If it is a debt provable in bankruptcy, why may not his action be also defeated by showing that his debt has been discharged by bankruptcy? It is to be borne in mind that in this case it is not attempted to establish the lien against the bankrupt contractor's land, but against the land of one not in privity with him. If judgment should go against the owner of the land improved in the foreclosure proceeding, he would have his remedy over against the contractor, either by deducting the amount of the judgment from what is due the contractor, or, if the contractor had been fully paid, the landowner, on paying the judgment, would be subrogated to the rights of the materialman in enforcing reimbursement from the overpaid contractor. But if the contractor had been adjudged a bankrupt, and is liable to be discharged as such by the bankrupt court, and therefore not subject to suit, then the landowner would have no remedy over, if the materialman be allowed a judgment in rem against his property. Equity follows the analogy of the law. The materialman cannot foreclose his lien in an action at law against the landowner, because he cannot get a judgment in personam against the bankrupt contractor. *Bowen v. Keller*, 130 Ga. 31, 60 S. E. 174, 124 Am. St. Rep. 164. He should not be permitted to do so in equity, where the effect would be to deprive the landowner of his remedy over against the contractor, who, perchance, had been fully paid. The bankruptcy of the con-

tractor occasions the loss, and it would be inequitable to shift the loss from the materialman to the landowner, simply because the materialman has lost his remedy at law by the contractor's bankruptcy. In connection, see *Philip-Carey Co. v. Viaduct Place*, 1 Ga. App. 707, 58 S. E. 274.

Judgment affirmed. All the Justices concur.

(132 Ga. 700)

MALLETT & NUTT v. WATKINS.

(Supreme Court of Georgia. June 17, 1909.)

1. CONTRACTS (§ 57*)—CONSIDERATION.

Watkins signed and delivered to Mallett a writing as follows: "I agree to sell W. M. Mallett 25 bales of middling cotton at 7½ cents delivered at his warehouse during November and October, 1900. 4/2/1900. Jackson, Ga. B. F. Watkins." Such writing, not showing any consideration to support the promise of Watkins, did not, of itself, bind him to deliver the cotton, or make him liable in damages for a failure to do so.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 345, 352, 353; Dec. Dig. § 57.*]

2. TRIAL (§ 250*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND EVIDENCE.

A charge must be adjusted to the evidence; and there being no evidence of any promise on the part of Mallett to buy the cotton, other than a written promise delivered to Watkins, the court did not err in instructing the jury that the plaintiffs could not recover unless Mallett executed and delivered to Watkins such written promise, or in failing to charge what would be the effect of an oral promise on the part of Mallett to buy the cotton.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

3. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the verdict, and the court did not abuse its discretion in denying a new trial.

(Syllabus by the Court.)

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by Mallett & Nutt against B. F. Watkins. Judgment for defendant, and plaintiffs bring error. Affirmed.

Jno. R. L. Smith, for plaintiffs in error
W. E. Watkins, for defendant in error.

HOLDEN, J. The plaintiffs in error brought suit against the defendant in error for damages, alleging substantially as follows: The defendant executed and delivered to W. M. Mallett a contract of which the following is a copy: "I agree to sell W. M. Mallett 25 bales of middling cotton at 7½ cents delivered at his warehouse during November and October, 1900. 4/2/1900. Jackson, Ga. B. F. Watkins." The plaintiffs in error were transferees of this contract under a transfer dated October 2, 1903, made by the administrator of W. M. Mallett. The defendant refused to perform the contract, and the plaintiffs allege that the market price of cotton during the months of October and Novem-

ber was more than 7½ cents per pound, and the plaintiffs sued to recover the difference between such contract price and the market price. Upon the trial of the case a verdict was rendered for the defendant, and the plaintiffs excepted to the order of the court overruling their motion for a new trial.

1. The written promise by Watkins to sell Mallett the cotton, standing alone, is an executory contract and without a consideration. The writing is not signed by Mallett. It shows no promise by Mallett to buy the cotton, or other consideration to support the promise of Watkins to sell the cotton. Being an executory contract without a consideration, it is nudum pactum and without any binding force. Civ. Code 1895, §§ 3656, 3657. In order to make an executory contract binding, there must be a consideration to support the same. Mutual promises constitute a good consideration for each other. Civ. Code, § 3661. In the absence of any promise by Mallett to take and pay for the cotton, or other consideration to support the promise of Watkins, to sell the cotton, or anything done by Mallett whereby he became bound to take and pay for the cotton, Watkins was not bound to sell the cotton, nor was Mallett bound to buy it. In this connection, see *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Cooley v. Moss*, 123 Ga. 707, 711, 51 S. E. 625; *Glessner v. Longley*, 125 Ga. 676, 54 S. E. 753; *Swindell & Co. v. First Nat. Bank*, 121 Ga. 714, 49 S. E. 673; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67; *Harrison v. Wilson Lumber Co.*, 119 Ga. 6, 45 S. E. 730. The fact that Mallett wrote the written promise, signed by Watkins, wherein the name of Mallett appeared, and the fact that the writing, after being signed by Watkins, was delivered to and accepted by Watkins, would not bind Mallett to buy the cotton, if tendered to him by Watkins.

2. One ground of the motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'Now, gentlemen, I charge you, as a matter of law, there can be no recovery on the contract as set out in this petition—on the contract alone; there being the want of mutuality in the contract. There being nothing in it imposing any obligation on Mr. Mallett to purchase or pay for this cotton, therefore under the law it is void, unless there was a written contract, made and signed at the same time by Mr. Mallett and delivered to Mr. Watkins, in which contract Mr. Mallett agreed to receive and purchase and pay for the cotton at the time of its delivery.'" There are other charges of the court similar to the one above quoted, of which the same complaint is made. The plaintiffs alleged that, at the time the writing above set forth

was signed by the defendant, W. M. Mallett signed a writing wherein he promised to purchase and receive from the defendant the 25 bales of cotton and pay him therefor 7½ cents per pound whenever the defendant delivered the same to Mallett during the months of October and November, 1900. The plaintiffs complain that the court erred in charging that in order for the plaintiffs to recover, or introduce parol evidence of any such written promise by Mallett it must not only be shown that such written promise was made by Mallett, but it must be shown that it was delivered to Watkins. There was no evidence upon the trial of the case that Mallett signed and retained an agreement to buy the cotton. The only evidence of any written promise by Mallett was that of witnesses who said that, when Watkins signed the written promise herein above copied, Mallett signed and delivered to Watkins a written promise to buy the cotton at 7½ cents when delivered during October and November, 1900. There was no evidence of any other written promise of Mallett, and under the evidence the jury could not find that there was any written promise of Mallett to take the cotton, unless they found that Mallett had signed and delivered one to Watkins at the time Watkins signed and delivered the instrument for the breach of which suit is brought.

A charge must be adapted to the evidence and cover the issues made thereby and by the pleadings; and no error was committed in charging the jury that in order for the plaintiffs to recover, or introduce parol evidence of any such written promise by Mallett, it must not only be shown that such written promise was made by Mallett, but it must be shown that it was delivered to Watkins. As there was no evidence that Mallett made any promise to buy the cotton, except that he signed and delivered to Watkins a written promise to do so, whether a parol promise by Mallett to buy the cotton would have authorized a recovery in this case need not be considered. The question as to whether or not the court committed error in failing to charge the jury that a recovery could be had if there was a parol promise by Mallett to buy the cotton need not be considered, for the reason that the evidence would not have justified any such charge, there being no evidence of any promise by Mallett to buy the cotton, except a written promise signed and delivered to Watkins. No such written promise by Mallett was introduced in evidence, and the evidence was conflicting as to whether or not Mallett signed and delivered to Watkins such promise, and was such as to authorize the jury to find that no such written promise was signed and delivered. There was no evidence to authorize the jury to find that Mallett ever became bound to take and pay for the

cotton, if it had been tendered to him under Watkins' written promise, except the evidence of a written promise by Mallett signed and delivered to Watkins; and the evidence being conflicting as to whether Mallett did or did not do this, the charge quoted, and similar charges, were not subject to any criticism made thereof. We do not think the entire charge was subject to the criticism made, nor do any of the excerpts therefrom, in view of the entire charge, involve such error as requires a new trial. The evidence authorized the verdict, and the court did not abuse its discretion in refusing a new trial.

Judgment affirmed. All the Justices concur.

(6 Ga. App. 329)
KAIGLER v. STATE. (No. 1,824.)

(Court of Appeals of Georgia. June 15, 1909.)
CRIMINAL LAW (§ 1169*)—APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The evidence of the defendant's guilt of the offense of selling intoxicating liquors upon a specified occasion being manifest and demanding the verdict rendered, it was not error to refuse a new trial, even if certain opinionative evidence as to a mere circumstance concerning an entirely different transaction was improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

John Kaigler was convicted of an illegal sale of liquor, and he brings error. Affirmed.

R. L. Tipton, for plaintiff in error. J. A. Comer, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(6 Ga. App. 254)
PEARSON v. BASS. (No. 1,082.)

(Court of Appeals of Georgia. June 15, 1909.)
NEW TRIAL REQUIRED.

It appears from the answers given by the Supreme Court to questions certified to it by this court that the trial judge should have sustained the third ground of the demurrer to the petition. The case is therefore sent back for a new trial.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action between L. B. Pearson and Barney Bass. Judgment for Bass, and Pearson brought error to the Court of Appeals, which court certified constitutional questions to the Supreme Court. On remand, after answer to questions. 63 S. E. 798. Judgment below reversed.

Perry & Williamson, for plaintiff in error. J. J. Forehand and Claude Payton, for defendant in error.

RUSSELL, J. Judgment reversed.

(6 Ga. App. 332)

KING v. STATE (No. 1,854.)

(Court of Appeals of Georgia. June 15, 1909.)

1. ARREST (§ 63*) — AUTHORITY TO MAKE WITHOUT WARRANT — MUNICIPAL PEACE OFFICER.

The right of a municipal peace officer, within the jurisdiction of the municipality, to arrest without a warrant one who has violated an ordinance of the city in his presence, or who is endeavoring to escape, is settled by the statute law of this state and the repeated rulings of this court and the Supreme Court. Pen. Code 1895, § 896; Jenkins v. State, 3 Ga. App. 146, 59 S. E. 435; Holmes v. State, 5 Ga. App. 166, 82 S. E. 716; Johnson v. State, 30 Ga. 426; Johnson v. Americus, 46 Ga. 81; Harrell v. State, 75 Ga. 842; Yates v. State, 127 Ga. 818, 56 S. E. 1017.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.*]

2. ARREST (§ 70*)—DUTY TO BRING BEFORE OFFICER.

A peace officer, state, county, or municipal, who has arrested without a warrant, "shall, without delay, convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant"; but the exigencies of the particular case may authorize him to imprison the person so arrested temporarily and for a reasonable time. Pen. Code 1895, §§ 899, 901; Moses v. State, 6 Ga. App. —, 64 S. E. 699.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 171-173; Dec. Dig. § 70.*]

3. SUFFICIENCY OF EVIDENCE.

No error appears, and the evidence supports the verdict.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Gaines King was convicted of a crime, and he brings error. Affirmed.

W. B. Mebane and M. B. Eubanks, for plaintiff in error. J. W. Bale, Sol. Gen., and C. H. Porter, for the State.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 329)

BROWN v. STATE (No. 1,848.)

(Court of Appeals of Georgia. June 15, 1909.)

1. FALSE PRETENSES (§ 7*) — FRAUDULENT STATEMENTS AS TO PRIOR LIENS.

Obtaining money on a mortgage or bill of sale of personal property by false and fraudulent statements as to the existence of liens may be an offense under Pen. Code 1895, § 668, or section 670, although the liens may be recorded, and by an inspection of the records might have been discovered. Holton v. State, 109 Ga. 131, 34 S. E. 358; Crawford v. State, 117 Ga. 247, 43 S. E. 762.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 7; Dec. Dig. § 7.*]

2. CRIMINAL LAW (§ 155*)—INDICTMENT AND INFORMATION (§ 67*)—LIMITATIONS.

The statute of limitations does not begin to run in favor of the offender until his offense is known to the prosecutor, or to some one interested in the prosecution or injured by the offense. An allegation in an indictment for cheating and swindling that the offense was unknown to the person cheated and defrauded un-

til a certain named date is sufficient, and proof of the allegation would presumptively fix the date when the statute of limitations would begin to run. Pen. Code 1895, § 30 (4); Cohen v. State, 2 Ga. App. 689, 59 S. E. 4.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. 281; Dec. Dig. § 155; * Indictment and Information, Cent. Dig. § 189; Dec. Dig. § 67.*]

3. SUFFICIENCY OF EVIDENCE.

We find no error of law, and the evidence supports the verdict.

(Syllabus by the Court.)

Error from City Court of Quitman; J. G. McCall, Judge.

Lewis Brown was convicted for cheating and swindling, and he brings error. Affirmed.

Branch & Snow, for plaintiff in error. S. M. Turner, Sol., for the State.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 353)

WEBB v. STATE (No. 1,863.)

(Court of Appeals of Georgia. June 15, 1909.)

1. CRIMINAL LAW (§§ 419, 450*)—EVIDENCE—HEARSAY—COMPETENCY.

The plaintiff in error was convicted of the offense of adultery and fornication. He was a member of the church, and a committee composed of his fellow members was appointed to make an investigation of the accusation. On the trial of the accused a witness was allowed, over objection, to testify that he had heard two members of this church committee say "that from the investigation made by them they thought there was something in it." The testimony was not offered to show any contradictory statements. Held, that the testimony was wholly incompetent, inadmissible, and presumptively prejudicial. (a) It was hearsay. (b) As original testimony offered by the members of the committee, it would have been incompetent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983, 1036; Dec. Dig. §§ 419, 450.*]

2. CRIMINAL LAW (§§ 561, 1038*)—EVIDENCE OF GOOD CHARACTER—WEIGHT—REVIEW—HARMLESS ERROR—OMISSION TO INSTRUCT.

Good character is a substantive fact in defense, and may itself alone be sufficient to generate a reasonable doubt of guilt. When the evidence warrants it, trial courts may very properly state to the jury the weight that they would be authorized to give to proof of good character; but without an appropriate written request the failure to do so will not amount to reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1267, 2646; Dec. Dig. §§ 561, 1038.*]

3. CRIMINAL LAW (§ 381*) — EVIDENCE OF GOOD CHARACTER—WEIGHT.

While in doubtful cases proof of good character is entitled to much weight in rightly adjusting the "wavering balance" between guilt and innocence, yet a request to charge that "in doubtful cases the good reputation of the defendant will compel an acquittal" states the rule too strongly, and was properly rejected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 846; Dec. Dig. § 381.*]

4. NO OTHER ERROR.

No error appears, except that stated in the first headnote.

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

J. T. Webb was convicted of adultery and fornication, and brings error. Reversed.

O. C. Hall and Hendricks & Christian, for plaintiff in error. W. J. Wallace, Sol., for the State.

HILL, C. J. Judgment reversed.

(6 Ga. App. 307)

MILNE MFG. CO. v. COWART. (No. 1,633.) (Court of Appeals of Georgia. June 15, 1909.)

APPEAL AND ERROR (§ 592*)—RECORD—BRIEF OF EVIDENCE.

This case is controlled by the decision of this court in Huntley Manufacturing Co. v. Nixon Grocery Co., 64 S. E. 279, and cases there cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2620; Dec. Dig. § 592.*]

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action between the Milne Manufacturing Company and L. Cowart. From the judgment, the Manufacturing Company brings error. Affirmed.

P. D. Rich, for plaintiff in error. W. I. Geer, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 315)

STEVENS v. J. R. & T. BUNN. (No. 1,656.) (Court of Appeals of Georgia. June 15, 1909.)

1. RAILROADS (§ 2*)—WHAT CONSTITUTES.

Under the facts, the defendants were not operating a railroad, within the meaning of Civ. Code 1895, § 2321, but were conducting a tramway in connection with their lumber business. Self v. Adel Lumber Co., 5 Ga. App. 846, 64 S. E. 112; Railey v. Garbutt, 112 Ga. 288, 37 S. E. 360.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. MASTER AND SERVANT (§ 196*)—FELLOW SERVANTS—WHO ARE.

A wood cutter, an engineer, and a brakeman, engaged in cutting, loading, and transporting timber over a tramway to a sawmill for a common master, are fellow servants. Railey v. Garbutt, supra.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 486; Dec. Dig. § 196.*]

3. MASTER AND SERVANT (§ 177*)—NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF MASTER.

The master, except in cases of railroad companies, is not liable to one servant for an injury caused by the negligence of another servant about the same business. Civ. Code 1895, § 2610.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 352; Dec. Dig. § 177.*]

4. MASTER AND SERVANT (§ 96*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The evidence for the plaintiff showed that he was injured either by his own negligence, the

negligence of a fellow servant, or by the joint negligence of both, and without any contributory negligence of the master. The judgment of nonsuit was properly awarded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 162; Dec. Dig. § 96.*]

(Syllabus by the Court.)

Error from City Court of Waycross; J. T. Myers, Judge.

Action by Duke Stevens against J. R. & T. Bunn. Judgment for defendants, and plaintiff brings error. Affirmed.

J. L. Sweat, for plaintiff in error. Wilson, Bennett & Lambdin, for defendants in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 259)

SMITH v. CHRISTIAN. (No. 1,346.) (Court of Appeals of Georgia. June 15, 1909.)

SUNDAY (§ 13*)—EXECUTION OF NOTE—VALIDITY.

A note executed on Sunday by one as a part of a transaction connected with his usual or ordinary calling is void.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 38; Dec. Dig. § 13.*]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by J. W. Smith against J. V. Christian. Judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Edwards, for plaintiff in error. McMillan & Erwin, for defendant in error.

POWELL, J. Under the consent of counsel appearing in the record in regard to the exceptions filed to the justice's answer, it appears that there was evidence before the jury that the note sued upon was executed upon the Sabbath day; that, although the note was dated on the following day, it was in fact signed and delivered to the plaintiff on Sunday; that the note was given for the purchase price of a mule and buggy, which the plaintiff carried to the house of the maker of the note on the same Sunday; that the maker of the note took possession of the mule and buggy that night, and the plaintiff exercised no further control over it. There was dispute as to these cardinal facts, but the jury was authorized to find as above set forth.

The maker of the note was a farmer, and the jury was authorized to find that the horse and buggy were bought by him to use in his business. The case is therefore controlled by Morgan v. Bailey, 59 Ga. 683. It is said there: "Where a farmer, a part of whose ordinary business was the purchase and cultivation of land, bought a tract of land on Saturday, and agreed to consummate the trade on the next day by signing the nec-

essary papers, and did sign a note for the purchase money on that day (Sunday), held, that the contract was illegal, and, in a suit on the note, the courts will not assist in its collection." See, also, *Hayden v. Mitchell*, 103 Ga. 445, 30 S. E. 287, and cases cited; *Calhoun v. Phillips*, 87 Ga. 483, 13 S. E. 593. Judgment affirmed.

(6 Ga. App. 292)

PRATER v. PAINTER. (No. 1,578.)

(Court of Appeals of Georgia. June 15, 1909.)
TROVER AND CONVERSION (§ 16*)—TITLE OF PLAINTIFF—NECESSITY.

The undisputed testimony showing that the plaintiff in the action of trover had parted with his title prior to the institution of the suit, and had not reacquired it, the verdict in his favor cannot be sustained.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 119; Dec. Dig. § 16.*]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Action by Luther Painter against W. H. Prater. Judgment for plaintiff. Defendant brings error. Reversed.

Geo. G. Glenn and M. C. Tarver, for plaintiff in error. W. E. Mann, for defendant in error.

POWELL, J. Painter sued Prater in trover for a horse. It appears that on the day before the suit was brought the plaintiff's uncle, who was his authorized agent, swapped the horse to one McGaha, taking another horse in exchange. When the trade had been consummated, an execution against the plaintiff's uncle (the agent) was levied upon the horse in dispute while in McGaha's possession, and the latter immediately demanded back from the uncle the other horse, claiming that he had represented to him in the trade that there were no liens or incumbrances against the horse and that the levy of the execution authorized him to rescind. The plaintiff's uncle explained to McGaha that, while he had traded the horse in his own name, it really belonged to the plaintiff, and that therefore the representation that it was free from incumbrances was in fact true, and not fraudulent; consequently he and the plaintiff declined to allow the swap to be rescinded. McGaha brought suit against the plaintiff's agent for the recovery of the other horse, and the action seems to have been pending at the time the present suit was tried.

We think it perfectly plain, from what has been stated above, that the plaintiff had no right to maintain this action. According to his own testimony, as well as that of his uncle, the latter had traded the horse by the authority of the former, and title to it had passed out of the plaintiff prior to the institution of the suit. Legal title in the plain-

tiff at the time of the institution of the suit is a *sine qua non* in an action of trover. Under the facts appearing in this record, McGaha might have maintained the action, but not the plaintiff.

So, irrespective of all other questions made in the record, the judgment must be reversed.

(6 Ga. App. 335)

FINCH v. STATE. (No. 1,856.)

(Court of Appeals of Georgia. June 15, 1909.)

CRIMINAL LAW (§ 1172*)—ILLEGAL SALE—EVIDENCE—INSTRUCTIONS.

No error of law appears, and the evidence supports the verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3154-3169; Dec. Dig. § 1172.*]

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

D. C. Finch was convicted of selling liquor without a license, and brings error. Affirmed.

J. J. E. Anderson and A. M. Deal, for plaintiff in error. Fred T. Lanier, Sol., for the State.

HILL, C. J. The plaintiff in error was convicted of a violation of section 431 of the Penal Code of 1895, on an indictment found at the April term, 1908, of Bulloch superior court. This section makes it a penal offense to sell intoxicating liquors without a license, and the indictment charges that the defendant, on the 25th day of December, 1907, in said county, violated the statute by selling whisky and other intoxicating liquors to one Doll Williams. On the trial the evidence for the state showed that the defendant made one sale of one pint of whisky to Doll Williams on the 25th day of December, 1907, in Bulloch county. The defendant in his statement to the jury denied that he had sold whisky to Williams, or to any one else, on said date, or at any other time.

The act of 1907 (Laws 1907, p. 81) prohibits the sale of any intoxicating liquors in this state after January 1, 1908, and this act in effect repealed section 431 of the Penal Code, upon which this indictment was framed. The court, therefore, charged the jury as follows: "I charge you in this case that the jury has a right in the trial of this case to go back two years prior to the finding of this indictment, and find the time the sale was made, if they find the sale was made. * * * Now, I charge you that any time of the year 1908 is not included in that two years. You cut out the time from the 1st of January, 1908, until the finding of this indictment here, which is in April. So go back two years from the finding of the indictment to find the time, in case you find

a sale was made." This charge is excepted to, on the ground of being misleading and incorrectly stating to the jury that they were authorized to go back two years from the date of the indictment, which was in effect telling them that they could include in their computation the time intervening between the 1st day of January, 1908, and the finding of the bill in April, 1908, while the law under which the indictment was framed had been repealed by the prohibition act.

We think the charge as a whole did not mislead the jury, but correctly instructed them, in reference to the statute of limitations, that they could go back from April, 1908, for two years, in their computation of the time in which the indictment could be found for the offense, and withdrew from the jury any consideration of the period intervening between the 1st of January, 1908, and April, 1908, the date of the finding of the indictment by the grand jury. But, in any event, the charge of the court on the statute of limitations was wholly immaterial. There was no evidence whatever of any sale of liquor to Doll Williams by the defendant, except the one sale on December 25, 1907; no evidence of any sale prior to this time; no evidence whatever of any sale subsequently to that date. So the jury could not have based their verdict on a sale made after the general prohibition law went into effect. The charge of the court on the statute of limitations, under the facts in this case, was wholly unnecessary, and, if it contained the error complained of, it would be immaterial and harmless. *Harris v. State*, 2 Ga. App. 410, 58 S. E. 669.

The only other assignment of error is an attack made on the judgment of the court in overruling one of the grounds of the motion for new trial which challenged the impartiality of one of the jurors; and this ground counsel for plaintiff in error expressly stated to this court he abandoned.

Judgment affirmed.

(6 Ga. App. 330)

JUSTICE v. STATE. (No. 1,853.)

(Court of Appeals of Georgia. June 15, 1909.)

**HOMICIDE (§ 257*)—CRIMINAL LAW (§ 1165*)
— ASSAULT WITH INTENT TO KILL — EVIDENCE—HARMLESS ERROR.**

The evidence authorized the verdict. No error of law so serious as to require a reversal appears in the record.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 257; * *Criminal Law*, Cent. Dig. § 3088; Dec. Dig. § 1165.*]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

William Justice was convicted of shooting at another, and brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. J. W. Bale, Sol. Gen., and C. H. Porter, for the State.

POWELL, J. The defendant, William Justice, commonly known as "Coot" Justice, was indicted for assault with intent to murder, and convicted of the statutory offense of "shooting at another." According to the case made by the state he had been to a "candy pulling" over at Mr. Locklear's on a moonshiny night in October, 1907. Miss Holbrooks, the prosecutrix, was also there. So were her brother, Ira, and a young man named Davis. Justice left the candy pulling first. Miss Holbrooks, her brother, and Davis came along a little later. As they got across the creek, they heard a fuss behind them, and the young lady said, "Here comes Coot." As Ira and Davis looked around they recognized him. He ran down the creek in the direction Holbrooks and his sister had to go, and waited near Mr. Burk's barn. Here Miss Holbrooks saw him, and recognized him again, just as he was in the act of shooting. Just at this instant some one (Miss Holbrooks swore positively that it was the defendant) fired into the party with a repeating shotgun loaded with large bird shot. He fired several times in rapid succession. He put 40 or 50 shot into Miss Holbrooks' back, scattered all the way from her head to her heels. Her brother Ira received a similar load; and the Davis boy was not wholly slighted, for he, too, had some shot in his back. The next day Dr. Wicker picked the shot out of Miss Holbrooks' back, etc.; but he left a few in her. It further appears from the record that the young lady exhibited some of the shot to the jury. The defendant's testimony, if true, made out an alibi. Miss Holbrooks, among other things, testified as follows: "I heard the defendant, William Justice, say, 'I will kill every God damn Holbrooks by name.' When he said this he was in my father's house at home. He said this about a month before the shooting, I suppose."

The first ground of the amended motion for a new trial complains that "the court refused to allow the defendant to show by the witness Mollie Holbrooks that, on the same day that she testified that the defendant threatened to kill the whole Holbrooks family, her father was drunk that night, and that defendant, instead of trying to kill him, carried him out of Rome that night to keep him from being locked up." The exception just mentioned is the only one of the several assigned that smacks of error. The others belong to that class denominated by Justice Samuel Lumpkin in one of his opinions as "pintees." We are inclined to think that the trial judge might well have let in the proof of the defendant's generosity to the father of the

prosecutrix, for the purpose of showing that the alleged threat was mere idle talk, of which he had repented, if, indeed, the threat was made before the transaction with the father occurred. See *Crumley v. State*, 5 Ga. App. 231, 62 S. E. 1005. However, so far as we are informed, the threat may have been made after the defendant brought the old man home that night, and in that event the previous transaction would have been wholly irrelevant. The burden being on the plaintiff in error to show error, we cannot grant him a new trial on this ground.

As one of the reasons why he should be granted a new trial, the plaintiff in error says that the verdict against him was a compromise; that he was either guilty of assault with intent to murder, or was not guilty of anything. We think that, if he is the man who took one of these automatic repeating shotguns (we shall not rule judicially that to have one of these barbarous, unsportsman-like guns is a badge of malice prepense, though we confess to some personal predilection toward classing them with things unfair) and fired a fusillade of shot into a young lady's back as she was returning from a candy pulling, he is fortunate in escaping the limit of the law for the higher offense. However, under the principle announced in *Fallon's Case*, 5 Ga. App. 659, 63 S. E. 806, the verdict may be sustained against the objection that it is a compromise.

Judgment affirmed.

(6 Ga. App. 284)

LINDSAY v. WEST et al. (No. 1,548.)

(Court of Appeals of Georgia. June 15, 1909.)

1. TRESPASS (§ 76*)—CRIMINAL TRESPASS.

There is a misdemeanor in this state designated by Pen. Code 1895, § 219, as "trespass," and therefore a warrant alleging that the accused has committed that offense charges him with a crime.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 76.*]

2. MALICIOUS PROSECUTION (§ 24*)—PROBABLE CAUSE—EVIDENCE.

The action of a magistrate in binding over the defendant on a criminal warrant is prima facie, but not conclusive, evidence of probable cause in a subsequent suit brought by the accused against the prosecutor for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 49-55; Dec. Dig. § 24.*]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by R. A. Lindsay against A. S. West and others. Judgment for defendants, and plaintiff brings error. Reversed.

Seaborn & Barry Wright, for plaintiff in error. M. B. Eubanks, for defendants in error.

POWELL, J. This is an action of malicious prosecution. The plaintiff alleges that the defendant caused him to be arrested upon a warrant charging him with the offense of "trespass"; that the defendant acted maliciously and without probable cause; that the plaintiff was carried before a magistrate and bound over to the city court, but in that court the prosecution terminated by the solicitor general entering a nolle prosequi upon the accusation, which had been drawn upon the commitment and warrant. The court sustained a general demurrer, and the plaintiff excepts.

Two reasons are assigned by the defendant in error why the court properly sustained the demurrer: (1) Because the petition does not show that there was any prosecution, for that the warrant charged no crime, there being no such crime as "trespass"; and (2) because the action of the magistrate in binding the defendant over to the city court is conclusive evidence of probable cause.

1. There is such an offense in our law as "trespass." Our Pen. Code 1895, § 219, provides: "The following shall be deemed and held to be trespass and indictable, to wit"—and here follows an enumeration of acts.

2. The rule generally recognized by the American courts is that the binding over of the defendant by a magistrate is prima facie, but not conclusive, evidence of probable cause. Of course, in those states where the magistrate has the power to settle the issue as to the defendant's guilt, the trial before this officer would have the same effect as a trial before any other competent tribunal. In this state, however, the magistrate has no power in criminal matters, other than to make a mere preliminary inquiry. The question in all its phases is so fully and ably discussed in the case of *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760, 28 Am. St. Rep. 123, and in the note appearing at the foot of the case as reported in 28 Am. St. Rep. 123, that we deem it unnecessary to discuss the question further. See, also, *Burdick on Torts*, 254; *Perkins v. Spaulding*, 182 Mass. 218, 65 N. E. 72. The case last cited goes to the extent of holding that even the finding of a bill by the grand jury is not prima facie evidence of probable cause, but is a circumstance to be considered in determining the question.

The court erred in sustaining the general demurrer.

Judgment reversed.

(6 Ga. App. 332)

SCOTT v. STATE. (No. 1,855.)

(Court of Appeals of Georgia. June 15, 1909.)

LANDLORD AND TENANT (§ 333*)—CROPPERS—DISPOSAL OF CROP—CRIMINAL PROSECUTION—"DISPOSITION."

For a cropper to carry a portion of the crop raised by him from one county to another

in this state is not a disposition of it, in violation of section 680, Pen. Code 1895.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 833.*

For other definitions, see *Words and Phrases*, vol. 3, pp. 2119-2120.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Sam Scott was convicted of disposing of a part of his crop without the consent of the landlord, and brings error. Reversed.

W. A. James, for plaintiff in error. J. P. Brooke, Sol. Gen., and J. E. Mozley, for the State.

POWELL, J. The defendant was convicted of violating section 680, Pen. Code 1895, which provides that "any cropper who shall sell or otherwise dispose of any part of the crop grown by him, without the consent of the landlord, and before the landlord has received his part of the entire crop and payment in full for all advances made to the cropper in the year the crop was raised, to aid in making it, shall be guilty of a misdemeanor." The proof was that the defendant, a cropper of the prosecutor, had turned over to the landlord a part of the crop, and, while a dispute was pending as to whether any further sum was due, took one of the bales of cotton, which he had raised, and carried it from the premises in Cobb county across the line into Douglas county, where he then lived, and where he still holds the cotton. The judge charged the jury as follows: "If you believe from the evidence beyond a reasonable doubt that this defendant, Sam Scott, was the cropper of the prosecutor for the year charged in the bill of indictment, and raised a crop on his farm as charged, and then took and carried one bale of the cotton thus raised out of Cobb county, without the knowledge or consent of the prosecutor, William Hollerman, and before he had paid the prosecutor all he owed him for supplies or advances made him for that year, and also his part of the crop, he would be guilty. The carrying of the bale of cotton out of Cobb county would be such a sale or disposition of the cotton that the courts of this county would have jurisdiction of the crime if a crime was committed." This charge was given in connection with section 680, Pen. Code 1895.

We think that the instruction just quoted is erroneous. Certainly to take property from one county into another does not amount to a sale; but the contention of the state's counsel is that the transaction is covered by the words "otherwise dispose of" appearing in the statute and in the indictment against the defendant. Even when standing alone, the phrase "dispose of," when used in a criminal statute, is universally held by the courts to include only those transactions in which

there has been a transfer by the defendant of either title or absolute possession of the property, or else some such disposition of it as would destroy it in whole or in part. "Dispose of" means "to alienate; to effectually transfer." *United States v. Hacker* (D. C.) 73 Fed. 292, 294. It covers "all such alienations of property as may be made in ways not otherwise covered in the statute; for example, such as pledges, pawns, gifts, bailments, and other transfers and alienations." *Bullene v. Smith*, 73 Mo. 151, 161. "To dispose of" in a popular sense as used in reference to property means to part with a right to or ownership of it; in other words, a change of property. If this does not take place, it would scarcely be said the property was disposed of." *Reynolds v. State*, 73 Ala. 3. See, also, *Franklin v. State*, 12 Md. 246, 248. It differs in meaning from the word "secrete." *Pearre v. Hawkins*, 62 Tex. 434, 437. When it is associated in the context with the word "sell," then under the principle contained in the legal expression "noscitur a sociis" its meaning takes on some limitation from the association. In *re Carr*, 16 R. I. 645, 19 Atl. 145, 27 Am. St. Rep. 773; *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855. See, also, *Hawthurst v. Rathgeb*, 119 Cal. 531, 533, 51 Pac. 846, 63 Am. St. Rep. 142. Where the expression is "sell or otherwise dispose of," the other disposition must be somewhat in the nature of a sale. It does not include a mere removal of the property. *Roberson v. State*, 8 Tex. App. 502, 503. In a statute prohibiting "the selling, giving away, or otherwise disposing of" certain property under certain conditions, the expression "otherwise dispose of," in the absence of any expression of a legislative intent otherwise, must be construed to apply only to such a disposition as a sale or gift. *Roberson v. State*, 100 Ala. 37, 14 South. 554. Our local case of *Conley v. State*, 85 Ga. 348, 11 S. E. 659, is somewhat in point, though probably distinguishable by reason of the fact that the words as they appear in the body of the statute are limited in meaning by the courts in order that the body of the law may conform to the title. We see no reason why to move property across a county line would be any more criminal than to move it across a public road, or from one place to another within the same county. It might be that for a cropper to move any part of the farm products across the state line would be to dispose of it, as that would be a material interference with the landlord's constructive possession, in that it would destroy his right to resort to those remedies which are provided by the laws of this state for the maintenance of his peculiar and superior rights in the property; but to move it from one county to another has no such effect.

Judgment reversed.

(6 Ga. App. 308)

GEORGIA SOUTHERN & F. RY. CO. v. OLIVER. (No. 1,634.)

(Court of Appeals of Georgia. June 15, 1909.)

1. JUSTICES OF THE PEACE (§ 91*)—ACTIONS—PLEADING—SUFFICIENCY.

In a suit in a justice's court for the killing of live stock through the negligence of the employés of a railroad company in the operation of its trains, it is not necessary that the plaintiff should set out the particular acts of negligence. The strictness of pleading required in superior and city courts does not pertain to justice's courts. Ga. So. & Fla. Ry. Co. v. Barfield, 1 Ga. App. 203, 58 S. E. 236; Southern Railway Co. v. Oliver, 1 Ga. App. 734, 58 S. E. 244; Southern Express Co. v. Briggs, 1 Ga. App. 294, 57 S. E. 1066; Hendrix v. Elliott, 2 Ga. App. 301, 58 S. E. 495; Patterson v. Sams, 2 Ga. App. 755, 59 S. E. 18; Jackson v. Brothers and Sisters of Promise, 2 Ga. App. 761, 59 S. E. 11; Seaboard Air Line Ry. v. Smith, 3 Ga. App. 644, 60 S. E. 353; Central of Ga. Ry. Co. v. Crapps, 4 Ga. App. 550, 61 S. E. 1126.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-323; Dec. Dig. § 91.*]

2. SUFFICIENCY OF EVIDENCE.

The testimony in support of the plaintiff's recovery, while not wholly satisfactory, was nevertheless legally sufficient to authorize the judge of the superior court in his discretion to refuse to set aside the verdict of the jury in the justice court on the pure issue of fact involved.

(Syllabus by the Court.)

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

Action by N. L. Oliver against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fulwood & Murray, for plaintiff in error. Jas. H. Price, for defendant in error.

POWELL, J. Affirmed.

(6 Ga. App. 314)

COTTLE v. WADE et al. (No. 1,651.)

(Court of Appeals of Georgia. June 15, 1909.)

1. PARTIES (§ 96*)—MISJOINDER—WAIVER.

One who has filed a claim to the levy of a lien foreclosure cannot successfully urge the point that the verdict finding the property subject is illegal because there was a misjoinder of parties plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 173; Dec. Dig. § 96.*]

2. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to justify the jury in finding that the claimant bought the property with notice, either actual or constructive, of the lien of the plaintiffs.

(Syllabus by the Court.)

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

Claim proceedings against the levy of a lien foreclosure between W. E. Cottle and James Wade and others. From the judgment, Cottle brings error. Affirmed.

J. B. Murrow and J. J. Murray, for plaintiff in error. W. J. Wallace, for defendants in error.

POWELL, J. Judgment affirmed.

(6 Ga. App. 285)

R. B. OLIVER CO. v. SMITH. (No. 1,556.)

(Court of Appeals of Georgia. June 15, 1909.)

1. APPEAL AND ERROR (§ 564*)—REVIEW—FILING BILL OF EXCEPTIONS.

Rulings occurring upon a trial cannot be complained of in a bill of exceptions filed more than 30 days after the expiration of the term at which the trial was had, unless exceptions pendente lite have been duly preserved.

[Ed. Note.—For other cases; see Appeal and Error, Dec. Dig. § 564.*]

2. NEW TRIAL (§ 71*)—GROUNDS—CONFLICTING EVIDENCE.

There was no error in overruling the motion for a new trial based on the general grounds alone, since the evidence, though conflicting, was sufficient to authorize the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action between the R. B. Oliver Company and B. E. Smith. From the judgment the Oliver Company brings error. Affirmed.

Brannen & Booth, for plaintiff in error. H. B. Strange, for defendant in error.

POWELL, J. Judgment affirmed.

(6 Ga. App. 338)

FINCH v. STATE. (No. 1,858.)

(Court of Appeals of Georgia. June 15, 1909.)

1. INTOXICATING LIQUORS (§ 146*)—ILLEGAL SALE.

"A sale on credit is a complete sale." Therefore a sale of whisky in this state since January 1, 1908, whether for cash or on credit, or whether subsequently paid for or not, constitutes a violation of law. Acts 1907, p. 81; Civ. Code 1895, § 3526; Lupo v. State, 118 Ga. 759, 45 S. E. 602; Cook v. State, 124 Ga. 653, 53 S. E. 104.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 146.*]

2. INTOXICATING LIQUORS (§§ 219, 223*)—ILLEGAL SALE—IDENTITY OF PURCHASER.

It is not necessary, in an indictment for the illegal sale of intoxicating liquors, to name specifically the person to whom the sale was made; but, if the indictment does name such person, testimony that a sale was made to any other person would be irrelevant and inadmissible, unless the person to whom the liquor was sold was acting for the person named in the indictment as making the purchase, and that fact was known to the defendant when he made the sale. Williams v. State, 89 Ga. 483, 15 S. E. 552; Carter v. State, 68 Ga. 826.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 237-239, 274; Dec. Dig. §§ 219, 223.*]

3. REVIEW OF EVIDENCE.

In view of the unsatisfactory character of the evidence, the error committed in the admis-

sion of the irrelevant testimony indicated in the second headnote was presumptively prejudicial.

(Syllabus by the Court.)

Error from City Court of Statesboro.

W. S. Finch was convicted of an illegal sale of liquor, and brings error. Reversed.

Strange & Cobb and J. J. E. Anderson, for plaintiff in error. Fred T. Lanier, Sol., for the State.

HILL, C. J. Judgment reversed.

(6 Ga. App. 301)

OXFORD KNITTING MILLS v. WOOLDRIDGE. (No. 1,622.)

(Court of Appeals of Georgia. June 15, 1909.)

1. SALES (§ 442*)—BREACH OF WARRANTY—MEASURE OF DAMAGES.

When there is a sale of goods with a warranty of quality and a delivery and acceptance by the buyer, if the goods prove not to correspond with the warranty the measure of damages is the difference between the contract price and the actual value of the goods when and where delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

2. REVIEW.

No error of law appears, and the verdict is fully supported by the evidence

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by J. R. Wooldridge against the Oxford Knitting Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

E. C. Armistead, for plaintiff in error. A. A. Murphy, for defendant in error.

HILL, C. J. Wooldridge sued the Oxford Knitting Mills in a justice court on account to recover the contract price of a car load of steam coal. The defense relied upon was total failure of consideration, in that the coal was expressly warranted as a steam coal of first quality, when in fact it was not steam coal and could not be used for the purpose of generating steam. A judgment was rendered for the plaintiff, and, on appeal to a jury in the superior court, a verdict was found for the plaintiff for the full amount sued for. The evidence showed that the coal was warranted by the plaintiff as a first class quality of steam coal. There was conflict in the evidence as to a breach of this war-

ranty, and the jury solved the conflict in favor of the plaintiff.

Only one error of law is complained of. In support of its plea the defendant offered to prove that it had lost \$15 per day in wages paid to its hands while waiting for steam to be sufficiently generated by the use of the coal in question to operate the mill, and that this delay continued for four days; and also offered to prove the loss of \$10 per day for four hours each day as lost interest on the money invested in the mill. The court excluded this testimony, and this ruling constitutes the error of law assigned. We think it clear that the court did right in excluding the testimony. Certainly the damages here attempted to be recovered by the defendant by way of recoupment could not be said to have been within the contemplation of the parties to the contract, and only such damages would be recoverable. Civ. Code 1895, § 3799. Besides, the defendant accepted and used the coal. If it was in fact an inferior quality of coal, and there was a breach of the express warranty on this subject, it was entitled, on proper proof, to an abatement in the price of the coal, and this abatement would be determined by the difference in the agreed price of the coal and its actual value when used, as decreased by its defective quality. *Atkins v. Cobb*, 56 Ga. 86; *Florence v. Pattillo*, 105 Ga. 581, 32 S. E. 642; *Clark & Co. v. Neufville*, 46 Ga. 26. In this latter case it was held by the Supreme Court that, where there is a sale of goods with a warranty of quality and a delivery and acceptance by the buyer, and the goods prove not to correspond with the warranty, and there is no fraud by the seller, the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of sale and delivery. There was no proof offered as to the actual value of the coal. The defendant could have rejected the coal entirely as worthless, if such had been the fact, and refused to pay for it on that ground. Having received and used it, the defendant would only have been entitled to a reduction from the contract price to the actual value of the coal when used. There was no evidence offered by which the jury could determine the damages to the defendant arising from any partial failure of consideration. The verdict, under the law, was demanded.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(33 S. C. 58)

**McCLINTOCK v. CHARLESTON & W.
C. RY. CO. (two cases).**

(Supreme Court of South Carolina. June 16, 1909.)

**1. APPEAL AND ERROR (§ 1056*)—REVIEW—
HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In an action for the destruction of a house near defendant's right of way claimed to have been caused by sparks from its engine, error in excluding evidence whether the house ever caught fire from trains before was harmless to plaintiff; it being evident that a house near the track might be fired from a passing locomotive, which the jury as men of common sense should be presumed to know, and the fact sought to be shown not being the main issue.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

**2. APPEAL AND ERROR (§ 1056*)—REVIEW—
HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In an action for damages for the destruction of a house near defendant's right of way by fire claimed to have been negligently communicated from its locomotives, the exclusion of evidence whether the house had ever caught fire from a train before, offered to show negligence, was not reversible where plaintiff withdrew his allegations of negligence, and relied upon the statutory remedy provided by Civ. Code 1902, § 2135, making railroads liable in damages for buildings injured by fire communicated from their engines.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

**3. APPEAL AND ERROR (§ 970*)—REVIEW—
DISCRETION OF TRIAL COURT—ADMISSION OF
EVIDENCE.**

The relevancy of testimony being largely in the discretion of the trial court will not be reviewed in the absence of an abuse thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3849; Dec. Dig. § 970.*]

**4. RAILROADS (§ 481*)—FIRES—EVIDENCE—
DISCRETION OF COURT.**

In an action for the destruction by fire of a house near defendant's tracks, the exclusion of evidence whether the house had caught fire from a train before, offered to show the cause of the fire and negligent operation of the trains, was not an abuse of discretion.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 481.*]

**5. TRIAL (§ 84*)—ADMISSION OF EVIDENCE—
OBJECTIONS—SCOPE.**

In an action for the destruction by fire of property near defendant's right of way, a train register offered to prove entries made therein by the witness as to the time of the arrival of trains was properly admitted, where defendant only objected to its admissibility to prove entries made by others than the witness.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 84.*]

**6. TRIAL (§ 56*)—RECEPTION OF EVIDENCE—
CUMULATIVE TESTIMONY.**

Cumulative testimony is properly excluded in the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 181, 132; Dec. Dig. § 56.*]

Appeal from Common Pleas Circuit Court of Laurens County.

Action by W. A. McClintock against the Charleston & Western Carolina Railway Company and W. E. McClintock against the Charleston & Western Carolina Railway Com-

pany. From a judgment for defendant in each case, plaintiffs appeal. Affirmed.

Dial & Todd, for appellants. S. J. Simpson and Simpson, Cooper & Babb, for respondent.

GARY, A. J. These two actions are separate and distinct, but by consent were tried together. The plaintiffs seek to recover damages for the loss of their property alleged to have been caused by fire communicated from a locomotive engine of the defendant, or originating within the limits of defendant's right of way. The fire is alleged to have occurred on the 21st of May, 1908. The plaintiff W. A. McClintock, claiming to be the owner of the house which was destroyed, seeks to recover as his damages the value of the same, while the other plaintiff, the occupant of the house at the time of the fire, sues to recover the loss of his household goods and other personal property. The jury rendered a verdict in each case in favor of the defendant, and the plaintiffs appealed.

The first exception is as follows: "Because his honor erred, it is submitted, in not allowing the plaintiff W. A. McClintock to answer the following question: 'Do you know whether this house ever caught from a train before?' and in holding that it was irrelevant. His honor should have held that this question was competent, relevant, and material as bearing upon the issue of the cause of the fire, and as tending to prove the possibility and a consequent probability that some locomotive of the defendant caused the fire, and also as bearing upon the question of negligence, either in the operation, management, or construction of defendant's engines." This question arose as follows during the examination of a witness for the plaintiffs: "Q. Do you know whether this house ever caught from a train before? Mr. Babb: We object to what may have occurred before this. The Court: How is that relevant? Mr. Todd: In one of these cases under this section, evidence of previous fires from locomotive engines was received and was held competent. I don't recall the name of that case, but I think I can get it. I asked the witness if he knew of his own knowledge that this house had ever caught from passing locomotives previous to this time. The Court: I don't think that would be relevant." The ground upon which the testimony was held to be inadmissible was that it was irrelevant. It is a self-evident fact that it is within the range of possibility for sparks from an engine to set on fire a house near the track. We must assume that jurors are men of common sense, and conversant with the ordinary and well-known laws of nature. So that, even conceding that the testimony was admissible, it has not been made to appear that its rejection was preju-

dicial to the rights of the appellant, especially since the testimony shows that this fact was not the main issue in the controversy. In so far as the exception raises the question of the relevancy of the testimony upon the issue of negligence, it must be overruled for the additional reason that the allegations of negligence and willfulness were withdrawn, and the plaintiffs relied solely upon the statutory remedy provided in section 2135 of the Code of Laws of 1902. Furthermore, the question as to the relevancy of testimony lies in large measure within the discretion of the presiding judge, and his ruling is not the subject of appeal unless there has been an abuse of discretion, which does not appear in this case. This exception is overruled.

The second exception is as follows: "Because his honor erred, it is submitted, in allowing the defendant, over the objection of the plaintiffs, to introduce in evidence by the witness C. H. Gasque the book known as train register. This was error because it was proving negatively what could not be proven positively, and because said book was a mere memorandum or record made and kept by the defendant, and its servants or agents, for its convenience and information solely, and was therefore not competent or relevant against these plaintiffs, and also because the absence of any entries of the arrival of trains arriving after the arrival of Verdery's train was not competent or relevant evidence to show that no trains in fact arrived; whereas, his honor should have so held, and should have excluded the book." The question arose as follows during the examination of a witness for the defendant: "Mr. Babb: We offer that book in evidence to show the time of the arrival and departure of trains on May 21st and 22d of 1906. Mr. Todd: We object. We think that book, so far as it shows any entries made by the witness, might be competent. The Court: Yes, sir. Mr. Babb, only those books are evidence, and they are only evidence when the entry in them is proven. This book is evidence of the entry where the witness who makes the entry testifies to it. Mr. Babb: We wish to introduce, then, the record for May 21, 1906, to show that no entry was made subsequent to this one, testified to by the witness. The Court: You want to show there is no entry there? Mr. Babb: No entry at all. The Court: Very well. You can show that. Mr. Babb: That is the purpose for which we wish to introduce it, to show there is no entry. Mr. Todd: We object to any further entry on that day made by any other person except this witness. The Court: I rule that out. Mr. Babb: All we want to show is that there was no other entries on that day after that one. The Court: Yes, sir." The plaintiff did not object to the introduction of the book in evidence to prove

entries made by the witness himself; but the sole ground of his objection was that it was not admissible to prove other entries, and his honor, the presiding judge, so ruled. As it was not offered in evidence to prove entries made by others, this exception cannot be sustained.

The third exception is as follows: "Because his honor erred, it is submitted, in refusing to allow the plaintiffs to examine the witness John H. Powers in reply as to the time trains passed Ora on the night of the fire. This was error because it denied to plaintiffs the right to bring out all the facts for the consideration of the jury, and such testimony as plaintiffs attempted to bring out was directly in reply to and contradictory of the testimony of several witnesses for defendant, and was therefore competent and important, and by being thus shut off plaintiffs' cases were prejudiced." The ruling of his honor, the circuit judge, in excluding the cumulative testimony, is sustained by the case of *Weaver v. Whilden*, 33 S. C. 190, 11 S. E. 686. This exception is also overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(33 S. C. 62)

LAUGHLIN et al. v. SOUTHERN PUBLIC SERVICE CORPORATION et al.

LAUGHLIN v. SAME.

(Supreme Court of South Carolina. June 16, 1909.)

1. CORPORATIONS (§ 432*)—ACTS OF OSTENSIBLE AGENT—RATIFICATION—EVIDENCE—ADMISSIBILITY.

In an action against a public service corporation and a light and power company for injuries by contact with an electric wire, receipted bills, dated in the name of the light and power company as agent for the other defendant, signed by it as agent, were properly admitted to show that the public service corporation acquiesced in the statements contained in the receipts, and held itself out as the principal, when considered in connection with testimony that defendants used the same office and had the same officers and employes, as the only reasonable inference to be drawn from these facts is that the public service corporation had notice that it was being held out as principal, and the testimony was competent as a link in establishing ratification of the acts of its ostensible agent.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—EVIDENCE.

An exception to the admission of testimony cannot be sustained on appeal, where similar testimony was introduced without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

3. TRIAL (§ 145*)—TAKING CASE FROM JURY—PARTICULAR ISSUES.

The fact that on the issue of wantonness, willfulness, or negligence there was contradictory testimony on the part of defendants is not to be considered by the Supreme Court in

determining whether the issue as to plaintiffs' right to punitive damages should be withdrawn from the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 145.*]

4. ELECTRICITY (§ 19*)—CONTACT WITH WIRE — ACTION FOR INJURIES — QUESTION FOR JURY.

In an action for injuries by coming in contact with an electric wire, evidence held sufficient to go to the jury on the question of a reckless disregard of the rights of the public, warranting punitive damages.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

Appeal from Common Pleas Circuit Court of Florence County; Charles G. Dantzler, Judge.

Actions by Maud Laughlin and another against the Southern Public Service Corporation and another, and by Lawrence Edward Laughlin, by guardian ad litem, against the same defendants. The actions were consolidated, and from a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Mordecai & Gadsden, Rutledge & Hagood, and J. P. McNeill, for appellants. Shipp & Baker and Willcox & Willcox, for respondents.

GARY, A. J. On the 19th of August, 1907, the plaintiffs, Maud Laughlin and her son, Lawrence E. Laughlin, were both burned by coming in contact with an electric wire, which had fallen from a pole near the intersection of two streets in the city of Florence. The wires were those through which ran the electric current which furnished light to the city. Subsequently these actions were brought by Mrs. Laughlin and her husband in one case, and Lawrence E. Laughlin by his guardian ad litem in the other case, against the Southern Public Service Corporation and Florence Light & Power Company, to recover damages for the injuries so sustained. The allegations in each case which are material to the points involved in this appeal are as follows: "That at the times hereinafter mentioned the defendants owned and operated, in the city of Florence, county of Florence, and state of South Carolina, an electric plant, and were engaged in the business of furnishing and supplying electric lights and an electric power to the city of Florence, and to divers persons residing in said city, and the plaintiffs allege, on information and belief, that the defendant Florence Light & Power Company owned the said electric plant at said times, and was operating and maintaining the same for the use and benefit of its codefendant, the Southern Public Service Corporation, as its agent, and under its control." The allegations of negligence are against the defendants jointly. The answers of the defendants were general denials. By consent the actions were consolidated and tried together, resulting in a verdict for the

mother in the sum of \$17,000, and for the son in the sum of \$8,000.

The defendant appealed upon exceptions, the first of which is as follows: "Because the presiding judge erred in admitting in evidence, against the objections of the defendant's attorneys, upon the examination of the witness George W. Laughlin, the receipt for electric light bill, \$1.80, dated August 15, 1907; the error assigned being that receipt was irrelevant upon the issue as to whether the Florence Light & Power Company owned the electric plant, and was operating it for the benefit of its codefendant, the Southern Public Service Corporation." The record shows that the plaintiffs introduced in evidence seven receipted bills, headed "To Florence Light and Power Company, Agent for the Southern Public Service Corporation Dr.," and signed: "Received payment. Florence Light & Power Company, Agent by ———." These receipted bills bore date April 1, 1907, August 1, 1907, August 15, 1907, November 2, 1907, December 2, 1907, January 2, 1908, and January 23, 1908. Even conceding that the said testimony was not competent on the question of agency, it was nevertheless admissible for the purpose of showing that the Southern Public Service Corporation acquiesced in the statements contained in the receipts, and held itself out to the world as the principal, when considered in connection with the testimony, to the effect that the two companies used the same office, and had the same officers and employes. The only reasonable inference to be drawn from these facts is that the Southern Public Service Corporation had notice of the fact that it was being held out to the world as the principal. The testimony was therefore competent as a link in establishing ratification of the acts of its ostensible agent. Another reason why this exception cannot be sustained is that similar testimony was introduced without objection.

The second exception is disposed of by what was said in considering the first.

The third exception assigns error in refusing the motion for a nonsuit, but it must also be overruled, as we have already ruled that there was competent evidence tending to establish the allegations of the complaint as to ownership.

The fifth exception is as follows: "Because the presiding judge erred in refusing to charge the jury as requested by the defendants (as per the second request) as follows: 'The jury is instructed that there is no evidence in these cases showing wantonness, willfulness, or recklessness, and they cannot therefore find verdicts for punitive damages'—the error assigned being that, there being no evidence of any more than ordinary negligence, the question of punitive damages should have been, by granting this request, withdrawn from the jury." There is testimony to the effect that this wire fell in a

thoroughfare of the city of Florence; that the wire at the time of the accident was old, and the insulation broken and hanging in ribbons; that the wire was permitted to lie across the limb for a long time; that it is dangerous for a live wire to be permitted to remain in contact with a limb; that the condition of the wire was frequently reported to those in charge of the company, but they took no step to remedy it; that W. L. Black, the superintendent of the plant, was notified, on the Saturday before the accident, of the condition of this wire, but he "did not regard it serious," and consequently did not attend to it; that it was the duty of the company to make these repairs; that two weeks before this accident the officers of the company had been commanded by the chairman of the street committee to take all wires out of the trees; and that in stringing the wire it should have been put on an insulator where it passed through a tree. There was contradictory testimony on the part of the defendants, but such fact is not to be considered by this court in determining whether there was any testimony tending to show that the plaintiffs were entitled to punitive damages. The testimony to which we have made reference certainly tended to show a reckless disregard of the rights of the public, and this exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(83 S. C. 53)

BROWN v. ATLANTIC COAST LINER CO.
(Supreme Court of South Carolina. June 16, 1909.)

1. CARRIERS (§ 316*)—INJURY TO PASSENGER—*RES IPSA LOQUITUR*.

No presumption of negligence arises on the part of a carrier from the fact that a passenger has been injured while on the carrier's train; but, in order to raise such presumption, it must appear that the injury resulted from some agency or instrumentality of the carrier, some act or omission of its servants, or some defect in the instrumentalities of transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283-1294; Dec. Dig. § 316.*]

2. TRIAL (§ 235*) — INSTRUCTIONS — ADMISSIONS—WEIGHT.

An instruction that alleged admissions of plaintiff were receivable only to discredit his testimony, and not as affirmative proof of material facts in the case, was erroneous; defendant being entitled to have plaintiff's admissions as to the manner in which he was injured considered as evidence that he was not hurt as alleged in the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 546; Dec. Dig. § 235.*]

3. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that the jury should consider plaintiff's admissions only to discredit his testimony, and not as affirmative proof of material

facts in issue, was erroneous, as violating Const. art. 5, § 26, prohibiting charges as to matters of fact.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

Appeal from Richland County Court; John S. Wilson, Judge.

Action by John W. Brown against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

De Pass & De Pass, for appellant. Barron, Moore & Barron and R. B. Herbert, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence of the defendant. The complaint alleges that: "While plaintiff was in the act of alighting from said train, with one foot on the last step of the car, and the other thrust forward in the act of stepping to the ground, the said train, by reason of the negligent and careless management thereof on the part of the employes of the defendant in charge of same, was caused to give a sudden and violent jerk and lurch forward, hurling and throwing the plaintiff from the steps of said car to the ground, under and beneath said car, and against the cross-ties and rails of said defendant's roadway, whereby plaintiff's left knee struck violently against the step of said car and the cross-ties of said roadbed of defendant, and so bruised and mangled same that in consequence thereof his left leg had to be removed just above the knee." The defendant denied the allegations of the complaint, and set up the defense of contributory negligence, which was withdrawn at the trial. The jury rendered a verdict in favor of the plaintiff for the sum of \$1,000, and the defendant appealed.

The first assignment of error is, because his honor the presiding judge charged the jury that "when a passenger is hurt, the presumption of law is that it is through the negligence of the railroad company, but the presumption may be done away with by proof." The rule is thus stated in *Anderson v. Railroad*, 77 S. C. 434, 58 S. E. 149, 122 Am. St. Rep. 591: "The third exception complains of error in charging: 'That the obligation of a common carrier for safe transportation is one arising from contract imposing duties growing out of the relation between the parties involving trust and confidence, requiring extraordinary care; and, whenever a passenger is injured on a train, without fault on his part, while being transported by a carrier, a presumption arises from this fact alone that there was negligence in the management of the road, which presumption the carrier is bound to rebut, or it will be liable in damages without further proof'—the error being that no presumption of negligence

can arise from the mere injury of a passenger, unless it is shown that the injury was caused by some instrumentality in the charge of, or under the control of, the carrier, and that some notice of the threatened violence or impending danger must be brought home to the carrier before negligence can be imputed. This exception is well taken. According to the rule in this state there is no presumption of negligence on the part of the carrier from the bare fact that a passenger has been injured while on the carrier's train, but that such presumption does arise on proof of such injury as the result of some agency or instrumentality of the carrier, some act of omission or commission of the servants of the carrier, or some defect in the instrumentalities of transportation." The testimony was contradictory as to the manner in which the plaintiff was injured. He introduced evidence tending to show that he was injured as alleged in his complaint, while the defendant's testimony tended to show that he suffered injury by jumping from the car before it reached the station, and while it was in motion. The charge gave the plaintiff the benefit of a fact to which he was not entitled, and which was prejudicial to the rights of the appellant. The exceptions raising this question are sustained.

The second exception is as follows: "Because his honor erred in charging the jury that 'alleged admissions of the plaintiff are receivable in evidence only as discrediting his testimony, and not as affirmative proof of material facts in issue, such as would excuse the defendant of the presumption of negligence raised by inference of law where a passenger is shown to be injured on its railroad'—the error being that: (a) The judge could not take from the jury the right to say whether plaintiff's admissions to third parties were evidence that he was not hurt in the manner alleged in the complaint; (b) it was a charge on the facts in telling the jury that such admissions were not such proof as would remove a presumption of negligence." The rule is thus stated in 2 Wigmore on Evidence, § 1048: "The logical basis, therefore, of the use of admissions is twofold: In the first place, all admissions furnished, as against the party, the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; * * * in the next place, those admissions which happen to state a fact that was at the time against the parties' interest have an additional testimonial value, independent of the contradiction, and similar to that which justifies the hearsay exception for statements of facts against interest, this element adding to their probative value, but not being essential to their admissibility. This double evidential utility explains the proposition, sometimes

judicially sanctioned, that an admission is equivalent to affirmative testimony for the party offering it. Such a theory is partly correct, partly incorrect. It certainly cannot be true of admissions in general. Their effect, like that of a witness' self-contradictions, is merely destructive." In the case of Zemp v. Railroad, 9 Rich. Law, 84, 64 Am. Dec. 763, where the facts were similar to those in the case under consideration, the court used this language: "The first ground attributes error to the presiding judge, in that he did not charge the jury, if they believed the testimony as to the plaintiff's declarations, they should find for the defendant. The judge very properly presented the plaintiff's declarations as part of the case. If they were believed, they were to be put into the scales with the other proof, and given their appropriate weight." The declarations of the plaintiff contained the statement of a fact which at the time was against his interest, and they should have been put into the scales with the other testimony, and given their appropriate weight by the jury. This disposes of subdivision "a" of said exception. Having reached this conclusion, it clearly appears that there was error in stating to the jury what force and effect should be given to the declarations of the plaintiff, as the charge was violative of article 5, § 28, of the Constitution, prohibiting judges from charging juries in respect to matters of fact.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(33 S. C. 287)

**BARKSDALE v. CHARLESTON & W.
C. RY. CO.**

(Supreme Court of South Carolina. June 25, 1909.)

1. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—IRRELEVANT TESTIMONY.

An exception to the admission of testimony cannot be sustained, where it does not appear prejudicial to the complaining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

2. NUISANCE (§ 72*)—PUBLIC NUISANCE—REMEDY THEREFOR.

The remedy for a public nuisance is by indictment, unless the person instituting civil proceedings therefor can show special or peculiar damages, differing in kind from those to which all others in common with him are exposed.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

3. NAVIGABLE WATERS (§ 26*)—PUBLIC NUISANCE—AFFECTING NAVIGATION—INJURY TO ADJOINING LANDOWNER—RIGHT TO SUE THEREFOR.

An injury to land on a navigable stream, caused by a public nuisance, affecting the rights of navigation, differs in degree and kind from

the injury done to the public, and hence the owner is entitled to sue therefor.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 154; Dec. Dig. § 26.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—CONSIDERATION OF CHARGE AS A WHOLE.

No error can be predicated on a portion of a charge which, considered in connection with the entire charge, is free from error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. APPEAL AND ERROR (§ 1078*)—REVIEW OF EXCEPTION NOT ARGUED ON APPEAL.

An exception not argued on appeal will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

6. APPEAL AND ERROR (§ 1004*)—REVIEW—CONCLUSIVENESS OF VERDICT.

The Supreme Court cannot consider whether a verdict is excessive, when there is any evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Appeal from Common Pleas Circuit Court of Laurens County; J. C. Klugh, Judge.

Injunction by W. D. Barksdale against the Charleston & Western Carolina Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. J. Simpson and Simpson, Cooper & Babb, for appellant. Cannon & Blackman, for respondent.

GARY, A. J. This is an action for an injunction and to recover damages, alleged to have been caused by the operation of a coal chute, in the city of Laurens, S. C., on the ground that it is a nuisance. The jury rendered a verdict in favor of the plaintiff for \$1,000, but an injunction was not granted, as the plaintiff announced that the verdict would be accepted as including both past and future damages, and that he would not ask for an injunction. The defendant appealed, upon exceptions which will be set out in the report of the case.

First exception: Subdivision "a" of this exception cannot be sustained, for the reason that, even conceding the testimony was irrelevant, it has not been made to appear that it was prejudicial to the rights of the appellant. And it is only necessary to refer to the complaint to show that subdivision "b" must be overruled.

Second, sixth, and seventh exceptions: These exceptions assign error, on the part of his honor the presiding judge, in refusing to grant a nonsuit, in his charge to the jury, and in refusing to grant the motion for a new trial, on the ground that the undisputed testimony showed that the plaintiff had not sustained injury special or peculiar to himself, or differing in kind and degree from that suffered by others in the same neigh-

borhood. The following authorities sustain the proposition that the remedy for a public nuisance is by indictment, unless the person instituting proceedings, on the civil side of the court, can show special or peculiar damages, differing in kind from those to which all others in common with him are exposed. *Carey v. Brooks*, 1 Hill, 365; *State v. Rankin*, 8 S. C. 438, 16 Am. Rep. 737; *Hellams v. Switzer*, 24 S. C. 39; *Steamboat Co. v. R. R. Co.*, 30 S. C. 539, 9 S. E. 650, 4 L. R. A. 209, 14 Am. St. Rep. 923; *Steamboat Co. v. R. R. Co.*, 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688; *Baltzger v. Railroad*, 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789; *McMeekin v. Power Co.*, 80 S. C. 512, 61 S. E. 1020. In the case of *Jones v. Railroad*, 67 S. C. 181, 45 S. E. 188, the owner of land on a navigable stream brought an action against the railroad company for causing damages to his land by obstructing the flow of freshet waters through the negligent construction of the piers for its bridge. In delivering the opinion of the court Mr. Justice Woods used this language: "The right which the plaintiff says the defendant invaded was not the right of navigation, or any other right which he held in common with the public, but the right to the unimpaired use of his land on the banks of the river. The fact that the stream was navigable does not affect this question. *Blood v. R. R. Co.*, 2 Gray (Mass.) 137, 61 Am. Dec. 444. The injury alleged is different in degree and kind from any done to the public, and therefore does not fall within the reason of *Steamboat Co. v. R. R. Co.*, 30 S. C. 539, 9 S. E. 650, 4 L. R. A. 209, 14 Am. St. Rep. 923, and other like cases." The fact that they arose out of the obstruction of a navigable stream which constitutes a public nuisance (*Drews v. Burton & Co.*, 76 S. C. 362, 57 S. E. 176) did not prevent a recovery. We quote from said case to show that the injury alleged in the complaint was special and peculiar, differing in degree and kind from those to which all others in common with him were exposed. And as there was testimony tending to sustain the allegations of the complaint, these exceptions must be overruled.

Third exception: The first subdivision has been disposed of by what has already been said. The second subdivision cannot be sustained, as it presents an immaterial question.

Fourth exception: When that portion of the charge set out in the exception is considered in connection with the entire charge, it will be seen that it is free from error.

Fifth exception: This exception was not argued by the appellant's attorneys, and therefore will not be considered.

Eighth exception: We do not deem it necessary to cite authority to show that this court cannot consider whether a verdict is

excessive when there is any evidence to support it.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(83 S. C. 65)

DAVIS v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina. June 17, 1909.)

1. CARRIERS (§ 316*)—CARRIAGE OF PASSENGERS—NEGLIGENCE.

That a train failed to stop at a flag station to which a passenger had paid his fare, resulting in his injury, is evidence of the carrier's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1283; Dec. Dig. § 316.*]

2. CARRIERS (§ 316*)—CARRIAGE OF PASSENGERS—NEGLIGENCE—PRESUMPTIONS.

A presumption of negligence of a carrier arises from the fact that a passenger was injured while on its train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1283; Dec. Dig. § 316.*]

3. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—PROXIMATE CAUSE.

Whether the proximate cause of an injury to a passenger was the negligent failure of the carrier to stop its train at a flag station to which the passenger had paid fare *held* for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 320.*]

4. CARRIERS (§ 347*)—CARE REQUIRED OF PASSENGERS.

It is not contributory negligence per se for a passenger to go on the platform of a train to alight, having reasons to believe that the train is about to stop at his station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1376; Dec. Dig. § 347.*]

5. CARRIERS (§ 347*)—CARE REQUIRED OF PASSENGERS—QUESTION FOR JURY.

Whether a passenger, injured by being thrown from the platform while there intending to alight at his station, was guilty of contributory negligence, *held* for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 347.*]

Appeal from Common Pleas Circuit Court of Pickens County; Ernest Gary, Judge.

Action by Lula H. Davis, administratrix of John W. Davis, deceased, against the Atlanta & Charlotte Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. P. Casey, for appellant. Morgan & Mauldin, for respondent.

WOODS, J. The plaintiff, Lula H. Davis, as administratrix, brought this action against the Atlanta & Charlotte Air Line Railway Company for the alleged killing of her husband, John W. Davis. There was evidence tending to prove: That on 22d September, 1905, Davis was a passenger on defendant's train between Easley and Beverly, having paid his fare to the latter place, which is a flag station; that, on drawing near to Beverly, the train blew the usual stop signal and

slowed down; that deceased went to the back platform and down on the steps in order to alight; that, instead of stopping, the train's speed was quickened; and that thereupon deceased attempted either to re-enter the coach or to pass to the other side of the platform, when a sudden jerk of the cars threw him off, and he sustained a fatal injury.

On the trial of the cause motions for a nonsuit and for a new trial were overruled by the presiding judge. The five grounds urged in favor of these motions present two questions for the consideration of this court: (1) Was there any evidence of negligence of defendant which was a proximate cause of the injury? (2) Did the evidence admit of no other inference than that the plaintiff was guilty of contributory negligence?

The fact that the train failed to stop at the station to which testimony tended to show the deceased had paid his fare was evidence of negligence on the part of the carrier (*Cooper v. Railway*, 58 S. C. 91, 34 S. E. 16), and added to this is the presumption that the injury to plaintiff as a passenger was due to the carrier's negligence (*Cooper v. Railway*, 61 S. C. 345, 39 S. E. 543; *Steele v. Railway*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756; *Zemp v. Railway*, 9 Rich. Law, 89, 64 Am. Dec. 763). On this evidence of carrier's negligence, the question of proximate cause was properly submitted to the jury. *Doolittle v. Railway*, 62 S. C. 130, 40 S. E. 133.

The rule is established in this state by the case of *Zemp v. Railway Co.*, supra, that it is not contributory negligence per se for a passenger to go on the platform of a train for the purpose of alighting, having reason to believe that the train is about to stop at his station. It follows from the evidence above stated that the issue of contributory negligence was properly submitted to the jury.

The judgment of this court is that the judgment of the circuit court be affirmed.

(88 S. C. 49)

HICKSON LUMBER CO. v. STALLINGS.

(Supreme Court of South Carolina. June 16, 1909.)

TRIAL (§ 11*) — DOCKETS — TRANSFER FROM LAW TO EQUITY DOCKET.

Where, in a suit on a timber contract, plaintiff demanded judgment for \$2,000 damages; that the contract be abrogated; that defendant vacate and surrender to plaintiff a mill site, and be enjoined from cutting or interfering with plaintiff's timber and lands described in the complaint, and from sawing and manufacturing timber of others at plaintiff's mill, or from further using the mill, and for such other and further relief as the court might deem proper—the case was properly transferred to the equity docket, under Code Civ. Proc. 1902, § 274, providing for the trial of issues of law by the court, and issues of fact for the recovery of

money only, or of specific real or personal property, by a jury, unless a jury is waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.*]

Appeal from Common Pleas Circuit Court of Darlington County; R. C. Watts, Judge.

Action by the Hickson Lumber Company against Sylvester Stallings. From an order transferring the cause to the equity docket, defendant appeals. Affirmed.

Spears & Dennis and E. O. Woods, for appellant. R. T. Caston, Edward McIver, and George E. Dargan, for respondent.

GARY, A. J. The appeal herein is from an order of his honor, the circuit judge, transferring the case from calendar 1 to calendar 2. The reason assigned to him was that the issues raised by the pleadings, other than the question of damages, should be tried by the court, and that they should be determined before the trial of the question of damages. The practical question presented by the exceptions is whether the appellant was entitled to a trial by jury upon all the issues raised by the pleadings, on the ground that such issues were legal.

The allegations of the complaint, material to the question under consideration, are as follows: "That on about the 31st day of January, 1906, the plaintiff and defendant entered into a contract, whereby the plaintiff undertook and agreed to furnish to the defendant a large body of timber described in the contract, at least 5,000,000 feet, in the county and state aforesaid, to be cut by him for, and on the orders of, plaintiff, at a price and in a manner stated in said contract, and to furnish a site for defendant's mill, together with the right of way for tramroads from the mill to said timber, and the defendant therein contracted to install at once on said site a complete first-class sawmill outfit, of a sufficient capacity to give a daily output of 10,000 feet one-inch board, to put in a dry kiln capable of drying 10,000 feet of boards per day, and with said plant to cut and manufacture said timber on and according to the orders of plaintiff, and further contracted not to interfere with the plaintiff in buying other timber accessible to said site, and which could be cut at such location. That although more than a year has passed since the execution of the said contract, and though plaintiff has repeatedly urged defendant to comply with his contract by cutting the lumber which he was to furnish to plaintiff, he has utterly failed and refused to cut and furnish to plaintiff any lumber whatsoever, except one car load about the 15th or 16th of November last, and two additional car loads soon thereafter, in all not more than 25,571 feet, less than three days' output of the capacity of the said mill. The defendant has utterly failed to comply with his said contract, but has been, and still is,

as plaintiff is informed and believes, using the mill site and location provided by plaintiff for the purpose of cutting and manufacturing lumber for other parties, and on his own account. That on or about the 10th day of December, 1906, plaintiff, having become convinced of the incapacity of the defendant, and his inability to carry out his contract, and to furnish the lumber as ordered, gave him notice that the contract was no longer binding on it, and notified him to vacate the premises of the plaintiff, and not to molest or further interfere with the timber thereon. That notwithstanding his utter failure to cut said timber as provided by said contract, defendant refuses to vacate said premises, and threatens and declares his purpose to cut said timber in such quantities, and at such times, as he may be able to get the work done, and does not even now undertake or promise to cut the amount, or furnish same on orders provided in said contract. That the defendant continues to occupy the mill site of plaintiff against its protest, and is cutting and manufacturing the timber of adjacent landowners, which plaintiff proposed under said contract to purchase and furnish to defendant, and continues to cut in very small quantities the timber of plaintiff, and asserts his right to prevent plaintiff from cutting its timber itself, or having same cut by other parties, or of selling same, any one of which it could do easily, if it was not for the interference of defendant and his molestation of the same, and the assertion of his own alleged rights as above stated." The relief demanded is as follows: "(1) For the sum of \$2,000 damages; (2) that the said contract be abrogated and declared null and void; (3) that the defendant vacate and surrender to the plaintiff the said mill site; and (4) that the defendant be enjoined and restrained from cutting, or in any way interfering with, the timber and lands of the plaintiff, described in the complaint, and from sawing and manufacturing timber of other parties at said mill site of plaintiff, and from further using said mill site for sawing and manufacturing lumber, and from interfering with and molesting plaintiff or its agents or assigns in the cutting and using of its said timber." The answer of the defendant denies certain allegations of the complaint, and explains others, but does not set up any specific defense. The relief demanded by the defendant is as follows: "(1) For the sum of \$5,000 damages against the plaintiff; (2) that the order of injunction heretofore issued be vacated, and the defendant be allowed to continue operating under the contract, and that plaintiff be compelled to carry out said contract; (3) that the mill site be declared to belong to the defendant under the agreement, if said contract be terminated; (4) that the complaint in this action be dismissed, with costs; (5) and for such other and

further relief as the court may deem meet and proper."

Section 274 of the Code of Civil Procedure of 1902 provides that "an issue of law must be tried by the court, as also cases in chancery, unless they be referred. * * * An issue of fact for the recovery of money only, or of specific real or personal property, must be tried by a jury unless a jury trial be waived. * * *" In *Ex parte Landrum*, 69 S. C. 136, 48 S. E. 47, the court uses this language: "In an action at common law the only judgments that could be rendered were: (1) For the recovery of specific real property; (2) for the recovery of specific personal property; (3) for money. In the case under consideration the respondents not only seek to recover judgment for the amount of their fees, but likewise to have determined out of what fund they are to be paid. This renders it necessary to invoke the aid of the court in the exercise of its chancery powers." See, also, *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255. Not only do the allegations of the complaint show that the plaintiff is entitled to legal relief, but they are appropriate to an action seeking equitable relief by way of rescission of contract, and for injunction against an alleged continuous breach of contract. It cannot therefore be successfully contended that the only issue of fact raised by the pleadings was either for the recovery of specific real or personal property, or for money.

It is the judgment of this court that the order of the circuit court be affirmed.

(83 S. C. 46)

TOWN OF UNION v. HAMPTON.

(Supreme Court of South Carolina. June 16, 1909.)

1. MUNICIPAL CORPORATIONS (§ 643*)—VIOLATION OF ORDINANCE — PUNISHMENT — STATUTES—"IN HIS DISCRETION."

Acts 1897, p. 499, § 2 (Civ. Code 1902, § 2004), provides that, whenever the mayor shall find a party charged before him guilty of violating a town ordinance, he may impose "in his discretion" a fine or imprisonment, in the alternative, not to exceed the limits prescribed for such violation by the ordinances of the town, and such imprisonment may be accompanied with the additional requirement of hard labor. *Held*, that the words "in his discretion" referred to the extent of the punishments, and not to the question whether the mayor could impose a single, instead of an alternative, sentence, and that the mayor was therefore bound to impose an alternative sentence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 643.*]

2. MUNICIPAL CORPORATIONS (§ 643*)—VIOLATION OF ORDINANCE—PUNISHMENT—CONSTITUTIONAL PROVISIONS.

Const. art. 5, § 33, providing that circuit courts and all inferior courts shall have power in their discretion to impose sentence of labor on highways on persons by them sentenced to imprisonment, was merely intended to provide for an additional punishment, and did not interfere with the procedure in the municipal

courts, nor abrogate the duty of a mayor to impose an alternative sentence, as required by Acts 1897, p. 499, § 2.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 643.*]

3. MUNICIPAL CORPORATIONS (§ 643*)—VIOLATION OF ORDINANCE — PUNISHMENT — STATUTES.

The Union City Charter provided that the mayor should be vested with all the power of trial justices or other inferior courts in the state, and Cr. Code 1902, § 12, declares that magistrates shall have jurisdiction to impose fines or forfeitures, not exceeding \$100, or imprisonment in the jail or workhouse, not exceeding 30 days, and may impose any sentence within those limits, singly or in the alternative. Acts 1897, p. 498, § 1, provides that the mayor shall have all the powers and authority of magistrates in criminal cases within the corporate limits of their respective cities and towns, and section 2 requires the imposition of alternative punishments. *Held* that, in conferring on mayors the power of magistrates, the Legislature did not intend to nullify section 2 of the act of 1897, and did not relieve the mayor, in a prosecution for violating a town ordinance, of the obligation to impose an alternative sentence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 643.*]

Appeal from Union County Court; J. O. Klugh, Judge.

Cordoza H. Hampton was convicted of keeping a bawdy house, and he appeals. Reversed and remanded.

Townsend & Townsend, for appellant. J. Ashby Sawyer, for respondent.

GARY, A. J. The defendant was tried by a jury in the mayor's court, under the charge of keeping a bawdy house, in violation of the ordinance of the town of Union. The jury found him guilty, and he was sentenced to 30 days on the chain gang. On appeal to the circuit court, the sentence was affirmed except in one particular—the number of days was changed from 30 to 20, so as to conform to the provisions of the charter of said town. The defendant has appealed again, upon numerous exceptions, all of which were abandoned except those raising the question whether his honor, the presiding judge, erred in imposing a single, instead of an alternative, sentence of a fine.

Section 2, p. 499, of the Acts of 1897, entitled "An act to define the jurisdiction of, and to settle the procedure in municipal courts of the cities and towns of this state" (incorporated in volume 1 of the Code of Laws as section 2004) is as follows: "Whenever said mayor, intendant, or mayor pro tempore, shall find the party charged before him, guilty of violating an ordinance of said town, he shall have power to impose, in his discretion, a fine or imprisonment in the alternative, not to exceed the limits prescribed for such violation, by the ordinances of said city or town, and such imprisonment may be accompanied, with the additional requirement, of hard labor on the streets of said

city or town, under such regulations, as by ordinances may be established." The respondent's attorney contends that the words "in his discretion" and "in the alternative" are inconsistent, and that the words "in the alternative" should be stricken out. In the first place, this section relates to the punishment of those charged with a violation of the town ordinances, and therefore must be strictly construed, so that, if there is such an inconsistency between said words that both expressions cannot stand, the words "in his discretion" should be eliminated; but our construction is that the words "in his discretion" have reference to the extent of the respective punishments, and not to the question whether he had the right to impose a single, instead of an alternative, sentence.

Again the respondent's attorney argues that the foregoing provisions of the act of 1897 are in conflict with section 33, art 5, of the Constitution, which is as follows: "Circuit courts and all courts inferior thereto, and municipal courts, shall have the power, in their discretion, to impose sentence of labor upon highways, streets and other public works, upon persons by them sentenced to imprisonment." In the case of *State v. Williams*, 40 S. C. 373, 19 S. E. 5, it was held that a statute, which authorized the trial justice to sentence a convict to hard labor on the streets, during the term of his imprisonment, added an additional punishment, and was therefore unconstitutional and void. It was to meet this view of the law that the foregoing section was incorporated in the Constitution. That section was not intended to interfere with the procedure in municipal courts, but simply to provide for an additional punishment, which could not be inflicted without such a provision. The respondent's attorney likewise relies upon certain provisions in the charter of said town, among which is that which declares that the intendant (now mayor) shall "be vested with all the powers of trial justices or other inferior courts in this state, within the limits of the said town"; and upon section 12 of the Criminal Code of 1902, which is as follows: "They [magistrates] shall have jurisdiction of all offenses which may be subject to the penalties of either fine or forfeiture, not exceeding one hundred dollars, or imprisonment in the jail or workhouse, not exceeding thirty days, and may impose any sentence within those limits, singly or in the alternative." Section 1, p. 498, of the Acts of 1897 (incorporated in the Code of Laws as section 2003), provides that: "The intendants or mayors of the cities and towns of this state, that have been heretofore chartered, or that may be hereafter chartered, by special act of the General Assembly, or under general laws, shall have all the powers and authority of magistrates in criminal cases, within the corporate limits, and police juris-

diction, of their respective cities and towns." The act of 1897 contains the usual repealing clause. It cannot be successfully contended that, in conferring upon intendants and mayors the powers of magistrates, the Legislature intended to nullify the provisions of section 2 of the act of 1897.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court, for the sole purpose of an alternative sentence.

(83 S. C. 83)

CARRISON et al. v. KERSHAW COUNTY et al.

(Supreme Court of South Carolina. June 18, 1909.)

1. COUNTIES (§ 178*)—ISSUANCE OF BONDS—SUBMISSION OF QUESTION TO VOTERS—STATUTES.

The proviso to Act Feb. 23, 1909 (26 St. at Large, p. 298), § 3, empowering the commissioners of a county to issue bonds of the county, that, if they decide to issue them, they shall have power and authority to submit the question of issuing them to the voters of the county, does not require such submission.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 269; Dec. Dig. § 178.*]

2. COUNTIES (§ 178*)—INCREASE OF INDEBTEDNESS—SUBMISSION TO VOTERS.

In the absence of a provision of the Constitution prohibiting the increase of indebtedness of, or creation of a bonded indebtedness by, a county without submission of the question to the voters, as required in case of the state or a city or town, the Legislature can authorize it, as it did by Act Feb. 23, 1909 (26 St. at Large, p. 298), § 3.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 269; Dec. Dig. § 178.*]

Petition by H. G. Carrison and others for injunction against Kershaw County and others. Dismissed.

Lawrence T. Mills, for petitioners. T. J. Kirkland, for respondents.

JONES, C. J. The petitioners, taxpayers of Kershaw county, have applied in the original jurisdiction of this court for an injunction to restrain the respondents, county commissioners of Kershaw county, from issuing coupon bonds of said county to the amount of \$40,000 under an act of the Legislature approved February 23, 1909 (26 St. at Large, p. 298). The question presented by the petition and return is whether the county commissioners have authority to issue said bonds without submitting the question of such issuance to an election.

The title of the act is as follows: "An act to authorize the county commissioners of Kershaw to construct a bridge across the Wateree river, to provide funds therefor and to issue the obligation of said county for such purpose, and to create a sinking fund for the retirement or payment of such obligation." The third section of the act relevant to the issue provides as follows: "Sec. 3. That

in order to raise funds requisite for the construction of such bridge and the other purposes appertaining thereto aforesaid, the said county commissioners are also hereby authorized and empowered to borrow money upon the promissory notes of Kershaw county, or to issue and sell the coupon bonds of said county to an aggregate amount not exceeding forty thousand (\$40,000) dollars. Any such notes or bonds shall be in denomination not exceeding one thousand (\$1,000) dollars each; to bear interest from date thereof at a rate not exceeding six (6) per cent., and to run for a period not exceeding twenty-five (25) years, interest to be payable annually or semiannually. Any such notes or bonds and coupons shall be signed by the county supervisor for Kershaw county: Provided, that the signature of the supervisor to coupons may be lithographed or engraved in fac simile: Provided, that in the event the said county board of commissioners shall decide to issue coupon or registered bonds, they shall have full power and authority to submit the question of issuing said bonds to the qualified voters of the county, said election to be governed by the provisions of law now applicable to such election: Provided, further, that such bonds when issued shall be exempt from taxation."

It will be seen that the first part of the section expressly empowers the county commissioners to issue the coupon bonds of the county to the amount of \$40,000. It is contended, however, that the second proviso above compels the county commissioners, in the event they decide to issue such bonds, to submit the question to the voters. We do not so construe this section. While the county commissioners are empowered to submit the question of issuing the bonds to the voters, they are not compelled to do so. The statute contemplated that the county commissioners might deem it proper to submit such question to the voters, and in such case it was necessary to confer upon them the requisite authority to that end. The proviso is therefore not meaningless and is consistent with the full authority of the commissioners to issue the bonds as conferred in the first clause of the section.

The power of the Legislature to confer such authority upon the county commissioners is clear. While article 10, § 11 of the Constitution forbids an increase of the public debt of the state without submitting the question to the qualified electors, and while article 8, § 7, forbids any city or town from creating a bonded debt without submitting the question to the qualified electors of the city or town, we find no such restriction on the power of the Legislature with respect to the issuance of bonds by a county. In the absence of such restriction, the power of the Legislature is plenary.

The petition is therefore dismissed.

(33 S. C. 82)

STATE v. BALLEW et al.

(Supreme Court of South Carolina. June 17, 1909.)

On petition for rehearing. Dismissed.
For former opinion, see 63 S. E. 688.

PER CURIAM. A careful examination of this petition does not lead us to the conclusion that any material matter of law or fact was overlooked or disregarded; and the petition is therefore dismissed, and the order staying the remittitur revoked.

(65 W. Va. 573)

WHITE et al. v. BAILEY et al.

(Supreme Court of Appeals of West Virginia. April 27, 1909. Rehearing Denied June 9, 1909.)

1. DEEDS (§ 177*)—RESCISSION—NONPERFORMANCE BY GRANTEE.

Neither the reservation of a lien for maintenance and support in a deed of conveyance, made in consideration of a covenant to support and maintain the grantor, nor the insertion therein of a clause, giving him a right to re-enter and use and occupy the land during his life, in case of nonperformance of the covenant, extinguishes, cuts off, or prevents right of rescission in the grantor, in the event of failure of the grantee to perform the covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 549, 549½; Dec. Dig. § 177.*]

2. DEEDS (§ 90*)—CONSTRUCTION—PURPOSE.

A deed should be so construed as to give effect to all of its parts and harmonize them, but functions and purposes, not expressed nor necessarily implied, should not be added after a reasonable and important function for every clause, which the parties may have had in contemplation, has been already perceived.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-248; Dec. Dig. § 90.*]

3. DEEDS (§ 90*)—CONSTRUCTION—IMPLIED EFFECT OR PURPOSE.

Generally a provision, effect, or purpose is not read into an instrument as having been implied, unless necessity therefor is found in terms used, or purposes expressed, therein.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-248; Dec. Dig. § 90.*]

4. DEEDS (§ 100*)—CONSTRUCTION—INTENT—EXTRINSIC CIRCUMSTANCES.

The purpose and object of the parties to a deed or other contract, as shown by the instrument itself, read as a whole, at the time of its execution, in the light of the subject-matter, the situation of the parties, and the circumstances surrounding them, constitute the safest and best guide to their intention.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.*]

5. EQUITY (§ 72*)—LACHES—PREJUDICE FROM DELAY.

Mere delay, for a long period of time, in asserting a cause of action, cognizable in equity only, working no injury or prejudice to the defendant in any way, bars relief only on the presumption of abandonment, which may be overthrown by proof of conduct showing the contrary.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207-226; Dec. Dig. § 72.*]

6. EXECUTORS AND ADMINISTRATORS (§ 149*)— POWER TO SET ASIDE DEED.

The executor of the will of a deceased person may prosecute a suit to set aside, for failure of consideration, a deed conveying away land he is authorized by the will to sell.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 149.*]

Brannon, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County.

Bill by A. P. White, executor of the will of William J. Bailey, deceased, and another, against Bland Bailey and others. Decree for complainants, and Bland Bailey appeals. Affirmed.

W. W. Brannon and A. B. & R. F. Fleming, for appellant. Linn & Bland and John Bassel, for appellees.

POFFENBARGER, J. Bland Bailey complains of a decree of the circuit court of Lewis county canceling and setting aside a deed by which his father, William J. Bailey, had conveyed to him a tract of 208 acres of land, upon a bill filed for the purpose by the executor of the will of said William J. Bailey and Broadus College, a beneficiary of a trust created by said will. The deed so set aside conveyed the land to the appellant, July 12, 1889, in consideration of \$1 and a covenant, on the part of the grantee, "to remove to and occupy, use, and cultivate in a proper manner said tract of land, for the exclusive use and benefit of said Bland Bailey and is to support and maintain at his exclusive costs and charge, the said William J. Bailey, and his said wife during their joint lives, and the life of the survivor of them in sickness and in health, in a comfortable and careful manner in all respects, and on said land in the dwelling house of the said William J. Bailey, thereon, during the time to be occupied by the said William J. Bailey and wife with the said Bland Bailey and family." A lien for support and maintenance was expressly retained, and the following clause of re-entry inserted: "The right is reserved to said William J. Bailey to re-enter said land, and use and occupy the same during his life." The grantee, with his family, immediately moved into the dwelling house with the grantor and remained there about nine months, when, becoming dissatisfied, he went away and never returned, leaving the grantor in possession. About two years after the execution of the deed, June 18, 1891, William J. Bailey, having no other land, and assuming he had become re-invested, by the breach of the covenant to maintain and support him, with the title, legal or equitable, to the land so conveyed, or a right to acquire the same, executed another deed, purporting to convey to certain trustees for Broadus College, a corporation, an undivided half of the tract, and a will by

which, after giving numerous legacies, he directed the executors therein named, Marcellus White and Perry (A. P.) White, to sell the residue of that and any other he might afterwards acquire and pay the legacies. Among the legacies there was one of \$800 to Marcellus White and another of \$400 to Perry White, given by the fourteenth and fifteenth items, respectively, subject to certain conditions, not material here. On the same day he executed a codicil, directing the payment of \$3,000 out of his estate to Broadus College, in the event the deed executed to the trustees for its benefit should fail to pass title to the land, and gave this legacy precedence over all others except the two above mentioned. By another codicil, made the same day, he reduced Marcellus White's legacy to \$600. He retained the control and management of the land until his death, some time in the year 1903. The bill seeks instruction and guidance of the court respecting the duties of the executor in the premises and a settlement of the estate.

Unless principles well settled, generally recognized, and often declared by this court are rendered inapplicable by the peculiar terms of the deed and the time and circumstances of the institution of the suit, the decree is manifestly right. This is frankly admitted. The principal contentions in the brief of counsel for the appellant are: (1) The provisions of the deed, reserving security for performance of the covenant and prescribing a remedy for breach thereof, precluded resort to any other; (2) relief is barred by laches. The others are merely argumentative, collateral, and subsidiary in character.

The main reliance for reversal is the re-entry clause. As, by the deed, the grantor conveyed the fee-simple title and then reserved a lien for support and a right to re-enter upon the land and "use and occupy the same during his life," it is said he was limited to these two methods of relief, since the parties contemplated possibility of failure and undertook to provide for it. In other words, it is contended that, by adding the words, "and use and occupy the same during his life," he limited the purpose of his re-entry and the scope and extent of his relief, in respect to title, to the recovery of a life estate. This view seems to rest upon the assumption of the existence of an ambiguity, calling for the application of a rule of construction requiring the terms of an ambiguous deed to be taken most strongly against the grantor. Resort is not had to this rule, unless ambiguity or uncertainty remain after all others have been vainly appealed to in an effort to ascertain the meaning of the instrument. 2 Kent, Comm. 556; 13 Cyc. 609; Chitty, Con. p. 137; Ham. Con. § 413. Nor will uncertainty or a doubt be unnecessarily introduced or raised. It must appear from

the terms. When the terms are plain, and a reasonable function for all clauses or provisions, contained in the instrument, is clearly discernible, and no necessary friction, repugnancy, or inconsistency will result, and nothing in the purposes or objects contemplated require any further effect to be given to any clause, the instrument should have effect according to the plain meaning of the terms used. All authority opposes construction, or the reading in of matter not expressed, when it is not rendered necessary in some way or for some reason. *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *Jackson v. Lewis*, 17 Johns. (N. Y.) 475; *Turnpike Co. v. People*, 9 Barb. (N. Y.) 161; *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. Ed. 743. These cases involved the interpretation of statutes, but the same rule applies in the interpretation of contracts. *Chitty*, Con. 6, 113; *Hammon*, Con. pp. 811-813, § 412; *Devlin, Deeds*, § 836.

What function could the re-entry clause have been intended to perform? Its object was to enable the grantor to regain possession in case of necessity. That it was not intended as a full, complete, and exclusive remedy, in case of failure, is made apparent by the retention of a lien reaching beyond the supposed life estate to the fee. Many contingencies might arise. The grantee might die, leaving only a widow and children, wholly incapable of managing the farm so as to sustain themselves and to render the support stipulated for, or he might become an invalid, in consequence of which failure could occur under peculiar circumstances and from unavoidable causes, such as might make it desirable to forego the equitable right of rescission, provided the grantor could take control himself or substitute some person capable of perfecting the object both parties had in view. A general re-entry clause would have made it necessary, under such conditions, to wholly terminate the estate of the grantee or allow it to exist to the great disadvantage and embarrassment of the grantor. No right of re-entry at all would have made it still worse, as possession could not then have been rightfully regained, until after a decree of rescission, perhaps delayed by protracted litigation. The clause of re-entry may also have been intended to supplement the lien for support, since any attempt to enforce that might have met with resistance, causing delay. Thus it appears to be wholly unnecessary to say this clause was intended to cut off the equitable right of rescission, in case of nonperformance of the covenant, in order to find an important function for it to perform. Moreover, there is no express waiver of the right of rescission, nor, indeed, any reference to that right by any word used in the deed. It does not deal with that subject at all. It relates solely to the right of possession, as a means of realizing support and maintenance

from the land, treating it as that of the grantee, in case the grantor should desire to do so. It creates a right under the contract, not a right against it, widely different in nature. With what does this clause, so read, conflict? Plainly not with any express words of the deed. It is inconsistent with nothing except a mere unnecessary, and therefore fanciful, implication, or rather theory as to intent, not a necessary implication, for the clause may perform important and highly beneficial functions, other than that of relinquishing right of rescission for adequate cause. If no purpose could be assigned to it other than that of barring right of rescission, an implication might be said to arise from necessity; presumption against intention to insert useless clauses being recognized and entertained by the courts.

One of the best and most potent indices of the intention of the parties to a deed or other contract is the purpose disclosed by it, considered as a whole in connection with its subject-matter and the situation and circumstances of the parties. The grantor, seised of a good farm, conceived the idea or purpose of conveying it in fee, in consideration of support and maintenance for himself and his wife. The grantee was a nephew, not a member of his immediate family. There are no words in the deed importing a gift. Tested by its terms, it conveys the land for a valuable consideration and nothing else. The consideration was entire, going to the whole estate conveyed. It is not to be presumed he intended the grantee to have either the fee-simple title or the remainder in fee, without rendering the consideration stipulated for. The construction contended for would have made the deed operate a gift pure and simple as to all except a life estate, and the grantee need never have performed his covenant. Thus he would have obtained by far the most valuable part of the estate without rendering anything for it. This conflicts with the purpose disclosed by the terms of the deed. It purports a sale of the entire subject, not a gift as to any of it. It bound the grantee to remove to and occupy, use, and cultivate the land and support and maintain the grantor and his wife on it in a comfortable and careful manner. Under this construction he need not have done so. He could have compelled the grantor to earn his own living on the land as he had previously done, looking only to him for damages for breach of the covenant, and relying upon the right to sell what had been his own land as security. If unable to earn his living and compelled to sell the land, he might then have been under the necessity of selling his own roof from over his head. Plainly no such results were ever contemplated by either party.

It is difficult to perceive any distinction between the effect of this clause and that of the clause reserving a lien for support

and maintenance, upon the right of rescission. If one is exclusive of that right, why is not the other? The reservation of the lien contemplates possible failure of the grantee to render the support stipulated for, constituting the consideration. It affords a means of relief or remedy on the happening of such a contingency. Its incorporation in the deed shows that it was foreseen by the parties. What more can be said of any other clause, giving a right to re-enter and hold the land during the lifetime of the grantor? We have two decisions, setting aside deeds, conveying land in consideration of a covenant for support, and containing clauses of forfeiture for failure of performance. *Goldsmith v. Goldsmith*, 46 W. Va. 428, 83 S. E. 266, and *Fluharty v. Fluharty*, 54 W. Va. 407, 46 S. E. 199. Equity never enforces a forfeiture, and did not do so in those cases. It rescinded the contracts, set them aside wholly, for failure of consideration. The argument used here would have denied equity jurisdiction there and remitted the plaintiffs to actions at law for recovery of the possession under the forfeiture clauses. Those cases are express authority for the position that the insertion of a forfeiture clause does not preclude right of rescission on the theory of substitution, prescription of an exclusive remedy, or otherwise. These decisions say, in effect, that a mere surmise or conjecture as to intent will not be read into a deed. Necessity in some sense is a prerequisite. It is the ground upon which every implication arises.

The doctrine of laches cannot be invoked. The appellant was not in any sense prejudiced by the delay, and the intent of the grantor not to abandon his right of rescission is placed beyond possibility of doubt. He retained possession until the time of his death. Two years after the deed was made, he endeavored to dispose of the property to other parties by deed and will. Mere delay for a long period of time, standing alone, does no more than raise a presumption of intent to abandon the cause of action, if it be one of exclusive equity jurisdiction. *Depue v. Miller* (decided at the present term) 64 S. E. 740; *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221; *Pusey v. Gardner*, 21 W. Va. 469; *Cranmer v. McSwords*, 24 W. Va. 594; *Kerr on Fraud & Mistake*, 305; *Pickering v. Stamford*, 2 Ves. Jr. 593; *Railway Co. v. Gregg*, 101 Va. 308, 43 S. E. 570; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504. Even long periods of delay do not bar, if the intent to abandon is negated by conduct of the party showing the contrary. *Berry v. Weldeman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; *Roberts v. King*, 10 Grat. (Va.) 184.

The only other question deemed worthy of consideration is whether any person other than the grantor can prosecute this right of

rescission. If the plaintiff were a mere assignee of the cause of action, his right to sue would be gravely doubtful; but he is the representative of the estate to which it belongs and sues as such. Hence there is no shadow of maintenance and champerty, forbidding entry to courts of equity in so many cases, reported in the books. Nor is the cause of action one that dies with the person. *Fluharty v. Fluharty*, cited; *Booth v. Fuller*, 35 App. Div. 117, 54 N. Y. Supp. 670; *Kent v. Davis*, 89 Ga. 151, 15 S. E. 457; *Hensley v. Hensley* (Ky.) 30 S. W. 613.

Seeing no error in the decree, we affirm it, with costs and damages.

Affirmed.

BRANNON, J. (dissenting). I am decidedly averse to the decision in this case. I go upon the letter of the deed, the contract between the parties. The deed is an absolute grant of the fee. Its consideration, its vital purpose on the grantor's part, was support of himself and wife. To secure this he chose his own remedies in case of the grantee's default to give such support. He chose two remedies, one a lien, the other a right to re-enter and hold for his life; in other words, reserved a life estate on the contingency of failure to support. His only object being support, he did not reserve right to re-enter absolutely and hold the fee, but only for his life, for that was all he asked. He did not desire to take back the fee, but only a life estate. He desired, in case of default, to choose one or the other remedy. He might not want the land, but money for support, and therefore he reserved a lien, which would hold the land liable in a court of equity for money support. On the other hand, he might prefer to hold the use of the land for life, and therefore he reserved a life estate. These remedies were regarded efficient, and as far as he went. He took no note of the fee after his death. Now, the decree takes back, not a life estate, but the fee. For what purpose? To support the grantor and wife? Not at all. They are dead. The grantors only reserved support. It cannot be rendered now, unless we can give bread to the dead. That was the grantor's sole purpose. It cannot be accomplished. The fee goes, not for Bailey's support, but to others. Were it not that the parties fixed their own remedies, I would not hold the opinion which I do hold. Bailey did not sue to enforce the lien. He did not sue to cancel in life. This court gives a remedy taking back the fee; whereas, the grantor stipulated that he could take back only a life estate. That would be sufficient for support, as he considered. I repeat that grantor Bailey inserted a clause of forfeiture for an estate for his life only, and the court gives him a clause of forfeiture forever. He reserved a life estate only, and he could not vest in Broadbush College a fee by a later deed. In *Lowman v. Crawford*, 99 Va. 688,

40 S. E. 17, was a deed in consideration of support, and the court held that equity would cancel it for default, giving as its reason that there was no clause of re-entry, indicating that, where there is such clause, that is the remedy, and that must govern.

As I have stated, the deed passed to Bland Bailey an absolute fee. There was left in William J. Bailey nothing but the right to re-enter to execute the condition. Failure to support was a condition of forfeiture. Could a grantee of Bailey take the right to enforce this forfeiture? In *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551, an act of Congress enacted that certain lands unsold after 10 years should revert to the government if the railroad should not be then completed. The court said that such provision was "no more than a provision that the grant should be void if a condition subsequent be not performed. In *Sheppard's Touchstone* it is said: 'If the words in the close or conclusion of a condition be thus, that the land shall return to the enfeoffor, etc., or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffor shall reciper the land, these are, either of them, good words in a condition to give a re-entry—as good as the word "re-enter"—and by these words the estate will be made conditional.' * * * And it is settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and, if they do not see fit to assert their rights to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down." We find in *Tiedeman on Real Property*, § 207, this: "Conditions are reserved only to the grantor and his heirs. They cannot be reserved for the benefit of third persons. As a general rule therefore only the grantor and his heirs have a right to enter upon condition broken, and they lose their right if they should convey away the reversion in them. The right of entry is not an estate, not even a possibility of reverter; it is simply a chose in action. And although it has been held that an express condition can be devised with the reversion, and the devisee and his heirs enter for the breach, yet such a condition cannot be aliened or assigned, and does not pass with a grant of the reversion." *Hopper v. Cummings*, 45 Me. 359, holds: "At common law none but the grantor, his heirs and legal representatives, can take advantage of a breach of condition subsequent. When a condition is annexed to a particular estate, and afterwards by another deed the reversion is granted by the maker of the condition, the condition is gone." In *Nicoll v. Railroad*, 12 N. Y. 121, it is held that "right of entry is not a reversion or an estate in land, and it

will not pass by assignment or by a conveyance of the premises held subject to the condition. Accordingly, where the grantor of premises on condition subsequent afterwards conveyed the same to a third person, and there was subsequently a breach, held, that the latter could not divest the title of the grantee on condition." In *Southard v. Railroad Co.*, 28 N. J. Law, 21, we find it held that a contingent estate or a right for a condition broken was not devisable at common law, and the condition of a deed could only be taken advantage of by a party to it or privies in right and representation, as the heirs of natural persons or the successors of artificial persons. The opinion says: "It is a rule of the common law that none may take advantage of a condition in deed but parties and privies in right and representation, as the heirs of natural persons and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat, nor in deeds, as grantees of reversions, nor privies in estate, as he to whom the remainder is limited, shall take benefit of entry or re-entry by force of a condition. *Shep. Touch.* 149; *Co. Lit.* 214a; *Lit.* § 347; *Doct. & Student*, 161, c. 20; *Perkins*, § 830; 4 *Kent*, 127; 2 *Crulise*, Dig. c. 2, § 49." In *Avelain v. Ward*, 1 *Vesey*, Sr., 422, it is held that: "If there is a devise to a stranger, not the heir at law, upon a condition subsequent, the devisee cannot take advantage of the breach, for the benefit thereof is not devisable, but must go in privy to the heir at law of the grantor, who must enter for the breach, not the devisee." 2 *Washburn on Real Property*, § 954, says: "But of conditions in deed no one but he who creates the estate or his heirs, as for instance the heirs of the deviser, or, in case of a devise of the contingent right, such devisee or his heirs, can take advantage by entering and defeating the estate. It is a right which cannot be aliened or assigned or passed by a grant of the reversion at common law." As to the right of the devisee to enforce a condition, the bulk of the common law is against it, and *Tiedeman, R. Prop.*, in note to section 207, p. 279, says that that rule is local in Massachusetts. Why not? A grantee in a deed cannot enforce the condition, and a devisee takes, not by descent, but by purchase, and is a purchaser just as a grantee unless he is heir, and then he takes, not by devise, but by descent. Therefore the *Broadus College* trustees could not enforce that condition, nor could Bailey's executors, for the will gave the executors a naked power, not coupled with title or interest, as the will only gave them power to sell, invested them with no estate. Having no right to enforce this condition, strangers to it, the trustees and executors, cannot rescind in equity. Bailey did not grant the trustees' right to sue for rescission, nor did his will grant it to his executors.

Some days after writing the above, I con-

cluded to make further examination, and I have made it, with the result that I am more decided in my dissent than I was then, and I will supplement the above with some other authorities. I would recall to mind that William J. Bailey's deed to Bland Bailey passed from William J. Bailey a fee, every vestige or morsel of title, and vested the same in Bland Bailey forever, unless William J. Bailey had revested himself with title, and that could be done only by re-entry, or the enforcement of the lien and purchase of the land by William J. Bailey. No suit to enforce the lien was brought. No re-entry was made. Therefore William J. Bailey had no estate in him when he made the deed to the trustees of Broadus College or when he made his will. The books teem with the doctrine that, where title has passed with condition subsequent defeating the estate for its breach by re-entry, there must be re-entry to re-vest the estate in the grantor. In 1854 the case of *Nicoll v. Railroad*, 12 N. Y. 121, was fully considered, and it was held that: "A mere failure to perform such a condition does not divest the title. There must be an entry, or what is equivalent thereto by the statute, by the grantor or his heirs, for a breach of the condition to forfeit the estate. This right of entry is not a reversion or an estate in land, and it will not pass by assignment or by a conveyance of the premises held subject to the condition." In 1896 the New York court had this subject again under full consideration in *Uppington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, and it reiterated this doctrine. It was there said that no action could be maintained by the assignee to recover the land whether the breach was before or after the assignment, and no one but the grantor or his heirs could take advantage of the forfeiture. That re-entry is required to re-vest, I add the following authorities: *Bowen v. Bowen*, 18 Conn. 535; *Board v. Trustees*, 63 Ill. 204; *Tallman v. Snow*, 35 Me. 342; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Morris v. Hoyt*, 11 Mich. 9; *Adams v. Lindell*, 72 Mo. 198; *Rollins v. Riley*, 44 N. H. 9; *Vall v. Railroad Co.*, 106 N. Y. 233, 12 N. E. 607, 60 Am. Rep. 449; *Phelps v. Chesson*, 34 N. C. 194; *Kibler v. Luther*, 18 S. C. 606. *Ohio Iron Co. v. Auburn Iron Co.*, 64 Minn. 404, 67 N. W. 221, holds that: "The right of re-entry cannot exist as an independent condition, but only as an incident to an estate or interest for the protection of which it is reserved. The right of re-entry is not an estate or interest in land, nor does it imply the reservation of a reversion, and when enforced the grantor is in through the breach of the condition, and not by reverter." The Supreme Court of the United States, in *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101, citing a host of authorities, held that breach of a condition subsequent, not followed by limitation over to a third person, does not ipso facto work forfeiture. It only vests in

the grantor or his heirs a right of action which cannot be transferred to a stranger, which they cannot without actual entry enforce by suit for the land. We find in 5 *Ballard on Real Property*, note to section 270, that right of re-entry for breach of condition subsequent "is a mere right in action, not an interest in land; that it is not assignable nor grantable; that it descends to the grantor's heirs, but does not pass by a conveyance."

It may be suggested that these principles of common law everywhere held have been changed by section 5, c. 71, Code 1899 (Code 1906, § 3024), providing that: "Any interest in or claim to real estate may be disposed of by deed or will." That statute cannot apply, because it requires some estate or actual interest for the foundation of a claim to come under that statute. It was suggested to the New York court in *Nicoll v. Railroad*, 12 N. Y. 121, and *Uppington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, that its statutes of wills read "every estate and interest in real property descendible to heirs may be devised," and another statute said that "expectant estates are descendible, devisable and alienable in the same manner as estates in possession"; but the court said that these statutes did not change the common-law rule in this matter. The court said that the words "expectant estates" "include every present right and interest, either vested or contingent, which may by possibility vest at a future day, yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living." The court denied in those two cases that these New York statutes, though very broad, applied to such a case as this. If this statute could be held to change this organic principle of estates, held through the centuries, why did not that most reliable and eminent Virginia author, Prof. Minor, realize it when he laid down in 2 *Minor's Institutes*, 229, the following statement of the law: "The mere occurrence of the event which constitutes the condition does not at common law, of itself, defeat the estate, supposing it to be a freehold, because, as a freehold can at common law only be created by the notoriety of livery of seisin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor, or his heirs, supposing the grant to be a private one." Our statute (Code 1899, c. 93, § 1 [Code 1906, § 3394]), giving the grantee of any land let to lease or the reversion the same right against the lessee by action for entry upon any covenant or promise of the lease, has no application. That is between landlord and tenant. There is no lease here. There is no reversion. Nor does section 16 have anything to do with this case. It recognizes,

as common law, the rule above stated requiring actual re-entry, and changes that by dispensing with re-entry, but only by an action of ejectment. It gives no chancery jurisdiction.

But do the principles laid down show that a suit in equity for cancellation of the deed from Bailey to Bailey cannot be maintained? They do, because they show that William J. Bailey had no estate or present interest in the land. It had all gone out of him, and he could not therefore pass any interest or estate to the trustees of Broadbudd College or to his executors. Section 16, c. 93 (Code 1906, § 3409), will not help them to maintain ejectment, because to do so they must have "the right of re-entry," and we have seen that that is not conveyable or assignable, and the trustees and executors did not have a right of re-entry so as to maintain ejectment under section 16. This section does not give, create, right or title. It only gives ejectment to one who already has right on which to enter. It would give Bailey action, without entry, but not his grantees. William J. Bailey did not confer upon them by word or otherwise right to sue for cancellation. Now I ask how can a suit for cancellation, or any other legal proceeding, rest upon nothing, no title, no right? How can the plaintiffs maintain any suit whatever, having no right recognized in law? How can a suit stand upon a nonentity?

I have above discussed the case on the theory that the grantor Bailey made no entry under the forfeiture clause, but that theory does not likely apply. He made what in law is re-entry. He was on the land when grantee Bailey left it. The latter yielded the possession to grantor Bailey. It was matter of agreement between them. The grantee Bailey agreed to and thus waived formal re-entry. The grantor Bailey remained in possession, and assumed authority over the land, leased it, had it cropped. Even if grantee Bailey had not consented, grantor Bailey being in sole possession when grantee Bailey quit possession, this in law was the equivalent of formal re-entry. Being in possession already, he could not enter upon himself. We cited authority in *Guffey v. Hukill*, 34 W. Va. 56, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901, for the proposition that "No man can enter upon himself." 2 Washburn on Real Prop. 957, says: "If the grantor is himself in possession when the breach happens, the estate reverts in him at once without any formal act on his part, and he will be presumed, after the breach, to hold for the purpose of enforcing the forfeiture, unless he waive the breach." Therefore we must treat William J. Bailey as having himself re-entered for breach of condition, and thus reinvested himself with an estate. But what estate was he invested with by such entry? With a life estate by the letter of

the deed, not with a fee. Having exercised this right of re-entry, he used the remedy given by the deed. He did this himself, and he could not have that remedy and also rescission in equity. Having himself used this remedy, that was the extent of his remedy under the letter of the deed, and he could not convey any other remedy, by rescission or otherwise, to Broadbudd College or others. The only estate he had by such entry was a life estate, and he could confer no greater. "The right to re-enter * * * means the recovery of possession in one way only." *Michaels v. Fishel*, 169 N. Y. 881, 62 N. E. 425. There it is said that, when parties have used the word "re-enter," it is presumed they used it in the common-law sense. Note 7, 24 A. & E. E. L. 216. It was held in that case that the statute remedy by summary proceedings could not be resorted to. I here repeat that under the cases of *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17, and *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901, where a deed has a clause of re-entry, that is the remedy, and there is not the superadded remedy of rescission, especially where the re-entry is by deed only for a life estate. The decision gives a fee; whereas, re-entry by the letter of the deed gives only a life estate.

Thus whether we say that Bailey did not re-enter, or did re-enter, we reach the same conclusion; that is, that the plaintiffs have no right to maintain their suit.

(65 W. Va. 628)

STATE v. VERTO et al.

(Supreme Court of Appeals of West Virginia. May 4, 1909. On Rehearing, June 10, 1909.)

1. RAPE (§ 40*)—GENERAL REPUTATION—EVIDENCE.

Upon a trial for rape, a defendant is allowed to prove that the general reputation of the prosecutrix, before the act, was bad as to chastity.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. § 55; Dec. Dig. § 40.*]

2. CRIMINAL LAW (§ 834*)—INSTRUCTION.

A prisoner on trial has right to have given an instruction presenting to the jury specifically his theory or claim of defense, under the evidence, in his own language, if in law the instruction is sound.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2014; Dec. Dig. § 834.*]

(Syllabus by the Court.)

Error to Circuit Court, Marion County.

Mike Verto and Sam Bruzzino were indicted for crime, and Verto and Bruzzino were convicted, and Verto brings error. Reversed.

Harry Shaw, for plaintiff in error. Wm. G. Conley, for the State.

BRANNON, J. In the circuit court of Marion county, Mike Verto, Paul Oliverio,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
64 S.E.—65

and Sam Bruzzino were indicted for rape upon Zana Mike. Oliverio escaped, and Ver-to and Bruzzino were convicted by a jury and sentenced to the penitentiary for 12 years.

On the trial the court refused the defendants' instruction No. 4 that if the jury believed from all the evidence that the defendants did not touch or interfere with the person of Zana Mike, when the rape was alleged to have been committed, but went to the place for the purpose of inducing Paul Oliverio to leave her alone and go to his home, then the defendants were guilty of no offense. There was evidence going to show that Oliverio was raping the woman, and that the defendants went to the spot to make him desist, and did not assault the woman or aid and abet. Whether this evidence was credible or not we do not say; but it was in the case. Why this instruction was objected to or refused, no member of this court can see. While I think the instruction ought to have been given, I would hesitate to reverse on it alone, because I think any jury would acquit if its supposed facts were proven, without any instruction, and also because instructions given by the court told the jury that to convict they must find beyond reasonable doubt that the prisoners committed the act by force and against the will of Zana Mike, or aided and abetted the act. The defendants' claim was that only Oliverio ravished the woman, and that they, seeing him assault the woman, went to her relief, and they had a right to have this claim put before the jury in a direct, distinct instruction, in their own language, as a definite legal proposition.

The defense sought to show by a witness, Guarascio that the general reputation of Zana Mike as to chastity and virtue was bad. Whilst the witness did not show knowledge of general reputation, but said he heard the boarders talk about her, when the question was put, "What is this woman's reputation in that respect, good or bad?" the court said, "The court will exclude that question, because not a material inquiry in this kind of a case." Why not? It is settled that, in prosecutions for rape, the unchastity of the prosecutrix may be shown. 10 Encyc. of Evl. 602; 23 Am. & Eng. Enc. Law, 870; Elliott on Evl. § 3101. Another witness, Guzzo, was asked as to her reputation as to chastity and the court allowed him to answer that it was bad, saying that it was admitted for the purpose of showing the probability of consent. This remark, which was correct, was inconsistent with the remark above quoted. Which ruling of the court would the jury follow? Was the matter not thus left in uncertainty? What would the jury think as to the opinion of the court as to the effect of such character evidence? The remark above quoted, that evidence of reputation was not pertinent in such a case, would weaken the effect of the

evidence of Guzzo that was admitted. After Guzzo was allowed to say that he was acquainted with the reputation of the prosecutrix, and that it was bad, he was asked whether he had heard her reputation was bad before the alleged rape, and the court would not allow the question to be answered. We understand the law to be that it is allowable to prove such reputation only before the act, not after it. The defense sought to prove bad repute before the alleged rape so as to bring it within the law. 4 Elliott on Evl. § 3101.

I see no objection to instruction No. 5, telling the jury that, even if Oliverio did rape Zana Mike, they must find the defendants not guilty, unless the jury should believe beyond all reasonable doubt that defendants also had sexual intercourse with her, or aided and assisted Oliverio in having such connection with her. I do not know that I would reverse for refusal of this instruction, in view of instructions given practically covering the same ground. It may want the words "or were present for that purpose," as its close, though presence for such purpose would be aiding and abetting, and I hardly think these words essential. The contention of the defense was that Oliverio did the act, and they were present only to make him desist, and they did not touch her. I cannot see why they were not entitled to an instruction directed to the distinct point that, though Oliverio did the act, they would not be guilty unless they had intercourse, or were present aiding and abetting Oliverio. The instructions given did not cover just this point specifically, but only generally. A party has a right to an instruction in his own language.

We do not think there is error in refusing a view. It is a matter in the discretion of the court, and we see no such necessity for a view. *Gunn v. Railroad Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

It will be understood that this court intimates no opinion as to the guilt or innocence of the defendants. That is for the jury and court upon another trial. We see no error in other respects than those specified.

Judgment reversed, verdict set aside, and new trial granted.

On Rehearing.

Since writing the above opinion and its adoption by the court, my attention has been called to that feature of it holding it error to reject evidence of the woman's reputation prior to the crime charged. I refer to the evidence of Guzzo. A fuller statement as to his evidence is this, which I make to fairly present the ruling of the circuit court. Guzzo was asked whether he was acquainted with the woman's reputation "for chastity and virtue at the time of the trouble on the 1st day of March and before," and, having answered that he was, he was then asked

ed whether it was good or bad. The state objected. The court said: "This portion of the testimony can only go for the purpose of showing whether or not she consented." The answer was that the witness had heard it was bad. Next followed the question whether such reputation was bad "before this trouble on the 1st day of March." The court refused to allow the question to be answered. Now, it is suggested that the first answer covered the time before the trouble, and it was useless to allow the witness to repeat by answering the pointed question whether he was acquainted with the woman's reputation before the trouble; but the trouble is that the answer to the first question covered the time at and before the trouble, and the refusal to allow the second question to be answered would logically induce the jury to think that reputation before the trouble was not admissible, whereas, it was only admissible to prove the reputation before the trouble. I repeat that, under these circumstances, the jury might infer that the opinion of the court was that reputation prior to the trouble was not admissible or to be considered by the jury. If we cannot say that the jury might so infer, still would it not leave it a matter of uncertainty as to the ruling of the court upon the admissibility of evidence of reputation before the trouble? Under the evidence which I have not detailed, that was a proper matter for the consideration of the jury, and we can say either that evidence of reputation before the crime alleged was rejected, or its competency left in doubt before the jury.

(65 W. Va. 595)

MCGRAW OIL & GAS CO. et al. v. KENNEDY et al.

(Supreme Court of Appeals of West Virginia.
April 27, 1909. Rehearing Denied
June 12, 1909.)

1. MINES AND MINERALS (§ 78*)—LEASES—FORFEITURE.

A lease for oil and gas is for five years, "and as long thereafter as oil or gas, or either of them, is produced by the party of the second part." The lessor cannot forfeit it because he thinks the gas not in paying quantity; the lessee claiming that it is, and willing to pay the sum stipulated for the well. It is for the lessee to say whether the gas is in paying quantity, acting in good faith.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 78.*]

2. MINES AND MINERALS (§ 78*) — LEASES — FORFEITURE—FAILURE TO MARKET GAS.

When a producing gas well is developed, but its product not marketed, that fact does not authorize the lessor to forfeit the lease; the lessee being willing to pay the agreed sum for a gas well.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 78.*]

3. MINES AND MINERALS (§ 78*) — LEASES — FORFEITURE—FAILURE TO DRILL ADDITIONAL WELLS.

An oil and gas lease cannot be canceled in equity only for failure to drill additional wells.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 78.*]

4. MINES AND MINERALS (§ 78*) — LEASES — ESTATES CREATED.

Under the lease in this case, a well producing gas is drilled, and the lessee elects to consider it in paying quantity. An estate has thus vested in him.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 201; Dec. Dig. § 73.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Taylor County.

The McGraw Oil & Gas Company filed a bill against R. W. Kennedy and the Crystal Ice Company, and thereafter Kennedy and the ice company filed a bill against the McGraw Oil & Gas Company, the South Penn Oil Company, and another. The cases were heard together and from the decree the Crystal Ice Company, Kennedy, and the South Penn Oil Company appeal. Reversed and remanded.

Davis & Davis, A. B. Fleming, Chas. Powell, Kemble White, and B. F. Bailey, for appellants. Dent & Dent, for appellees.

BRANNON, J. Hugh Evans, on September 20, 1899, leased a tract of 523 acres of land in Taylor county to U. S. Dittman and J. C. Gawthrop for production of oil and gas. The lease provided that Evans have free of charge gas for use in his residence; the lease to continue for the term of five years "and so long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, heirs, executors, administrators or assigns." The lease deed provided that the lessee deliver into pipe line to the credit of Evans one eighth of oil produced and pay \$200 yearly for "each gas well the product from which is marketed and used off the premises." The lease provided that the lessees drill a well within twelve months or pay thereafter \$132 quarterly until one should be drilled. No well having been drilled within 12 months, the sum of \$132 was paid Evans, extending the lease to December 20, 1900. Before the 20th of December the Southern Oil Company, under some agreement with Dittman and Gawthrop, drilled a well and produced gas in December, 1900. The casing was drawn from the well, and the well prepared for use by the insertion of a wall-packer and 1,400 feet of tubing, and a cap at the top, with a gate through which the gas could be removed. This was done to save all gas. Tests of the gas produced in the well were made at various times; the tests varying in quantity from 331,700 to 1,140,500 cubic feet. No gas from the well was marketed; but it was closed so as to save the gas from waste. The Southern Oil

Company sold its interest in the well to the South Penn Oil Company, and then Dittman and Gawthrop assigned the lease to the South Penn Oil Company. Later the South Penn Company assigned the estate in the gas to the Hope Natural Gas Company, reserving the estate in the oil. Later the Hope Natural Gas Company assigned the gas right to R. W. Kennedy to hold in trust for the Crystal Ice Company, a corporation engaged in manufacturing ice in the city of Grafton. The well was bought to give fuel to this and other plants, and a franchise from Taylor county and Grafton to lay pipes from the well to the plant was obtained by the ice company. This was under the authority of the directors of the ice company, and the purchase money was paid out of its treasury. The well was in "wild cat territory." There was no pipe line near it. When the well was drilled, Evans, the lessor, piped gas from it to his residence, and has ever since used the gas for his domestic purposes. He received \$132 for failure to drill the first year, and after the well was drilled he received seven payments of \$200 each, the annual payments stipulated for each gas well. He was tendered the \$200 for the year ending December 20, 1907, but refused to receive it. On March 20, 1907, Evans leased the same tract to the McGraw Oil & Gas Company. The latter company had full notice of the first lease, when it leased, and notice was served on it by Kennedy of his claim of title, and warning the McGraw Oil & Gas Company and John T. McGraw not to go on the premises, and warning them that, if they should produce oil or gas on the land, Kennedy would claim for the same. Notwithstanding this notice, the McGraw Company entered and drilled a well producing gas. The McGraw Company brought a chancery suit against Kennedy and the Crystal Ice Company to declare the lease made by Evans to Dittman and Gawthrop forfeited and cancel it as a cloud upon its title under the second lease. Later Kennedy and the Crystal Ice Company brought a chancery suit against the McGraw Oil & Gas Company, the South Penn Company, and Evans, setting up the first lease, that from Evans to Dittman and Gawthrop, claiming under it title paramount to that conferred by the second lease, that from Evans to the McGraw Oil & Gas Company, and to cancel the latter lease as a cloud upon the title conferred by the first lease, and to make the McGraw Company responsible for gas taken from the premises. The South Penn Company filed in the case of the Crystal Ice Company an answer, containing also cross-bill matter against the McGraw Company, Evans, and others, seeking to have declared void as to the first lease the lease from Evans to the McGraw Company. The cases were heard together, and a decree was pronounced, sustaining a demurrer to the cross-bill of the South Penn Company, and dismissing the bill filed by Kennedy and the Crystal Ice Company, and

canceling the right of Kennedy and the Crystal Ice Company, and enjoining them from asserting any right against the McGraw Company and from doing anything to interfere with or prevent the McGraw Company from developing and using the land for gas. The Crystal Ice Company, Kennedy, and the South Penn Oil Company appeal.

It cannot be said that the first lease is forfeited by any express forfeiture clause found in it. The theory of the McGraw Company is that such a lease confers no vested estate in oil or gas in the earth, but at most confers only a right to search for oil and gas, and that only when oil or gas shall be found in paying quantity and marketed does any estate vest in the lessee, and that no estate ever vested under the first lease, because the gas found was not in paying quantity. This lease does not limit its term by requiring that oil or gas shall be found in paying quantity, as leases usually do. It says that the lease shall endure "five years from this date and as long thereafter as oil and gas, or either of them, is produced therefrom by the party of the second part." So this lease contains nothing in terms allowing the lessor to end it because oil or gas is not found in paying quantity; and, if there were such provision, I should regard it as made in the interest of the lessee to protect him from payment of the annual sum for a gas well, if insufficient in quantity, and not as intended to give the lessor right to terminate the lease against the lessee's will, he treating the quantity as sufficient and electing to pay. What right has Evans to say that no estate vested by reason of insufficiency of gas, when the lease makes no such provision, and the lessee chooses to regard it as sufficient and pay as if it were? And again it has been held, even when such a clause is in the lease, that it is with the lessee to say whether the product is in paying quantity. *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; *Thornton, Petroleum & Gas*, § 119. So held in *Summerville v. Apollo Gas Co.*, 207 Pa. 334, 56 Atl. 876, and by Judge Goff in *Kellar v. Craig*, 126 Fed. 630, 61 C. C. A. 366; *Young v. Oil Co.*, 194 Pa. 243, 45 Atl. 121, is notable for this construction of such a clause. It says that the operator has election to say whether it will pay. It is useless to argue that a lease does not vest right to oil and gas in place, and therefore no right vests of any character, if the quantity is too small to pay. No one says that the lease carries title to these minerals, even after a paying well has revealed them; but an estate, a right of value then vests, that is, right to retain possession of the land for operation and to go on to sever the minerals from the land and convert them into personalty. When this well was found, the lessee had right, if he chose, to keep possession and pay the annual rental. He had a vested right. Evans was only entitled to the rental. Title vested. He gets the same pay as if the well produced a larger

quantity. There is really no evidence that it was not a paying well. The cross-bill alleges that it was, and this is to be taken as true on demurrer. Evans for seven years so treated it, for he received seven annuals of \$200, knowing that the gas was not being marketed, knowing the status of the well. Though the gas was not marketed, the well was being used to comply with the lessee's covenant to furnish Evans gas for his use. The law is that "the right to declare a forfeiture must be distinctly reserved, proof of the happening of the event, on which the right is to be exercised must be clear, and the party entitled to do so must exercise his right promptly." *Thompson v. Christie*, 138 Pa. 230, 20 Atl. 934, 11 L. E. A. 236. Will equity allow Evans to wait and wait, drawing large sums of money yearly, and then at the eleventh hour suddenly forfeit? Is he not estopped? Such acceptance of money by Evans, knowing all the facts, is forcible against him as an estoppel in a court of equity. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151. As to the suit by the McGraw Company, it is virtually, really, a suit in equity to enforce a forfeiture. Equity will not take affirmative, active steps to enforce a forfeiture. *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618, where the subject is discussed by Judge Poffenbarger. So held in *Pyle v. Henderson*, 64 W. Va. —, 63 S. E. 762. That clause in the lease by which the lessees were to pay \$200 yearly for each gas well "the product from which is marketed and used off the premises" was designed to protect the lessee from demand unless he marketed the gas. It is not a stipulation to market or give up. That is for the lessee's protection, and that has been waived and royalty paid. Moreover, there is evidence going to show that the gas was, in fact, in paying quantity.

Title having vested, the lease contains no clause that forfeits it. It is argued not definitely, but virtually, that failure to drill other wells forfeits. We have frequently held that, where there is no express provision requiring additional wells, but only an implied one, this will not forfeit. *Core v. Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128; *Kellar v. Craig*, 126 Fed. 630, 61 C. C. A. 366. I have never been reconciled to the doctrine that for failure to drill additional wells the lessor must sue at law for damages, and equity will not cancel unless for draining from nearby territory, and thus exhaust oil in the leasehold involved. I have asked: How many actions must the landlord bring? How can damages be measured? How can we see into the depth of the earth? But it has been so held. The reason is that equity will not, as a rule, enforce a forfeiture of an estate. It will not especially insert such a clause when the parties have not inserted it, especially when they did insert forfeiture for failure to drill or pay commutation, but did not insert forfeiture for

failure to drill additional wells. As to duty to drill additional wells for gas, the Pennsylvania Supreme Court has held, practically, that it does not exist in gas as in case of oil, because of the difference. A small oil well can be used; a gas well of slight pressure will not enter the gas line. *McKnight v. Manufacturers' Gas Co.*, 146 Pa. 185, 23 Atl. 164, 28 Am. St. Rep. 790. That was for both oil and gas, but development seemed to show the section to be gas territory, as in this case; but we express no opinion as to this. We only say there can be no forfeiture for mere failure to drill more wells.

It is argued that failure to market the gas forfeits the lease. So it was claimed in *Summerville v. Apollo Gas Co.*, 207 Pa. 334, 56 Atl. 876, as to a lease for two years "and as much longer as oil and gas are found in paying quantities," and the court said that the lessor had no right to forfeit at the end of two years because during that time no oil or gas had been marketed. "It may be that for some time the lessee was not able to find a purchaser for the gas, but that was not the affair of the lessors. They were not interested in the proceeds of the sale of the gas. Their rights under the agreement extended only to the receipt of a stipulated annual rental for each well, and the free use of gas for domestic purposes. Beyond this the question of whether or not the quantity of gas was profitable was for the decision of the lessee. It may be that the final disposition of the product of the well was such as to amply remunerate it for the delay in finding a market." There is no evidence that the well was not in paying volume.

It is claimed that the well and lease have been abandoned. As said in *Urpman v. Lowther Oil Co.*, 53 W. Va. 506, 44 S. E. 434, 97 Am. St. Rep. 1027: "The loss of property by abandonment is not easily shown nor readily held by the courts." "To constitute abandonment by the lessee of a lease for oil, there must be both an intention to abandon, and actual relinquishment of the leased premises." *Sult v. Hochstetter*, 63 W. Va. 317, 61 S. E. 307, says the tenant must quit and the landlord take possession to work abandonment. Abandonment is not only not established, but plainly negated, in this case. The lessees paid, and Evans received, for seven years the rental money for the well. The lessees tendered for the year 1907. The leasehold was assessed with taxes to Kennedy. The lessee put in the well 1,500 feet of tubing, wall-packer, and casing head. The lease was at different times conveyed from one to another as an existing lease. The Grafton Ice Company in December, 1904, paid \$1,000 for the lease, and made preparation to pipe the gas from the well to Grafton to its ice manufactory. They have cared for the well, blown and tested it, and never been out of possession; nor has Evans ever tried to expel that company from his premises.

He says he never hindered it from going on the premises to attend to the well, and that "they always had that right."

Therefore we reverse the decree, and dismiss the bill filed by the McGraw Company, and we decree that the lease in the record specified dated the 20th day of March, 1907, from Hugh Evans and wife to the McGraw Oil & Gas Company, be canceled, annulled, and set aside as to the rights of the Crystal Ice Company, Robert M. Kennedy, the South Penn Oil Company, and all other parties having rights derived under and by virtue of the lease in the record specified, dated the 20th day of September, 1899, made by Hugh Evans and wife to U. S. Ditman and J. C. Gawthrop; and this cause is remanded to the circuit court of Taylor county for further proceedings.

(65 W. Va. 672)

EDWARDS MFG. CO. v. CARR et ux.

(Supreme Court of Appeals of West Virginia.
May 11, 1909. Rehearing Denied
June 12, 1909.)

1. FRAUDULENT CONVEYANCES (§ 277*)—PRESUMPTIONS AND BURDEN OF PROOF—TRANSACTIONS BETWEEN HUSBAND AND WIFE.

The statute, enabling a married woman to carry on business in her own name, freeing her separate property from the control of the husband and liability for his debts, and making her earnings separate estate, does not destroy the presumption, in favor of the husband's creditors, that his conveyance of property to her was voluntary, nor relieve her from the burden of clearly proving payment of a fair and adequate price therefor, with money procured from some one other than her husband.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 814; Dec. Dig. § 277.*]

2. EVIDENCE (§ 265*)—ADMISSIONS—WEIGHT.
Though an admission, accompanied by explanatory or exculpatory matter, cannot be introduced as evidence without the explanation, if objected to, the weight to which each is entitled, after introduction, is a matter wholly within the determination of the court or jury trying the issue.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1041; Dec. Dig. § 265.*]

3. FRAUDULENT CONVEYANCES (§ 299*)—EVIDENCE—SUFFICIENCY.

Expenditure of money by a husband in improving his wife's property having been admitted, in a suit by his creditors to charge her property with his debts to the extent of such expenditure, the mere uncorroborated oral testimony of the husband and wife is not sufficient to establish repayment of the money.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 888; Dec. Dig. § 299.*]

4. FRAUDULENT CONVEYANCES (§ 64*) — INTENT—EXISTING CREDITORS.

As to creditors existing at the date thereof, a gift of property or money is void, no matter what the actual intent of the parties may have been. The statute makes proof of lack of a consideration valuable in law conclusive.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 159; Dec. Dig. § 64.*]

5. FRAUDULENT CONVEYANCES (§ 69*) — INTENT—SUBSEQUENT CREDITORS.

In order to set aside a voluntary conveyance, a subsequent creditor must prove actual fraudulent intent; and, though there may have been existing creditors, at the time of the conveyance, who could have set it aside without such proof, and the grantor was never afterwards free from debt, though the prior or existing debts were afterwards paid, such subsequent creditor cannot be subrogated to the rights of the prior creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 178; Dec. Dig. § 69.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by the Edwards Manufacturing Company against T. M. Carr and Sarah A. Carr. Decree for complainant, and Sarah A. Carr appeals. Reversed, and bill dismissed.

Simms & Enslow, C. W. Campbell, and Holt & Duncan, for appellant. Wallace & Fitzpatrick and W. K. Cowden, for appellee.

POFFENBARGER, J. Deeming the evidence, adduced for the purpose, sufficient to prove that T. M. Carr, a debtor, had expended \$1,500 of his own money on improvements, made on a certain lot owned by his wife, Mrs. Sarah A. Carr, in fraud of the rights of his creditors, the circuit court of Cabell county pronounced a decree charging said property, in favor of the creditors, to the extent of \$1,950, the principal sum so invested and interest thereon, and Mrs. Carr has appealed.

The evidence covers a considerable period of time and a great many transactions, varying widely in respect to the extent or degree of their bearing on the question at issue. The Carrs were married in 1884, and came to Huntington in 1887, bringing with them about \$1,000 in money, and soon afterwards bought a lot on Fourth avenue, taking the title in Mrs. Carr's name. On this they built a house, partly with lumber and materials they had accumulated before coming to Huntington, and partly with materials purchased as the work progressed; and in this house they resided practically all the time, until they moved into their present residence on Sixth avenue, the property in question, about July, 1901. The husband, a carpenter by trade, carried on no business of his own until about the year 1896, when he engaged in manufacturing, merchandising, and contracting, successively, and wound up insolvent about the time the new house was completed, but not very heavily indebted. His debts are estimated at about \$2,000. The wife is said to be worth from \$12,000 to \$15,000, consisting principally of real estate. Before marriage she taught school and clerked in a store. After marriage she received all of her husband's earnings until 1896. For three or four years she kept green-houses, producing flowers for sale, and claims

to have made considerable money in that way. While living in the Fourth avenue house she kept two or three boarders, and, after the completion of the new one, a large 16-room house, she kept several, and derived from the rooms rents ranging from \$50 to \$70 per month. Soon after the house on Sixth avenue was built, she sold the Fourth avenue house for \$3,000. In January, 1902, she purchased from R. S. Prindle another piece of property, paying \$800 cash, and assuming a trust lien on it for \$800. In February, 1903, she purchased another from T. W. Peyton, for which she paid \$573.12, and assumed a debt of \$691.88, constituting a lien thereon. The property on which the residence is was bought of Rufus Switzer November 27, 1890, for \$1,200, of which \$500 was paid in cash, and the house afterward built on it at a cost of about \$6,000. Mrs. Carr claims to have had large amounts of the materials used in it purchased and stored on her Fourth avenue lot before she began building. Both she and her husband admit that the former paid about \$1,500 for labor and materials that went into the construction of the house, but both emphatically testify that all this money was repaid, and more than repaid. They both say he got \$1,200 out of the proceeds of the sale of Mrs. Carr's Fourth avenue lot, besides \$150 she gave him with which to pay a debt to one Roberts, and \$225 with which to buy out the business of one Palmer, but this stands on their testimony, uncorroborated or strengthened by any written evidence or memoranda. That Carr was engaged in business from 1896 until some time in 1902 is admitted, and in that period it is likely he carried some indebtedness, but the only indebtedness proven in the cause is subsequent in date to the building of the house, and none is shown to have been incurred or existed between 1884 and 1896, a period during which he says he gave all his earnings to his wife, as he could lawfully have done, if he owed nothing, and intended no fraud upon subsequent creditors.

The principal contentions of counsel for the appellant consist of these four propositions: (1) The statute, making a married woman's earnings her separate property, has changed the rule respecting the burden of proof or presumption against the wife in cases of this kind; (2) the admission of the husband's contribution is nullified by the accompanying claim of repayment; (3) the evidence proves ample financial ability on the part of the wife to obtain all the property she has without any aid of her husband, except that rendered by him prior to 1896, and that the money contributed by him to the cost of the building was repaid; (4) there is no proof that Mrs. Carr had any knowledge of her husband's indebtedness, or any fraudulent intent on his part in contributing to the cost of the building. That the burden of proof has not been changed,

nor the presumption against the wife in cases of this kind destroyed, by the married woman's statute, enabling her to carry on business in her own name and making her earnings her separate property, has been expressly decided in *Miller v. Gillispie*, 54 W. Va. 450. See opinion on rehearing (page 463, 46 S. E. 451, 456). Besides, these old rules have been steadily and undeviatingly adhered to and enforced ever since the passage of the married woman's statute. The rule saying an admission, accompanied by an explanation or discharge, must be taken as a whole, does not relate to the probative force of evidence. It is a rule governing and controlling the question of admissibility. Such a statement must go to the jury as a whole, and it is error to allow the admission to go in, and exclude the explanatory or exculpatory part. The party against whom it is introduced has an absolute right to have the entire statement considered, and is protected against the introduction of only the prejudicial part of it. But, after it has been introduced, it is with the jury or court to say how much weight shall be given to each of the parts, and naturally the admission has greater weight than the explanation, because it is a statement against interest, while the explanation is self-serving. However, if the court or jury believe the entire statement to be true, it will find accordingly.

In view of the finding of the trial court, it is hardly necessary to discuss the tendency and weight of the evidence in respect to anything except the alleged repayment of the money contributed by the husband to the cost of the building. The decree does not proceed upon the assumption of finding of fraud in the purchase of any of the lots. It charges the Sixth avenue property to the extent of the husband's contribution to the cost thereof, and no further. We think the evidence of repayment fails to measure up to the requirement of the rules of evidence in cases of this class. The admission casts upon the wife the burden of full and clear proof of repayment. Nothing is offered except the uncorroborated statements of herself and her husband. No documentary evidence of any kind is produced. No note, memorandum, or other paper evidencing indebtedness of herself to her husband for these advancements is shown, nor any check, draft, bank book, or other paper showing repayment is disclosed. It is said she gave her husband certificates of deposit amounting to \$1,200, received by her as part of the proceeds of her Fourth avenue property, but these certificates are not produced, nor were any of the bank officers called upon to testify to their assignment to the husband. It is highly probable that she had such certificates, for it appears that she sold her Fourth avenue property for \$3,000, \$500 of which was represented by a lien assumed by the purchaser, but she had previously invested a large amount of money in the new house

and lot, exclusive of the contribution of her husband, far exceeding the entire value of the Fourth avenue property. This investment, it seems to us, represents all the money she could possibly have had from sources other than her husband. Besides, her rapid accumulation of property is coincident in point of time with the financial reverses and misfortunes of her husband. These circumstances call upon her for clear, strict, and full proof of the fact of repayment, and the rule is that, as against creditors, the mere verbal testimony of husband and wife as to money transactions between them will not avail. *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871; *Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175; *McGinnis v. Curry*, 13 W. Va. 29; *Horne v. Huffman*, 52 W. Va. 40 43 S. E. 132.

But this conclusion does not sustain the decree. The money so advanced, and not deemed to have been repaid, was a voluntary settlement on the wife. It would be void as against creditors existing at the time thereof, but it cannot be impeached on that ground alone by a subsequent creditor; *Code 1899, c. 74, § 2 (Code 1906, § 3100)* saying: "Every transfer or charge which is not upon a consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made; but shall not upon that account merely be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased, after it was made." There is not a word of direct evidence to the effect that Mrs. Carr knew of any indebtedness on the part of the husband at the time she allowed this contribution to be made to the cost of her building. In her testimony she says she knew nothing about her husband's business affairs, and also that she "knew nothing of Mr. Carr's debts." The bill does not specifically allege knowledge, on her part, of the existence of her husband's debts at the time she bought the Sixth avenue property, or at the time she built the house on it. It charges generally that she knew of the insolvency of her husband and his purpose to defraud his creditors, his insolvency and inability to pay his debts, at the time of the purchase of the property, and the continuance of indebtedness then existing, his placing the property purchased in the name of Sarah A. Carr for the purpose of hindering, delaying, and defrauding his creditors, the lack of any consideration moving from her, and knowledge on her part of the fact that her husband was putting property in her name for the purpose of avoiding payment of his debts and preventing his creditors then in existence, and any future creditors that he might have, from subjecting the same to the payment of his debts. To these allegations Mrs. Carr, after detailing facts and circumstances relating to her marriage, earnings, purchases and sales of property, and business trans-

actions with her husband and others, put in the following general denials: "She expressly denies all allegations in regard to any of said purchases. She denies that, at the time the said Carr originally gave her the money which she invested in the Fourth avenue property, which she sold, there were any creditors who could object to the said gift. She denies that any of the existing debts are continuances of the debts existing in 1899. She denies each, every, and all allegations of the plaintiff's bill, and amended and supplemental bill which seeks to impute her with fraud." Being unexcepted to, this general denial is good. She also avers her belief in the correctness of the facts set out in her husband's answer, in which he denied that his wife had any knowledge of any attempt to defraud his creditors "not then existing, by purchasing property in her name, which fraud never did exist," and says "the debts against him, and the judgments to recover against him, are not claims against his wife," nor are "his debts continuances of any debts which he owed before the time his wife became the owner of said real estate."

None of the debts involved in this suit seem to have been contracted earlier than the year 1902. That of the Edwards Manufacturing Company, the plaintiff in the bill, was contracted in November, 1902, long after the completion of the house in question. There is no presumption of fraudulent intent. That is a fact which cannot be assumed. It must be proven. The presumption, imposing such a great burden upon the wife when property stands in her name, is not that of fraudulent intent, but that of payment of the purchase money by the husband. If she fails to discharge that burden by showing payment by her with money derived from other sources, and the debts are pre-existing ones, the conveyance is set aside as a voluntary one, or as having been made without consideration. In such case no proof of fraudulent intent is necessary; but, if the creditor be a subsequent one, the fact that the conveyance or the money expended upon the wife's property was a gift does not make a complete case for relief. Fraudulent intent must be established in addition thereto. That the conveyance or expenditure of money on the property was without consideration is a circumstance to be considered, in pursuing the inquiry, as to whether such intent existed, but that alone does not justify the inference of fraud.

That Mrs. Carr has rapidly accumulated property, while her husband sustained losses, and finally became insolvent, is a circumstance calling for a close scrutiny into their financial transactions, but it is wholly insufficient to prove fraud in favor of subsequent creditors. That she has extensive and valuable property, amounting in value to three or four times that of the property owned by her in 1899, and owes only about \$800 on it, argues that she received assist-

ance from her husband. She does not deny that she did to the extent of \$1,500. Her husband, according to his testimony, sustained some losses before the house was completed, and some afterwards. Notwithstanding this, all of the indebtedness existing at the time of the donation made to his wife has been paid. He continued in business, contracting new debts and paying old ones. This argues intent on his part to continue in business, not to withdraw what property he had from the reach of his creditors and quit, and tends to repel the charge of fraud. *Greer v. O'Brien*, 36 W. Va. 277, 289, 15 S. E. 74; *Bank v. Patton*, 1 Rob. (Va.) 536. There was no conveyance of property to his wife on the faith of which the present creditors may have extended credit. This view of the case seems to bring it clearly within the principles declared in *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74, and *McCue v. McCue*, 41 W. Va. 151, 23 S. E. 689. In both of these cases, as well as others therein reviewed, it was held that the attacking subsequent creditor must prove some additional circumstance, connected with the fact of the donation and the indebtedness of the husband, in order to charge the wife's property. This doctrine dates back as far as *Lockhard v. Beckley*, 10 W. Va. 87, and *Hunter's Ex'r v. Hunter*, 10 W. Va. 321. *Greer v. O'Brien* expressly and distinctly decides that the old law of subrogation of subsequent creditors to the rights of prior creditors, in respect to voluntary conveyances, has been cut up by the roots and destroyed by section 2, c. 74, of the Code of 1899.

Only two circumstances, relied upon as proving actual fraudulent intent, are deemed worthy of notice. C. F. Millender testifies that, some 10 years before the Sixth avenue property was bought, and, at the time of the purchase of the Fourth avenue property, Carr told him he had made the latter purchase in his wife's name because something hung over him at Ripley, Ohio, whence they had come; but there was no specification of this something, nor any indication as to what it was. The admission long antedated the matters involved here. Carr swears he owed no debts in Ripley and it is not shown that he did. Besides, this admission related to property not in controversy here, and no longer owned by Mrs. Carr. We think it is entirely too remote and indefinite to have any bearing on the present issue. At the time of the erection of the Sixth avenue residence, Carr was conducting a mercantile business, called a paper store, in which he handled wall paper and building materials. R. C. Rankin, a brother of Mrs. Carr, worked about the store and in that business. Two horses and a wagon were also used in connection with it. Carr swears Rankin was simply employed by him, and had no interest

in the store, and also that Rankin was the owner of the horses, and that they were likewise hired by him (Carr). Rankin owned two adjacent half lots, the equivalent of one lot, in the city of Huntington, and by a deed, dated February 22, 1902, and reciting a consideration of \$2,500, he conveyed this real estate, and all his right, title, and interest in the two horses, wagon, and stock of goods, wares, and merchandise in Carr's store, to Mrs. Carr. She says she paid nothing for any of this property, and never took possession of, or used, any, of the stock of goods, which she says consisted of some wall paper and tools, worth probably \$15 or \$20, but did take the horses and sell them. Her explanation as to the real estate is that her brother, a single man, engaged and expecting to marry, had bought the real estate, and commenced the erection of a house on it, in anticipation of marriage; that, the lady whom he expected to marry having become an invalid, he conveyed the property to his sister, Mrs. Carr, with the understanding that she should complete the house and keep it, unless the lady should recover; and that, after the conveyance she (Mrs. Carr) borrowed \$500, and completed the building, and, after the marriage of her brother, reconveyed the property to his wife, and he paid off the debt made for the improvement of it. If the horses and wagon and other property described in the deed and used in Carr's business could be regarded as partnership property, and Mrs. Carr as having taken it with knowledge of its character and her husband's indebtedness at the time, it might prove participation on her part in the fraud of her husband against his creditors in respect to that property. This might justify the inference of fraud in the expenditure of money on her property. Such an inference as to intent respecting one piece of property may arise from proof of fraud respecting another conveyed at or about the same time from one of the parties to another. *Colston v. Miller*, 55 W. Va. 500, 47 S. E. 268. But there is no proof that it was partnership property, or her husband's property. Nothing points in this direction, except the deed executed by Rankin, purporting to convey his right, title, and interest in it, and the circumstances, already detailed, relating to Rankin's connection with Carr's business. It would only appear by way of slight inference, contradicted by positive evidence. Besides, this transaction occurred about seven months after the completion of the building. It is remote in both time and connection. Having carefully examined and analyzed all the evidence, we are of the opinion that it wholly fails to establish the charge of fraud against Mrs. Carr.

For the reasons stated, the decree will be reversed, and the bill dismissed.

(109 Va. 658)

NORFOLK & P. TRACTION CO. v. FOREST'S ADM'X.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. STREET RAILROADS (§ 111*) — INJURY TO TRAVELER—SPEED ORDINANCE—PLEADING.

Where, in an action for injuries to a traveler in a collision with a street car at a crossing, the negligence charged was that defendant ran its car at a rate of speed dangerous to persons traveling along and on the highway at the place of the accident, and violation of a speed ordinance was not relied on as a ground of negligence, the ordinance was admissible to prove negligence, though not pleaded.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 111.*]

2. EVIDENCE (§ 32*)—JUDICIAL NOTICE—MUNICIPAL ORDINANCE.

Courts do not take judicial notice of municipal ordinances, which must be established by evidence; but, when proven, they stand on the same footing as statutes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32;* Appeal and Error, Cent. Dig. § 2959.]

3. STREET RAILROADS (§ 94*) — INJURY TO TRAVELERS — SPEED ORDINANCES — VIOLATION.

Violation of a city speed ordinance by a street railway company at the time the traveler was injured in a collision with the car is evidence of negligence, though the ordinance imposes a penalty for its violation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 201; Dec. Dig. § 94.*]

4. STREET RAILROADS (§ 118*) — INJURY TO TRAVELERS — EXCESSIVE SPEED — SIGNALS — INSTRUCTIONS.

Where, in an action for injuries to a traveler in a collision with a street car, plaintiff's evidence showed that the excessive speed of the car and motorman's failure to give proper signals of its approach to the crossing, one or both, were the proximate cause of the accident, an instruction that intestate could assume that defendant's servants operating the car would give the proper signals and not run at an excessive rate of speed over the crossing, and that he had the right to drive his wagon across or even along the track in full view of the approaching car if, under all the circumstances, it was consistent with ordinary prudence to do so, was proper.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

5. STREET RAILROADS (§ 118*) — INJURY TO TRAVELERS—INSTRUCTIONS.

In an action for injuries to intestate, in collision with a car at a street railroad crossing, an instruction that if, under the surrounding circumstances, it would have been reasonably apparent that with ordinary care, and if defendant's servants had used ordinary care in driving the car, intestate could have driven across the tracks without collision, then he was not negligent, and if defendant's servants did not use ordinary care in operating the car in one or more of the particulars alleged, and as a direct and proximate result thereof intestate was injured, the jury should find for plaintiff, was not objectionable as ignoring the subject of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

6. STREET RAILROADS (§ 118*) — INJURY TO TRAVELERS — CROSSING ACCIDENTS — INSTRUCTIONS.

In an action for injuries to a traveler at a street railroad crossing, the court charged that if, at the time intestate was injured, there was in force in the city an ordinance making it unlawful to operate a trolley car over a street crossing without first reducing the speed to not more than three miles an hour, and requiring the ringing of the gong continuously after passing a point 50 feet from the crossing, intestate, when approaching the crossing, was entitled to assume that defendant's servants would obey the ordinance, and, if it would have been reasonably apparent to an ordinarily prudent person that he could have crossed the track without danger of a collision, he was not guilty of negligence in attempting to do so. *Held*, that such instruction was correct.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

7. STREET RAILROADS (§ 118*) — INJURY TO TRAVELERS — INSTRUCTIONS — LAST CLEAR CHANCE.

In an action for injuries to intestate, in a collision with a street car at a street railroad crossing, an instruction that if, after defendant's servants in charge of the car knew, or in the exercise of ordinary care ought to have known, of the danger to which intestate was exposed in crossing the track in front of the car, they could have avoided the accident by exercising ordinary care, but failed to do so, and intestate was injured as alleged, they should find for plaintiff, whether intestate was negligent at the time or not, correctly submitted the doctrine of last clear chance.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 268; Dec. Dig. § 118.*]

8. STREET RAILROADS (§ 117*) — INJURY TO TRAVELERS — LAST CLEAR CHANCE — EVIDENCE.

Where, in an action for injuries in a collision with a street car at a street railroad crossing, plaintiff's evidence showed that when the car was 150 feet away intestate was actually driving across the track, but, notwithstanding this, he was struck and injured, the court properly submitted plaintiff's right to recover under the last clear chance doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 248-250; Dec. Dig. § 117.*]

9. STREET RAILROADS (§ 118*) — INJURIES — INSTRUCTIONS.

Where the jury were properly instructed as to intestate's duty to exercise reasonable care for his own safety, the court did not err in refusing to ingraft an exception precluding recovery in case intestate was guilty of negligence on an instruction submitting plaintiff's right to recover under the last clear chance doctrine.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

10. STREET RAILROADS (§ 118*)—INJURY TO TRAVELERS — CROSSING — ACTION — INSTRUCTIONS.

A requested charge that plaintiff could not recover for injuries to intestate in a street car collision at a crossing, if intestate could have known, by the exercise of ordinary care, "that there was even a small chance" that the car would not stop in time to avoid a collision, was properly refused; intestate being only required to exercise ordinary care to avoid the accident under the existing circumstances.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 268-269; Dec. Dig. § 118.*]

11. STREET RAILROADS (§ 117*) — INJURY TO TRAVELER—QUESTION FOR JURY.

Where intestate was injured in a collision with a street car at a crossing, and the evidence was conflicting as to whether he started to check his horses before crossing the track, and the motorman testified that both he and deceased checked at the same time, the court properly refused to charge as a matter of law that, if the motorman saw deceased pull up and stop his horses, he could assume deceased would not drive in front of him.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243-246; Dec. Dig. § 117.*]

12. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requests to charge, the subject-matter of which is covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Error to Circuit Court of City of Norfolk.

Action by E. B. Forrest's administratrix against the Norfolk & Portsmouth Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, J. R. Tucker, and W. H. Venable, for plaintiff in error. Jeffries, Wolcott & Wolcott, for defendant in error.

HARRISON, J. This action was brought by E. B. Forrest to recover of the Norfolk & Portsmouth Traction Company damages for personal injuries alleged to have been sustained as a result of the negligence of the defendant company in the operation of one of its street cars on Botetourt street in the city of Norfolk. The plaintiff was driving a loaded ice wagon along Pembroke avenue, and at the intersection of that avenue with Botetourt street there was a collision between the street car and the ice wagon, whereby the plaintiff was thrown to the ground sustaining the injuries complained of.

During the pendency of this suit, the plaintiff died from the injuries he had received, and the suit was revived by his administratrix and prosecuted in her name to a final judgment against the defendant company for \$8,000.

Whether or not, upon the trial of the case, there was any error in the rulings of the circuit court to the prejudice of the defendant company, is the subject of the present inquiry.

The first assignment of error is to the action of the court in admitting as evidence a certain ordinance of the city of Norfolk, regulating the speed of cars at street crossings, and prescribing the manner of running and controlling the same at such points. That the violation of a statute or municipal ordinance is admissible as evidence of negligence is not denied, but it is contended that for such an ordinance to be invoked "as a ground of negligence" it must not only be proven, but must be pleaded, which was not done in this case.

It may be conceded that if the ordinance be the basis of the action, and its violation constitute the negligence relied on for a recovery, it should be pleaded; but the contention here made ignores the distinction between a case in which the violation of the ordinance is the "ground of negligence" relied on, and one like that at bar, where the ordinance is introduced as tending, along with other evidence, to prove the negligence which is alleged in the declaration.

The first count of the declaration alleges that the defendant negligently ran its car "at a rate of speed dangerous to persons traveling along and upon the highway at that place." This constitutes negligence, and any fact which tends to prove such allegation should go to the jury, who are to say whether or not the negligence alleged has been proved.

Persons, when traveling upon and using the streets and street crossings of a city, have a right to rely upon the observance by those operating cars of an ordinance limiting the rate of speed at crossings, and in doing so to govern their actions accordingly. The violation of an ordinance, thus relied on, is admissible, without being pleaded, along with other facts and circumstances of the case, as tending to establish the allegation that the defendant "carelessly, negligently, and recklessly, ran the said car at a rate of speed dangerous to persons traveling along and upon the highway at that place."

Courts do not take judicial notice of municipal ordinances as they do of statutes, and evidence must be offered to prove them; but, when proven, they stand upon the same footing as statutes. *Norfolk Ry. & L. Co. v. Corletto*, 100 Va. 355, 41 S. E. 740.

In the case cited, at page 359 of 100 Va., and page 741 of 41 S. E., it is said: "Statutes regulating the speed of railroad trains at certain places, being regulations clearly intended for the protection of travelers, it is well settled that any violation of them is competent evidence of negligence in an action brought by a traveler on the highway, even though the statute simply imposes a penalty for its violation." See *A. & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590, and *Southern Ry. Co. v. Stockdon*, 106 Va. 695, 56 S. E. 713.

In the case of *Faber v. St. Paul M. & M. Co.*, 29 Minn. 465, 467, 13 N. W. 902, where the introduction of a similar ordinance was objected to because not pleaded, it is said: "The objection cannot be sustained. The fact that the rate of speed at which the train was run was prohibited by the municipal law was competent evidence going to prove negligence; * * * and being evidence of the fact pleaded, it might be proved, although the existence of the ordinance had not been alleged in the complaint."

In *Brasington v. South Bound R. Co.*, 62

S. C. 667, 40 S. E. 667, 89 Am. St. Rep. 905, the Supreme Court of South Carolina says: "This is not an action to enforce the performance of any duty imposed by an ordinance of the city of Charleston, or to enforce the payment of any tax or penalty imposed by such ordinance; but the cause of action here is the negligence of the defendant company resulting in the death of the intestate, and the ordinances of the city are only referred to as showing such negligence."

In 6 Thompson on Negligence, § 7868, the author says: "Where the evidence tends to show that a particular act was prohibited by ordinance, and that such violation contributed to the injury, then the ordinance is quite properly admitted on the question of negligence, though not pleaded; but the rule is otherwise where the action is founded on a violation of the ordinance, and here it is necessary to plead the ordinance." See, also, *Lane v. Atlantic Works*, 111 Mass. 136, 140; *Union Pac. R. Co. v. Rassmussen*, 25 Neb. 810, 41 N. W. 779, 13 Am. St. Rep. 527.

In the case at bar the ordinance is not relied on as the ground of the plaintiff's right to recover. Its violation merely contributes to the proof of the fact alleged in the declaration that the defendant was running its car at a reckless and dangerous rate of speed. This being so, there is no more reason why the ordinance should be pleaded than that any other fact or circumstance adduced to establish the alleged negligence should be pleaded.

The second assignment of error is to the action of the court in giving instructions Nos. 1, 2, 3, 4, and 5, asked for by the plaintiff.

Instruction No. 1 is as follows: "The court instructs the jury that in running upon the public highway where the plaintiff's intestate, E. B. Forrest, was injured, the rights of the company's cars were not superior to those of any other vehicle, but simply equal, and said Forrest had the right to drive either across or along the track just as freely as upon any other part of the street, so long as he did not obstruct the cars or negligently expose himself to danger. He had the right to assume that the servants of the defendant operating said car would give the proper signals and not run at an excessive rate of speed at that crossing, and he had the right to drive his wagon across or even along the track in full view of the approaching car if, under all the circumstances, it was consistent with ordinary prudence to do so. And if the jury believe from the evidence that, under all the circumstances by which said Forrest was then surrounded, it would have been reasonably apparent to an ordinarily prudent person that, if the defendant's servants should use ordinary care in running and controlling said car, he could drive across the track without danger of a collision, then said Forrest was not guilty of negligence in driving across

said tracks; and if the jury further believe from the evidence that, under such circumstances, the said servants of the defendant did not use ordinary care in operating said car in one or more of the particulars alleged in the declaration, and that as a direct and proximate result thereof the said Forrest was injured as therein alleged, they should find for the plaintiff."

The first paragraph of this instruction is conceded to be correct. The second paragraph is admittedly a sound proposition of law, but the position is taken that it is inapplicable to the facts.

This contention is not tenable. There is a conflict in the testimony with respect to the facts relied on as the basis of this instruction. The evidence of the plaintiff tends to show that the excessive speed of the car and the failure to give proper signals of its approach to the crossing were, one or both together, the proximate cause of the accident. The plaintiff's intestate, in determining the prudence of his course, had a right to rely upon the assumption that the law would be obeyed, both in respect to the speed of the car at the crossing and the sounding of the gong as it approached. If the failure to sound the gong induced the belief that the car would stop or slacken its speed, and thereby led the deceased to enter a place made dangerous by a failure to slacken such speed, in obedience to the ordinance, then the failure to do these things was the proximate cause of the accident. These two paragraphs of the instruction are directed not so much to the defendant's negligence in failing to reduce its speed and sound its gong, as to the question of Forrest's contributory negligence. They practically tell the jury that the rights of both parties upon the street were equal, and that the deceased had a right to drive upon the tracks, provided he did not obstruct the cars or negligently expose himself to danger. *Richmond Traction Co. v. Clarke*, 101 Va. 382, 388, 43 S. E. 618.

The two succeeding paragraphs told the jury what they could consider in determining whether or not the deceased did negligently expose himself to danger. That if, under all the circumstances by which the deceased was surrounded, an ordinarily prudent man would have acted as he did, then he was not negligent; that if the defendant was negligent in operating the car, and as a direct and proximate result of such negligence the deceased was injured as alleged in the declaration, the company was liable.

The criticism that this instruction ignores the subject of the contributory negligence of the deceased and should have pointed out clearly that view of the case to the jury is not well taken. The jury are clearly told that, in going upon the track, the deceased, in order to be free from blame, could not negligently expose himself to danger, but

must be governed by the degree of caution that would be exercised by a reasonably prudent man under like circumstances. Besides, in other instructions the subject of contributory negligence of the deceased is so fully covered that when the instructions are read together it is apparent that the jury could not have been misled to the prejudice of the defendant.

Plaintiff's instruction No. 2 was as follows: "The court instructs the jury that the ordinance of the city of Norfolk introduced in evidence is a regulation intended for the protection of travelers, and any violation of it, if proven, is competent evidence of negligence in this suit, to be considered along with all the other evidence in the case in determining whether the defendant was guilty of negligence as charged in the declaration which caused the plaintiff's injury as therein alleged."

The objection to this instruction has been disposed of by what has been already said touching the admissibility of the ordinance as evidence.

Plaintiff's instruction No. 3 is as follows: "The court instructs the jury that if they believe from the evidence that, at the time of the accident by which the plaintiff's intestate, E. B. Forrest, was injured as shown by the evidence, there was in force an ordinance of the city of Norfolk which provided that: 'It shall not be lawful for any person, or corporation, to operate or run any electric or trolley car or other vehicle propelled by electricity over or through any street crossing in the city of Norfolk, Virginia, without first reducing the rate of speed of said cars to not more than three miles per hour. And there shall be fixed to such cars a gong or other bell which shall be sounded continuously before reaching such crossing, and beginning at a distance of fifty feet from such crossing'—then the said E. B. Forrest, in approaching and crossing the defendant's track, had the right to assume that the servants of the defendant in charge of its car which was then approaching would obey the requirements of said ordinance in the running and operating said car. And if the jury believe from the evidence that, under all the circumstances by which said Forrest was surrounded, it would have been reasonably apparent to an ordinarily prudent person that he could cross the track without danger of a collision, he was not guilty of negligence in attempting to do so."

No valid objection has been made to this instruction, and it is so clearly free from objection that comment is unnecessary.

Plaintiff's instruction No. 4 is as follows: "The court instructs the jury that if they believe from the evidence that after the servants of the defendant in charge of its car knew, or in the exercise of ordinary care ought to have known, of the danger to which the plaintiff's intestate was exposed in cross-

ing the track in front of the car, they could have avoided the accident by the exercise of ordinary care, but failed to do so, and that the plaintiff was injured thereby, as alleged in the declaration, they must find for the plaintiff, whether the plaintiff's intestate was guilty of contributory negligence in attempting to cross the track at that time or not."

This is a correct statement of the doctrine of the last clear chance, and there was ample evidence to justify such an instruction. The plaintiff's evidence tends to show that when the car was 150 feet away the deceased was actually driving across the track.

It is contended that this instruction should have concluded with the words: "Unless you also believe from the evidence that after the danger of collision became, or by the use of ordinary care could have been, known to the plaintiff's intestate, he could have avoided the accident and failed to do so."

This instruction was dealing with the duty of the defendant after it knew, or in the exercise of ordinary care ought to have known, of the danger to which the plaintiff's intestate was exposed in crossing the track in front of the car. The view of the case which it is insisted should have been embodied in this instruction was not ignored, but was fully and clearly given to the jury by instructions C and E, asked for by the defendant.

Defendant's instruction No. C:

"The court instructs the jury that if you believe from the evidence that the car of the defendant was coming south on Botetourt street approaching Pembroke avenue, and that the plaintiff's intestate was driving westwardly on Pembroke avenue, approaching Botetourt street just before the accident, and that the plaintiff's intestate as he approached and entered Botetourt street saw, or by the exercise of ordinary care could have seen, the car of the defendant approaching, and could have avoided this accident, either by stopping his team or turning to the right or left, but elected to take the chance of crossing the track on which the car was approaching at a time when he saw, or by the exercise of ordinary care could have seen, that there was danger of a collision in so doing, your verdict must be for the defendant."

Defendant's instruction No. E:

"The court instructs the jury that, even though you may believe from the evidence that the motorman failed to ring his bell as he approached the crossing, and that he was running at an excessive rate of speed, and that he failed to exercise ordinary care under the circumstances to avoid the accident, after he saw, or by the exercise of ordinary care could have seen, that there was danger of a collision with the wagon, you still cannot find a verdict for the plaintiff, if you believe from the evidence that Forrest attempted to drive across the track in front of the approaching

car, after he knew, or by the exercise of ordinary care could have known, that the car would not stop in time to avoid a collision with the wagon."

These two instructions fully inform the jury as to the duty resting upon the plaintiff to exercise reasonable care for his own safety and abundantly emphasize the point sought to be ingrafted upon the plaintiff's instruction No. 4. There was no more reason that the defendant's view of this phase of the case should be ingrafted upon the plaintiff's instruction, than that the plaintiff's view should be embodied in each of the two instructions given, on the same subject, for the defendant. The jury were fully informed upon the doctrine of the last clear chance, in its application to both the plaintiff and defendant, and could not have been misled, to the prejudice of the defendant, by the instructions as given. *Roanoke Ry. & Elec. Co. v. Young*, 108 Va. 783, 62 S. E. 961.

The third assignment of error was to the action of the court in refusing to give instructions E, G, H, and I, asked for by the defendant.

We have already referred to instruction E and quoted it in full as given by the court. The latter part of the instruction, as asked, read as follows: "If you believe from the evidence that Forrest attempted to drive across the track in front of the approaching car, after he knew, or by the exercise of ordinary care could have known, that there was even a small chance that the car would not stop in time to avoid a collision with the wagon."

The complaint is that, before giving the instruction, the court struck out the words "that there was even a small chance." These words were properly eliminated from the instruction. They were certainly misleading, if they did not in effect take from the jury the question of the contributory negligence of the plaintiff. The law does not require a person to know that he is absolutely safe before taking a given course of action. *Newport News v. Bradford*, 99 Va. 117, 37 S. E. 807. He is only required to exercise ordinary care to avoid accident—such care as a reasonably prudent person would exercise under like circumstances. The court could not hold as a matter of law that to take a "small chance" of collision constituted contributory negligence. It was for the jury to say whether or not the risk taken was, under the circumstances, such as a person of ordinary care would or would not have assumed. It was not necessarily contributory negligence for the deceased to drive across the track in the face of "a small chance of collision." His action depends upon what reasonably prudent persons, similarly situated, would have done. Whether or not a reasonably prudent person would have pursued the course that was taken by

deceased was a question for the jury to determine under the evidence.

Instruction H contained the objectionable language we have considered in connection with instruction E, and was therefore properly refused.

It was not error to refuse instruction G. It told the jury, as a matter of law, that, if the motorman saw the deceased start to pull up and stop his horses, he had a right to presume that deceased would not attempt to drive across the track in front of him. The evidence is conflicting as to whether or not the deceased started to check his horses, and there are other circumstances bearing upon the question besides the mere checking of the horses. According to the motorman, both he and the deceased checked up at the same time. If this be so, then the deceased might have been misled into the belief that the motorman was stopping to let him pass. It was for the jury to determine the weight to be attached to the inferences that could reasonably be drawn from the conduct of the parties. The court properly held that the impressions likely to be made upon the motorman by the conduct of the deceased was not a matter of law for its determination, but a question to be considered by the jury in the light of all the circumstances disclosed by the evidence.

There was no error in the refusal of the court to give instruction I asked for by the defendant. The subject-matter of that instruction had been fully covered by two other instructions—No. 5 given for the plaintiff, and instruction F given for the defendant.

Upon the whole case, we are of opinion that the instructions were as favorable to the defendant as it had a right to ask, that the case was fairly submitted to the jury, and that the verdict is sustained by the evidence.

The judgment must therefore be affirmed.
Affirmed.

(100 Va. 539)

J. N. H. CORNELL & CO. et al. v. STEELE.
(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. CONTRACTS (§ 292*)—PERFORMANCE—OPINION OF ENGINEER—FRAUD OR MISTAKE.

A stipulation, in a contract to construct a part of a railroad, that the final estimates of the chief engineer should be conclusive, does not make the engineer's estimates conclusive, where the engineer made such an error of judgment or mistake in the estimates so gross as necessarily to imply bad faith and amount to a fraud on the rights of the contractor, though the engineer had no intention to commit a fraud or to act in bad faith.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1343; Dec. Dig. § 292.*]

2. CONTRACTS (§ 292*)—PERFORMANCE—DECISION OF ENGINEER—FRAUD OR MISTAKE.

Proof that the engineer, required under a contract to construct a part of a railroad to make estimates and classification of the work which should be conclusive on the parties, arbitrarily rejected over 9,000 cubic yards of solid

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

rock removed by the contractor and classified the same with other materials that were less expensive to remove, was proof of an error of judgment or mistake so gross as to amount to a fraud on the contractor's rights, authorizing a recovery of the amount due the contractor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1343; Dec. Dig. § 292.*]

3 CONTRACTS (§ 292*)—PERFORMANCE—DECISION OF ENGINEER—FRAUD OR MISTAKE.

In order to avoid estimates and classification made by an engineer as required by a contract for the construction of a work, it is only necessary to show an estimate and classification so grossly erroneous as to imply fraud.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1343; Dec. Dig. § 292.*]

Appeal from Circuit Court, Fluvanna County.

Action by W. I. Steele against the J. N. H. Cornell & Company and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Perkins & Perkins and J. B. Moon, for appellants. Harmon & Walsh and Montague & Montague, for appellee.

CARDWELL, J. This action was brought by W. I. Steele to recover of J. N. H. Cornell & Co., a foreign corporation, and J. H. Fine, a balance of \$7,511.06, alleged to be due Steele from the defendants upon certain work which Steele subcontracted with Cornell & Co., general contractors with the Virginia Air Line Railway Co., to do on the Virginia Air Line Railway, to be constructed by the general contractor from Lindsay, on the Chesapeake & Ohio Railway in Albemarle county, to a point on James river, about 20 miles distant; the plaintiff, Steele, undertaking by his subcontract the construction of four miles of this road within a stated period and according to specifications as to the execution of the work. That Steele performed his part of this contract truly and faithfully seems not to have been questioned, and the controversy arises out of the classification of the material taken out and removed by him, made by Cornell & Co.'s chief engineer in charge of the work.

The contract, which was in evidence at the trial of this cause, shows the price of the excavation of the several kinds of material to be taken out and removed by Steele, viz., earth, loose rock, and solid rock, gives the definition of these several classes of material, and provides for monthly payments as the work progressed and for a final estimate on the completion and acceptance of the work; and the contract also provides that the decision of the chief engineer of the general contractor on all questions arising under the contract should be final as between the parties.

J. H. Fine, who made the estimates on Steele's work, was the chief engineer of the general contractor, and also its vice-president, and as Steele progressed with his work

he received monthly payments upon the estimates made by Fine, but, as we shall see later, protested all along that these estimates were incorrect. On the completion of Steele's contract in January, 1908, Fine made a final estimate showing that the general contractor, Cornell & Co., owed Steel \$1,775.73, to which Steele objected, alleging that this estimate was based upon an erroneous classification of material excavated and removed, and thereupon Cornell & Co. had the estimate reconsidered and the work re-examined, but insisted that the action of its chief engineer was correct and would not be corrected, and so informed Steele. Whereupon Steele selected one James Dickey, a competent engineer and an expert, to go over the work and make an estimate of it according to the provisions of the contract, and Dickey's estimate varied materially from that of Fine; the chief difference arising from the classification of material, the difference in the total quantity of material moved, or yardage, caused by certain measurements adopted by Dickey and not allowed by Fine, being comparatively slight. Omitting the items of these estimates as to which Dickey and Fine agreed, the latter's final estimate allowed Steele for 42,113.1 cubic yards of earth, \$9,896.58; 10,174.8 cubic yards of loose rock, \$3,856.42; and 586.9 cubic yards of solid rock, \$396.23—total \$14,155.13. While in Dickey's estimate these several items appear as follows: 30,011.1 cubic yards of earth, \$7,052.60; 15,559.5 cubic yards of loose rock, \$5,912.61; and 10,017.8 cubic yards of solid rock, \$7,012.46—total \$19,977.67. The disclosures made by these estimates caused Steele to realize that, despite his rigid economy and efficient work, he would sustain a loss of over \$3,500 if Fine's estimate of his work was to be adhered to, and thereupon he brought this suit for \$7,511.06, the amount of the difference between the final estimate made by Fine and that made by Dickey.

At the trial of the cause, it was submitted to the jury upon four instructions given by the court, to which neither party made objection, and the jury rendered its verdict for the plaintiff, assessing his damages at \$3,600, and upon the verdict the court entered the judgment to which this writ of error was awarded.

The instructions of the trial court, in sum and substance, rightly told the jury that notwithstanding the provision in the contract between the parties that the final estimate of the chief engineer of the general contractor, Cornell & Co., was to be final and conclusive on both parties, if they believed from the evidence Chief Engineer Fine made such error of judgment or mistake in the estimates and classification of the work made by him as amounted to a mistake so gross as necessarily to imply bad faith and amount to a fraud upon the rights of the plaintiff,

they should find for the plaintiff, even though they believed that said engineer had no intention to commit a fraud or to act in bad faith; and further told the jury that if they believed from the evidence that the estimates or classifications by the company's engineer were not binding on the plaintiff because of gross error or mistake, amounting to a fraud, then they should make such classification of the material removed as they deemed proper, under the evidence and according to the provisions of the contract, and assess the plaintiff's damages according to that classification at the prices specified in the contract, subject to proper credits.

The contract between the parties is explicit as to the classification of the material that was to be removed and the prices to be paid therefor, solid rock being recognized as the most expensive material, and therefore a higher price for its removal was fixed than for the removal of earth or loose rock. It will therefore be seen that the subject of classification of the work done by defendant in error was the crucial point in the case for the determination of the jury, and we deem it only necessary to refer briefly to the evidence to show that it was sufficient to warrant the jury in regarding the estimate made by Fine so grossly erroneous as to amount to a fraud upon the rights of defendant in error.

The material classified as solid rock by defendant in error and Dickey, and disallowed by Fine, is clearly and unmistakably proven to be the same material of the same nature and character of rock as that allowed defendant in error and classified by Fine as solid rock to the extent of 569 cubic yards. In other words, the evidence shows that the rock, classified as solid rock by defendant in error and by Dickey, was of the identical kind, character, and formation as the 569 yards of solid rock allowed by the estimates made by Fine, and that the arbitrary rejection by him of over 9,000 cubic yards of this solid rock removed by defendant in error, and classifying the same with other material far less expensive to remove, was an error of judgment or mistake so gross as to amount to a fraud upon defendant in error's rights; and, if the jury believed in the truth and correctness of this evidence, it was of itself sufficient to sustain its finding in his favor. *Mills & Fairfax v. N. & W. Ry. Co.*, 90 Va. 523, 19 S. E. 171; *Id.*, 91 Va. 613, 22 S. E. 556.

In the report of that case last mentioned, the syllabus, in part, is as follows: "Whether the plaintiff was entitled to recover the higher or the lower of the two prices fixed by the contract for different classes of work, or whether he had waived or abandoned his right to recover the higher price, were questions of fact which were properly left to the determination of the jury, under instructions which correctly propounded the law, and

gave them great latitude in the range of their inquiry."

The defendant in error in this case, testifying in his own behalf, stated that he all along protested that the classification of the material removed by him, made by Chief Engineer Fine in his monthly estimates, was grossly erroneous, and this statement is not disproved; but plaintiffs in error rely upon the contention, in support of which numerous authorities are cited, that fraud must be established by clear and satisfactory proof. The authorities cited sustain the proposition stated, but are not at all in conflict with the law as expounded in the instructions given in this case with the approval of plaintiffs in error, nor with the decided cases applicable to the facts submitted to the jury for determination.

In *Mills & Fairfax v. N. & W. Ry. Co.*, supra, it was expressly stated that to avoid the engineer's estimate and classification in a case like this, which is so grossly erroneous as to imply fraud, it is not necessary to impute or prove moral wrong to the engineer. All that is necessary in such a case is that the evidence be sufficient to justify the jury in finding that the estimates and classifications of the engineer are so grossly erroneous as to amount to a fraud upon the rights of the injured party.

In the case of *Kistler v. Ind. & St. L. R. Co.*, 88 Ind. 460, the contract between a railroad company and one who undertook to do certain work in its construction fixed the prices of the various kinds of work to be done, and provided that the engineer of the road should make estimates of the work from time to time upon which payment should be made and a final estimate which should be also paid, and that all disputes as to the meaning and execution of the contract should be referred to the engineer, and his decision should be final. Held, that where the engineer had failed to estimate the work, or by neglect or by mistake underestimated it, suit could be maintained for the recovery of the correct amount. In that case the court emphasizes that, to entitle the contractor to recover the correct amount due him for work done, it was not necessary to allege and prove that the engineer making the estimates acted corruptly or fraudulently.

In a later case decided by the same court (*Louisville, etc., Ry. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153), it was held: "A stipulation in a contract between a railroad company and a contractor that the estimate made by the former's engineer as to the quality, character, and the value of the work performed by the contractor shall be final against the latter, 'without further recourse or appeal,' cannot deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates."

In that case it was considered that the es-

timates of the engineers were so grossly erroneous as to amount to a fraud upon the contractor, although moral turpitude was neither charged nor attempted to be proved; in other words, where the mistake is so gross as to amount to a fraud upon the rights of the contractor, he is not precluded from bringing his action to recover the correct amount due him, notwithstanding the provisions of the contract or the fact that he had received and receipted for payments on estimates made during the progress of the work and before the final estimate. See, also, *Edwards v. Hartshorn*, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. (N. S.) 1055, where almost the precise facts were involved as in this case.

We are of opinion that there is no error in the judgment of the circuit court complained of, and it is therefore affirmed.

Affirmed.

(109 Va. 565)

COMMISSION OF FISHERIES et al. v. HAMPTON ROADS OYSTER PACKERS' & PLANTERS' ASS'N.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. FISH (§ 7*)—OYSTER BEDS—SURVEY—EFFECT—STATUTES.

Const. 1902, § 175 (Code 1904, p. cclxiv), provides that the natural oyster beds shall be held subject to such regulations as the Assembly may prescribe, and that such beds may be determined by survey or otherwise. Acts 1891-92, p. 816, c. 511, provides for a survey of such beds, requires the plats to be filed in the clerk's office in each county where the beds are found, and declares that the survey and report, when filed, shall be conclusive evidence of the boundaries of the natural oyster beds, subject to the oyster laws of the state. By act March 2, 1894 (Acts 1893-94, p. 605, c. 559; Code 1904, § 2130a), the prior law was amended so that the report and survey should constitute conclusive evidence that there were no natural oyster beds in the waters of the county wherein the report and survey were filed other than those embraced therein. *Held* that, where the survey was relocated and the lines as re-established showed that complainant's oyster ground was within the survey, it was conclusive evidence that such was the fact.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

2. FISH (§ 7*)—OYSTER GROUND—ASSIGNMENT—ACTS OF INSPECTOR.

Acts of the state oyster inspector in assigning oyster ground, as authorized by Code 1904, § 2137, are ministerial, though he is required to determine the existence of facts which makes it necessary for him to act.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

3. FISH (§ 7*)—NATURAL OYSTER BEDS—ESTABLISHMENT.

The boundaries of natural oyster beds, rocks, and shoals are conclusively established by the Baylor survey, and report made to the fish commissioners.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

4. FISH (§ 7*)—OYSTER GROUNDS—SURVEY—STATUTES—AMENDMENT.

The probative force and effect to be given to a survey of natural oyster ground, as authorized by Acts 1891-92, p. 816, c. 511, as amended by Act March 2, 1894 (Acts 1893-94, p. 605, c. 559 [Code 1904, § 2130a]), and the report filed pursuant thereto is not changed or impaired by Acts 1899-1900, p. 307, c. 280, as amended (Code 2082b), authorizing the board of fisheries to re-establish the line, or lines, of the original survey, when in the judgment of the board it becomes necessary.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

5. FISH (§ 7*)—OYSTER GROUND—LEASES—STATUTES.

Code 1904, § 2137a, providing that when the rents for oyster ground are paid annually in advance the state will guarantee the absolute right to the renter to continue to occupy the same for 20 years, applies only to leases of ground authorized by statute to be leased to planters, and does not estop the state to require the surrender of oyster ground within the Baylor survey, though illegally leased by an oyster inspector without authority.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

6. FISH (§ 7*)—OYSTER GROUND—LEASES.

Under the express provisions of Code 1887, §§ 1338, 2153, 2341 (Code 1904, pp. 750, 1090, 1157), a lease of a natural oyster bed, rock, or shoal by the state, is void.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 7.*]

7. CONSTITUTIONAL LAW (§ 251*)—"DUE PROCESS OF LAW."

"Due process of law" requires that a person shall have reasonable notice and opportunity to be heard before an impartial tribunal, before any binding decree or order can be made affecting his rights to liberty or property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 732; Dec. Dig. § 251.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

8. CONSTITUTIONAL LAW (§ 278*)—PROPAGATION—FISHERIES—PROCEEDINGS—DUE PROCESS OF LAW.

Code 1887, § 2153, as amended by Act Feb. 25, 1892 (Acts 1891-92, p. 599, c. 363), being Code 1904, p. 1090, providing that no person shall stake or use for oyster planting any natural oyster bed, nor continue to occupy the same, and conferring power on the oyster inspector to remove all the stakes, etc., if, after notice, the occupants refuse to remove the same, and providing, not only for reasonable notice, but an opportunity to be heard before the board of fisheries, and making its decision conclusive of all controversies with respect to the same, provides due process of law, so that an order of such commission, requiring the surrender of certain natural oyster beds, was not objectionable, as depriving the complainant of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 823; Dec. Dig. § 278.*]

Appeal from Circuit Court, Nansemond County.

Suit by the Hampton Roads Oyster Packers' & Planters' Association against the Commission of Fisheries and others. From a decree perpetuating an injunction in favor of plaintiff, defendants appeal. Reversed and dismissed.

The Attorney General and W. W. Old & Son, for appellants. Jeffries, Wolcott, Wolcott & Lankford, for appellee.

CARDWELL, J. This appeal brings under review the decree of the circuit court of Nansemond county, perpetuating an injunction theretofore awarded on a bill filed by appellee against the board of fisheries of Virginia and each member thereof, and one Reps Williamson, oyster inspector of Nansemond county, restraining the appellants, each of them, and their agents, etc., from requiring appellee to remove the stakes which mark the boundary of certain oyster planting ground situated in the Nansemond river in Nansemond county, occupied and claimed by appellee by virtue of successive assignments from one T. R. Gaskins and others, to whom the disputed ground was assigned in 1894 and 1895 by the then oyster inspector of Nansemond county, the original assignments having been made under the act of the Legislature approved March 5, 1894 (Acts 1893-94, p. 840, c. 743) the area of the disputed ground being 182.29 acres.

There is no controversy here as to the history of appellee's claim to the grounds in dispute, the crucial question with respect to the title asserted by it being whether or not those under whom it claims ever acquired title to this ground for oyster planting purposes; it being claimed by appellants that this ground is within the lines known as the "Baylor Survey," and therefore under the law could not have been assigned to any one for oyster propagation or other purpose. In other words, the questions presented on this appeal are: (1) Is the disputed ground within the Baylor survey? (2) If so, has the appellee, notwithstanding this fact, the right, as it contends, to hold the ground under its contract with the state? and (3) has any due process of law been provided, through which these questions may be heard and determined?

The learned judge of the circuit court gave the following reasons for the decree complained of:

"(1) That the evidence does not show that the land of the Hampton Roads Oyster Packers' & Planters' Association is within the lines of the public oyster grounds of the state, commonly known as the Baylor survey.

"(2) That the act of the General Assembly of Virginia, approved February 21, 1900 (Acts 1899-1900, p. 512, c. 474), which appears as section 2139a of the Code of Virginia of 1904, under which petitioners sought to require the removal of the stakes of the association from said grounds, and to permit oyster tongmen to enter the same as public oyster grounds, is unconstitutional and void, in that it fails to provide any notice to be given to the planter or lessee of the property of any procedure under which his rights could be adjudicated, and fails to make pro-

vision for any adjudication of his rights after notice, and that the said act, if enforced, will have the effect of depriving the said association of its property without due process of law."

The following facts appear with respect to the proceedings had before the Board of Fisheries of Virginia and the Commission of Fisheries (appellant), the latter being the successor to the former, which proceedings culminated in the order of the appellant, enjoined by the circuit court of Nansemond county in this cause, to wit:

On June 20, 1904, more than 10 citizens of the county of Nansemond, in accordance with section 2082b of the Code, made an application in writing to the Board of Fisheries to have the lines of the Baylor survey re-established and permanently marked in the Nineteenth district of Nansemond county, and gave bond and security as provided by said section.

On the same date an order was entered by the Board of Fisheries appointing Fred E. Rudiger to make the survey, and on January 18, 1905, the order of June 20, 1904, was so amended as to substitute A. B. Edmonds, of Newport News, a civil engineer, in the place of Rudiger, Rudiger having been unable to make the survey, owing to previous engagements, and Edmonds was ordered to proceed as soon as possible to make it.

On or before July 19, 1905, Edmonds filed his report, and on that date an order was entered by the Board of Fisheries, after a hearing, on the report and survey of Edmonds, relocating and re-establishing the lines of the Baylor survey in the Nineteenth district of Nansemond county, approving the report and survey; and, after reciting that the plat showed certain encroachments on the public grounds by various parties, a resolution was adopted by the board as follows:

"Therefore, be it further resolved, that all parties appearing by said plat to have encroached upon the public grounds, be notified to appear before this board at its next meeting, and show cause why said encroachments should not forthwith be declared public grounds, and their stakes upon the same be at once removed; to wit: * * * Hampton Roads Oyster Planting & Packing Company, 176 acres * * *"; the Hampton Roads Oyster Packing & Planting Company mentioned being the Hampton Roads Oyster Packers' & Planters' Association, appellee here.

There was a hearing on the survey and report of Edmonds, on August 18, 1905, all of the parties having been notified, and argument by counsel for appellee heard, whereupon the board decided it had jurisdiction in the matter, and the cause was continued to a subsequent meeting of the board to be held at Norfolk, Va., Wednesday, the 6th day of September, 1905, and all the defendants in the cause being present in person,

or through their attorneys, waived the requirements of public notice of the proceedings.

On September 19, 1905 (the meeting of the board having been held on September 6th, and continued to this date) the board after a hearing (appellee being represented by one or more of its officers and by counsel) decided that the survey filed by Edmonds on the 19th day of July, 1905, showed a much larger acreage than the plat held by appellee, showing the original assignment for 216 acres of ground; and, there being a contention between appellee and Edmonds as to the correctness of the survey of the grounds by Edmonds, the board directed that the matter be recommitted to Edmonds, with instructions that he go upon the grounds as staked off and claimed by appellee, together with such surveyor as it should select, and that the said surveyors should retrace the work of Edmonds as to it being correct, or otherwise, and, further, should survey and plat the entire number of acres of ground held by appellee under the original assignment, reproducing said original plat, and, further, to make survey of the entire holdings of the grounds of appellee, showing the entire number of acres held, and the number of acres held within the Baylor survey, and make report of same to the board at its meeting to be held in Norfolk on October 18, 1905.

At the meeting of the board held on October 18, 1905, a hearing was had (appellee being represented by its officers, and by counsel) on the report of Edmonds on the part of the Board of Fisheries, and B. P. Baker, the county surveyor of Nansemond county, on the part of appellee, as to the correctness of the survey of Edmonds filed on July 19, 1905, which survey showed an encroachment by appellee of 176 acres. The survey and report of said surveyors showed that holdings of appellee within the Baylor survey aggregated 182.29 acres, and the board decided that the appellee was not holding the said grounds by its own default, but by virtue of authority vested in it by the former holders thereof. After hearing evidence and argument by counsel the board further decided that appellee had, from time to time since acquiring assignment, planted oysters and shells thereon, but had not acquired vested rights in the 182.29 acres of public grounds in question; that appellee was entitled to a reasonable time within which to remove its planted oysters and shells therefrom, as provided by statute approved February 21, 1900, and ordered that the assignment of 182.29 acres of ground, shown to be within the Baylor survey, be revoked and annulled; that appellee should have until the 30th day of April, 1907, in which to remove its planted oysters from the grounds as shown by a diagram laid before the board, aggregating ——— acres; that appellee should have until the 31st day of

March, 1908, in which to remove its oysters and shells from the remainder of said 182.29 acres of ground, aggregating ——— acres, as shown by said diagram, upon which shells were planted, said removal of planted oysters and shells to be made under the terms and conditions as provided by statute, and thereafter appellee should be required to remove all stakes and obstructions from said grounds, and the same was declared to be within the Baylor survey and public oyster grounds, and to be used as such after said dates, and the board further directed the report and plat to be filed and recorded in the Nansemond county clerk's office, together with the decision as to said grounds, all of which were duly filed and recorded.

On March 30, 1906, appellee by its attorneys appeared before the board and asked for additional time in which to remove its planted oysters and shells from said grounds as regulated and fixed by the order of the 18th day of October, 1905, and the board, owing to the absence of parties and conflicting interests, declined to render any decision.

Appellee, by its officer, or officers, and by counsel, again appeared before the board on March 21, 1907, and petitioned that the time to remove the oysters be extended from April 30, 1907, to April 30, 1908, every effort "having been made by it to remove the same without being able to do so," and that matter was continued until the next meeting of the board.

On July 24, 1907, statements and arguments were made before appellant, the Commission of Fisheries, and the matter argued at length, both sides appearing by counsel, and the board recommended and ordered that the 182.29 acres of public oyster grounds encroached on by appellee, on which it had planted oysters, and as to which the former Board of Fisheries allowed until the 30th day of April, 1907, within which to remove said oysters, be opened to the public on September 15, 1907, and the stakes of appellee defining the same be removed, and placed on the true lines of the oyster grounds which it was entitled to hold.

Thereupon appellee, on or about September 14, 1907, filed its bill in this cause, and upon the filing of this bill an injunction was awarded in pursuance of the prayer thereof enjoining appellants from removing the stakes which mark the boundary of the ground in the bill mentioned, and from taking from appellee the possession thereof, and enjoining and restraining them from taking oysters, or causing same to be taken therefrom, and from in any way interfering with or molesting appellee in its possession, occupancy, use, or enjoyment thereof.

On November 1, 1907, appellants filed their demurrer, and also their answer, in the nature of a cross-bill, and on November 4, 1907, appellee filed its demurrer and answer to the cross-bill and an amended and supplemental bill, and afterwards appellants filed their an-

swer to the amended and supplemental bill, and other proceedings were had, so that, on the hearing of the cause upon the pleadings and the depositions of witnesses on behalf of the respective parties, the decree under review was rendered.

Before reviewing the statutes bearing upon the issues involved, it should be noted that "The Board on the Chesapeake and its Tributaries" was, under the statute, succeeded by the "Board of Fisheries," and the latter by appellant, the "Commission of Fisheries."

By constitutional provision (section 2, art. 10, of former Constitution, and section 175 of the present [Code 1904, p. cclxiv]) and numerous acts of the General Assembly the state has jealously sought to guard and protect the natural oyster beds, rocks, and shoals in the bays, rivers, etc., of the commonwealth, so that they may be held "in trust for the benefit of the people of this state, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks or shoals, by surveys or otherwise."

Deeming it necessary to define and determine the natural oyster beds, rocks, and shoals so held by the state, on February 29, 1892 (Acts 1891-92, p. 816, c. 511), the General Assembly passed the act entitled "An act to protect the oyster industry of the commonwealth," and under that act the survey known as the "Baylor Survey" was made. The act, after providing that the Board on the Chesapeake and its Tributaries should, as soon as possible, cause to be made a true and accurate survey of the natural oyster beds, rocks, and shoals of the commonwealth; how the survey was to be made, the maps and charts to be prepared, returned, and filed along with a report of the survey in the clerk's office of each and every county in which there was found natural oyster beds, rocks, or shoals; what the report should be, accompanied by true and accurate notes in writing of the survey, setting forth a description of the lines, with courses and distances, and a description of such landmarks as might be necessary to enable the oyster inspector to find and ascertain the boundary lines and limits of the natural oyster rocks, beds, and shoals, etc.; that said report should be completed and transmitted to the Board on the Chesapeake and its Tributaries within three months after the completion of the survey, and the board should cause the same to be published in pamphlet form, and transmit copies thereof to the clerk of the county court of the counties where the charts had been filed, or directed to be filed, as in the act thereinbefore provided for, the said report to be filed by the clerks of the several counties;—further provided: "Said survey and report, when so filed, shall be, and construed to be, in all the courts of this commonwealth, as conclusive evidence of the boundaries and limits of the natural oyster

beds, rocks and shoals lying within the waters of the counties wherein such survey and report are filed; provided, if any natural oyster rock, bed or shoal is left out in these surveys, they shall not be used for planting grounds, but shall be subject to the general oyster laws of the state."

The act just referred to was, on March 2, 1894 (Acts 1893-94, p. 605, c. 559), amended; the amendment, which took effect from its passage, appearing in the Code of 1904 as section 2130a, and so far as pertinent to the issues in this case is as follows: "And the said survey and report, when so filed, shall be, and construed to be, in all of the courts of the commonwealth, as conclusive evidence of the boundaries and limits of all the natural oyster beds, rocks and shoals, lying within the waters of the counties wherein said survey and report are filed; and shall be construed to mean in all of the said courts that there are no natural oyster beds, rocks, or shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey authorized by this act; provided that the said survey and report shall not be so construed in any pending trial or proceeding in any court upon any assignment made prior to the twenty-fifth day of February, eighteen hundred and ninety-two."

Section 2137 of the Code of 1887 relates to assignment of oyster planting grounds and the duties and powers of oyster inspectors, and this section was amended on February 25, 1892 (Acts 1891-92, p. 596, c. 363), and sets out more fully by whom, and the steps, to be taken, and the procedure to be had, in order to obtain a lease of any part of the residue of the beds of the bays, rivers, and creeks of the state in excess of what was reserved for the riparian owner, other than the natural beds or rocks, the duties of the oyster inspector to whom application may be made for a lease of oyster planting grounds, the number of acres which might be assigned to any one applicant, etc.; and that section was again amended on March 5, 1894 (Acts 1893-94, p. 842, c. 743), but that amendment was inconsequential. Under section 2137 of the Code, supra, the oyster inspector himself had to locate and assign the oyster planting grounds, while under the amendments, supra, which were in force from their passage, the applicant himself has to give to the inspector certain information, so as to enable him to survey and assign the ground applied for, and the inspector has to make the assignment, provided he ascertains it not to be natural oyster rock, bed, or shoal; i. e., that the ground applied for is not, nor any part thereof, within the lines of the Baylor survey. Under this statute so amended the assignments were made to Gaskins and others, through whom appellee claims the grounds here in question; and that they were made subsequent to the date the act and its amend-

ment took effect is not, and could not be, controverted.

That the acts of the inspector in making these assignments were purely ministerial, and none the less so because he had to determine the existence of facts which made it necessary for him to act, is settled by the decision of this court in *Lewis v. Christian*, 101 Va. 135, 43 S. E. 331.

That case also recognizes that under the existing statutes the limits and boundaries of the natural oyster rocks, beds, and shoals in every county in the state are conclusively established by the survey, and report made by the fish commissioners—i. e., the Baylor survey—and the report, etc., returned and filed therewith, the only question which the oyster inspector is required to determine in reference to these matters being whether a particular oyster rock is natural oyster rock according to said survey and report; and if so, and stakes have been placed on the natural oyster rock or beds, it becomes his imperative duty to have them removed.

What may be the effect of the assignment of oyster grounds within the lines of the Baylor survey, whether done purposely or by mistake, is a subject more properly to be discussed in another branch of this case.

As appears in the statement above of the proceedings had before appellant, Commission of Fisheries, and its predecessors in office, A. B. Edmonds, a competent surveyor, acting on the part of the Board of Fisheries, and B. P. Baker, the county surveyor of Nansemond county, on the part of appellee, agreed that the survey previously made by Edmonds was correct, and that this survey showed an encroachment by appellee upon the grounds within the limits of the Baylor survey, re-established and permanently marked in the Nineteenth district of Nansemond county, to the extent of 182.29 acres, the acreage which is here the subject of controversy.

What the evidence was to substantiate the assignments to Gaskins on October 8, 1894, and to one Lilliston on the 8th of May, 1895, through whom appellee claims, does not appear in the record, so that whether the fact, as reported by Edmonds and the county surveyor of Nansemond county, that appellee has within its grounds, as staked off, 182.29 acres of natural oyster rock, which is really within the Baylor survey, is due to an intentional ultra vires act, or to a mistake on the part of the oyster inspector in making the assignments to Gaskins and Lilliston, or to the moving out of the stakes marking the boundaries of the acreage within the limits of those assignments, so as to take in the disputed grounds, is not by any means made clear by the evidence before us; and perhaps this is immaterial.

It is also to be noted that in the foregoing statement it appears that appellee, at least seemingly, acquiesced in the establishment of the lines of the Nineteenth district of Nansemond county by Surveyor Edmonds, concur-

red in by the county surveyor of Nansemond county, the latter of appellee's own selection, and accepted the terms of the Board of Fisheries as to the time within which the planted oysters on the disputed grounds should be removed, and did not present its bill in this cause until the day before the time allowed by the board for the removal of planted shells and oysters from the disputed ground was to expire, viz., September 15, 1907; the time originally allowed by the order of the board, made October 18, 1905, having been, at the solicitation of appellee, from time to time extended, so that it was to expire on September 15, 1907, nearly two years after the original order was made, and the bill was only then filed by reason of the board's refusal to grant further time.

We deem it wholly unnecessary to consider the question, extensively argued upon the briefs of counsel, whether or not appellee should be estopped by its acts to deny appellants' right and authority to require the planted oysters and shells upon the disputed grounds to be removed, and the stakes marking the grounds moved to their proper location. In our view of the case the right and duty of appellants to have these oysters and shells removed, and the marks of the true line of the Baylor survey re-established, became fixed and determined by the re-establishment by Edmonds and Baker of the limits and boundaries of the Nineteenth district of Nansemond county, as fixed by the Baylor survey.

As we have seen, the statute in its original form made the survey and the report made pursuant to the statute conclusive in all the courts of the commonwealth that the grounds included therein are natural oyster rocks, beds, or shoals, and could not be leased to any one for oyster planting purposes; and, by the amendment to the statute of March 2, 1894, *supra*, "said survey and report," when so filed, "shall be construed to mean in all the said courts that there are no natural oyster rocks, beds or shoals lying within the waters of the counties wherein such report and survey are filed, other than those embraced in the survey authorized by this act." It was plainly the intent and purpose of the Legislature to make the survey and report of the limits and boundaries of the natural oyster rocks, beds, and shoals, authorized to be made conclusive evidence, in all the courts of the commonwealth, upon two propositions: First, that the grounds within the boundaries and limits of the report and survey are natural oyster beds, rocks, or shoals; and, second, that there are no natural oyster beds, rocks, or shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced within the report and survey.

The probative force and effect given to a survey and report made and filed pursuant to the statute as amended, *supra*, authorizing and requiring the making and filing of the

Baylor survey, is in no degree changed or impaired by Acts 1899-1900, p. 307, c. 280, as amended and now section 2082b, supra, and which authorized the Board of Fisheries to re-establish the line, or lines, of the Baylor survey, when in the judgment of the board it became necessary. The latter act is in aid of the former, and clearly but an amendment thereto, and became an integral part thereof. Therefore a survey and report, duly made and filed pursuant to the statute as amended, re-establishing a line, or lines, of the original Baylor survey, is entitled to the same probative force and effect in the courts of the commonwealth as is given by statute to the Baylor survey as originally made. If this were not so, section 2082b of the Code would serve to defeat the very purpose of the Legislature to locate, determine, and define conclusively the boundaries and limits of the natural oyster rocks, beds, and shoals within the waters of the commonwealth, and throw open a flood gate of litigation with respect to such boundaries and limits whenever it might be found necessary to re-establish a line, or lines, of the Baylor survey, caused by the removal or displacement, from one cause or another, of the stakes, buoys, or other marks used originally in marking and locating such line or lines.

The wisdom of the Legislature in giving to a survey and report of the oyster beds, rocks, and shoals in the waters of the commonwealth the probative force and effect that it did is demonstrated by the wide range this litigation and the evidence relied on in support of appellee's contentions have taken. There would be no end to litigation concerning the limits of the Baylor survey if the appellant the Commission of Fisheries could be called on to litigate in the courts the correctness of every survey re-establishing a line, or lines, of the Baylor survey, and that question to be determined upon a mere preponderance of the evidence that might be adduced. It was plainly the purpose of the Legislature to put an end to such litigation by establishing a final arbiter of all questions as to the location of a line, or lines, of the Baylor survey, and to relieve the officers of the state in charge of the oyster industry from litigation in the courts concerning the same.

Conceding, however, for the sake of argument, that the survey and report made by Edmonds October 18, 1905, and verified and approved by Baker, who was selected by appellee to act on its behalf, is not to be treated as conclusively showing that the 182.29 acres of disputed ground is within the limits of the Baylor survey, we are nevertheless of opinion that the evidence in the case establishes the correctness of Edmonds' survey and report.

Appellee's immediate assignor of the grounds which include the disputed acreage was J. D. Armstrong, and when Armstrong made this assignment on July 1, 1908, there was no survey, the lines being given by Armstrong, or the men he had there, and this is admitted by

the officers and employes of the appellee testifying in this case. When the holdings of Armstrong of 216 acres were assigned to him and Lilliston on September 1, 1895, a survey was made by P. St. J. Wilson, deputy surveyor of Nansemond county, which survey included the grounds assigned to Gaskins October 8, 1894, and to Lilliston May 8, 1895, and the testimony of Wilson clearly shows that the whole of the acreage of that survey was outside of the Baylor lines of public ground No. 1, Nineteenth district of Nansemond county. Wilson says that the southern line of public ground No. 1, viz., the line from corner No. 1 to corner No. 4, coincided with the northern line of the property surveyed by him at that time for Armstrong and Lilliston, now claimed by appellee, that he made a survey of the southern line of public ground No. 1, and located by instruments the two corners thereof, viz., corner No. 1 and corner No. 4, according to a pamphlet, entitled "Nansemond County Oyster Records, Distances, Bearings," etc., and a plat, entitled "James River Chart No. 4; Public Oyster Grounds, State of Va., 1892, surveyed under the direction of J. B. Baylor, Asst. U. S. Coast & Geodetic Survey" (Baylor's notes), filed with the deposition of Edmonds, and verified by the witness Smith, as being copies of the survey and report filed in Nansemond county clerk's office June 23, 1894, pursuant to the act of February 29, 1892, as amended March 2, 1894, and that he (Wilson) then located the 216 acres outside of the lines of public ground No. 1.

Wilson is not only shown to be a surveyor of much experience, but we are unable to find any evidence in the record to refute or contradict his evidence in this respect; nor is there evidence to show that the stakes were at that time located correctly and in accordance with the survey of Wilson; he having no recollection of this fact.

Baker, who had been county surveyor of Nansemond county from 1872 to January 1, 1908, testifies that on January 23, 1900, by virtue of some court order, either of the Nansemond county court or of the Board of Fisheries, he made a survey of the Baylor line of public ground No. 1, from corner 1 to corner 4; that he and Wilson ran that line in order that the tongers could know their line, and Armstrong's people their lines; that he planted about 20 buoys on the line; that Armstrong claimed in establishing these lines that they ran across two beds of his planted oysters, and consequently he claimed beyond, he owning the property at the time of this survey of which he and Lilliston had been in possession since 1895. So that, if the stakes were correctly located on September 21, 1895, it is to be noted that their location, according to Baker's testimony, had either been changed, or if ever correctly located, were certainly not prior to January 23, 1900.

Baker was asked: "Did you find the lines and stakes there on the property owned by

Mr. Armstrong within the Baylor survey? A. He did not have any stakes. We were to establish that line. Q. Did you find that the property claimed by Mr. Armstrong was in the lines of the Baylor survey, or not? A. No. Q. In other words, you say Mr. Armstrong had no stakes? A. We did not see any stakes. Mr. Armstrong was along, and we did not see any stakes. Q. Can you say by looking at this plat [an exhibit with the pleadings] the property was the same as claimed by Mr. Armstrong at that time? A. I can't say. Q. In other words, you said you surveyed public ground from No. 1 to No. 4? A. Yes. Q. Did you see any stakes there? A. There were some stakes, but I don't know anything about them. There were stakes all around, every which way, but there was nothing to designate any lines of Armstrong; and if there were, nothing was said to us. We went there under order of the court to establish the lines, and we did so."

Wilson, who made the survey of September 21, 1895 (mentioned above), further testifies that upon request he was present at the survey of January 23, 1900; that at that time, as well as he could remember, the line (meaning doubtless the line from corner No. 1 to corner No. 4) was relocated; that the stakes of the property claimed by Armstrong were within the lines of public ground No. 1; and that he could not recall whether they were moved back into their original places on that day.

From this evidence one of two things must be true: Either that the stakes were, at the time of the survey of January 23, 1900, correctly placed along the Baylor line from corner No. 1 to corner No. 4, and afterwards moved within the lines of public ground No. 1, or the plat filed by Edmonds on October 18, 1905, showing the encroachment of 182.29 acres, must be incorrect.

The only testimony that the stakes were, at the time of the survey of January 23, 1900, correctly placed along the Baylor line from corner No. 1 to corner No. 4, is that of Williamson, who states that at the time they (doubtless meaning Baker, Wilson, and himself) put Armstrong on the line, but he is corroborated by neither Baker nor Wilson in this statement. Baker's statement is that they placed about 20 buoys on the line, and Wilson had no recollection of this.

By concession of the general manager of appellee the survey and location of appellee's ground by Edmonds and Baker is correct, except as to the line from corner No. 1 to corner No. 4. That this disputed line was run and rechecked by Edmonds and Baker is testified to by both, and a very strong and significant corroboration of their testimony is to be found in the fact that appellee, upon the report of that survey, applied to the Board of Fisheries and obtained time within which to remove its planted oysters and shells within the limits of the Baylor sur-

vey; that it applied for and received, as a matter of grace, an extension of the time, and never assailed the correctness of the Edmonds-Baker survey and report in court until a further extension of time was denied by the board, and nearly two years after that plat and report had been finally acted upon by the board.

We might review the oral testimony further, but to do so would serve no purpose other than to show another demonstration of the wisdom of the legislative intention to make the Baylor survey and report, and the survey and report of a surveyor duly appointed to re-establish a line, or lines, of the Baylor survey, conclusive evidence in all the courts of the commonwealth that the grounds within the limits of such survey and report are natural oyster rocks, beds, or shoals, and that there are no natural oyster beds, rocks, and shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey.

The view that the Baylor survey and the Edmonds-Baker survey re-establishing the lines of public ground No. 1 in Nineteenth district, Nansemond county, as surveyed and located by the Baylor survey and report, are conclusive, and could not be challenged by subsequent proceedings in court, is sustained by the Supreme Court of the United States in *Gardner v. Bonestell*, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574, where it was held: "It is a well-settled rule of law that power to make and correct surveys of public lands belongs exclusively to the political department of the government, and that the action of that department within the scope of its authority is unassailable in the courts, except by a direct proceeding. The determination by the Land Department, in a case within its jurisdiction, of questions of fact depending on conflicting testimony, is conclusive, and cannot be challenged by a subsequent proceeding in the courts."

And in a still later case (*Bates & Guild Co. v. Payne*, 194 U. S. 103, 24 Sup. Ct. 595, 48 L. Ed. 894) the same court held that, where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and, even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right, of so doing. In the course of the opinion it is said: "It has long been the settled practice of this court in land cases to treat the findings of the Land Department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of judicial power. As was said in *Burfenning v. Chicago, St. Paul, etc., R. R.*, 163 U. S. 821, 16 Sup. Ct. 1018, 41 L. Ed. 175: "Whether, for instance, a certain tract is swamp land or

not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined"—citing with approval *Gardner v. Bonestell*, supra.

The second contention of appellee (i. e., if it be determined that the preponderance of evidence shows that the 182.29 acres of disputed grounds are within the lines of the Baylor survey as re-established by the Edmonds-Baker survey) that, notwithstanding such location of the grounds in dispute, appellee is entitled to the use of the property, rests solely upon the doctrine of equitable estoppel, whereby the state is estopped to claim appellee's ground under the facts of this case, or else upon the erroneous theory that appellee, having acquired a lease of these grounds from the state and paid the rent therefor, has an irrevocable right to the use of the grounds for the statutory period of 20 years.

This contention leaves wholly out of view the fact that, if it be public oyster grounds, neither appellee nor its assignors ever could have acquired, by contract of lease or otherwise, the right to use these grounds for any purpose, but they are by law held in trust for the use and benefit of all the citizens of the state.

It is very true that section 2137a of the statute, now chapter 97 of the Code of 1904, relating to the protection of the oyster industry of the commonwealth, contains this clause: "When the above amounts [rents for grounds leased for oyster planting purposes] are paid, then so long as the rent is paid annually in advance the state will guarantee the absolute right to the renter to continue to use and occupy the same for the period of twenty years thereunder acquired"—but clearly the protection of that provision of the statute only applies where the lease was made of oyster planting grounds authorized by the statutes to be leased to planters, and not where the acts of the oyster inspector in making a lease were ultra vires. If that were not so—i. e., if the lessee or renter, notwithstanding the acts of the inspector in making the lease, were ultra vires, be entitled, under section 2137a, supra, to hold the leased ground—why should the Legislature, as a matter of grace, have authorized the officers of the state charged with the supervision and control of the oyster grounds and the oyster industry of the commonwealth, in their discretion, to allow a reasonable time within which a renter could remove his planted oysters or shells from grounds found to have been erroneously leased to him, either by mistake or otherwise? Natural oyster beds, rocks, and shoals can-

not be leased at all, or title thereto acquired, or private use thereof made, and the constitutional provision supra, as well as the statutes, steadfastly guard against interference with the citizens of the state in their right to take oysters therefrom, subject only to the regulations of the statutes as to season, etc.

That this has been the policy of the state, steadfastly adhered to, we need only refer to the following statutes in force when the leases under which appellee claims were made, and when it took an assignment of those leases: Section 1333 of the Code of 1887 (Code 1904, p. 750), provides that no grant shall be issued by the register of the land office to pass any estate or interest of the commonwealth in any natural oyster bed, rock, or shoal, whether the bed, rock, or shoal ebb bare or not.

Section 2153 of the Code of 1887, as amended February 25, 1892 (Acts 1891-92, p. 599, c. 363), being Code 1904, p. 1090, provides that no person shall stake in, or use for the purpose of planting oysters or shells, or for depositing oysters while making up a cargo for market, any natural oyster bed, rock, or shoal, or any part thereof, nor shall continue to occupy the same, if occupied and staked off, with power to the oyster inspector to remove all stakes, etc., if, after notice, the person refuses to remove same.

And section 2341 of the Code of 1887 (Code 1904, p. 1157), provides that grants by the register of the land office of any estate or interest in any natural oyster bed, rock, or shoal, whether the same ebbed bare or not, should be absolutely void.

The remaining assignment of error, which presents the question whether or not the order of the Board of Fisheries, directing the stakes of appellee to be removed from the grounds within the lines of the Baylor survey as re-established by the Edmonds-Baker survey and report and the statute under which the order was made, is the taking of appellee's property without due process of law is upon reason and authority so obviously against the contention of appellee that an extended discussion of the question is unnecessary.

It is very true that "due process of law" requires that a person shall have reasonable notice and opportunity to be heard, before an impartial tribunal, before any binding decree or order can be made affecting his rights to liberty or property; but this constitutional safeguard cannot avail appellee upon the uncontradicted facts as to the proceedings before the Board of Fisheries and the Commission of Fisheries touching this controversy. The proceedings were had before the Board of Fisheries and its successor in office, a department of the state government to whose judgment and discretion the Legislature has committed the supervision and control of the natural oyster beds, rocks, and shoals within the waters of the commonwealth, as well as the oyster industry

of the commonwealth, and made the decision of that tribunal conclusive of all controversies with respect to the same. The proceedings in this case before that tribunal were in strict accordance with the requirements of the statute, and not only did appellee have reasonable notice thereof, but every reasonable opportunity to be heard, and was heard, from time to time before the order it now complains of was made by the board. It would be difficult to find a case in which the required "due process of law" has been more fully met and complied with.

In the case of *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563, in point here, the following is quoted from the opinion of Mr. Justice Matthews in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, reviewing at length the authorities and discussing the elements of due process of law: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom, or merely devised in the discretion of the legislative power in the furtherance of the general public good, which regards and preserves these privileges of liberty and justice, must be held to be due process of law." See, also, *Murray v. Hoboken L. Co.*, 18 How. 272, 15 L. Ed. 372; *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

The principles announced in *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825, have no application here. In that case the title of the owner of the property proposed to be taken for a public use without compensation was not questioned; while here no property of appellee to which it has title, or could have acquired title to, or interest in, is taken, or proposed to be taken.

In *Richardson v. United States (C. C.)* 100 Fed. 714, the plaintiffs sued the United States for compensation for certain lands taken for public purposes by the United States in dredging out the channel of a river, under the act of Congress, in which the plaintiffs claimed the right to about 40 acres of bottom, assigned to them under the laws of Virginia for oyster planting purposes. It appeared that the assignment of these grounds was not made in conformity with statutory authority; and the opinion of the court, after a review of the Virginia statute, and declaring that an assignment of oyster planting grounds not authorized by the statute will not even serve to confer upon the assignee color of title, but is void, says: "Can the petitioners, in the face of this statute so in evidence, come into this court and put the United States in their place, and ask just compensation for lands held, used, and occupied by them unlawfully?"

In *Silliman v. F. O. & Ch. R. R.*, 27 Grat. 119, the following is quoted with approval:

"In every instance (Mr. Justice Miller said in delivering the opinion, in which a majority of the court concurred, in the *Floyd Acceptances Case*, 7 Wall. 680, 19 L. Ed. 169) a person making a contract with the government, through its officers and agents, must look to the statutes under authority of which the agent as officer proposes to act, and see for himself that his contract comes within the terms of the law. The same rule would apply, a fortiori, to persons making contracts with the agents or officers of bodies corporate."

An oyster inspector is but an agent of the state to perform the duties delegated to him by statute, and all persons dealing with him must exercise care as to the extent of his authority and powers, and they are presumed to know the statutes under which he is called upon to act. This is but the general doctrine applying to all agencies, and the authorities are uniform that all acts of an agent outside of the scope of his authority are ultra vires and void. 1 Am. & Eng. Ency. L., p. 981, and note, page 988, and note; *State v. Chilton*, 49 W. Va. 453, 39 S. E. 612; *N. Y., etc., Co. v. Harrison (C. C.)* 16 Fed. 688; *Story's Agency* (9th Ed.) § 307a; *Mechem's Pub. Off.* 512; *Mayor, etc., v. Eschbach*, 18 Md. 276; *Delafield v. State* 26 Wend. (N. Y.) 192.

The powers and duties of all governmental officers are "limited and defined" by law, by statute where one exists, as in this case, and the law is the sole criterion of authority; and no custom can enlarge or vitiate it. *Floyd Acceptances Cases*, 7 Wall. 666, 19 L. Ed. 169; *Davis v. Gordon*, 87 Va. 564, 13 S. E. 35.

In *Stainback v. Read & Co.*, 11 Grat. 286, 62 Am. Dec. 648, the court said: "It is equally well settled that a party dealing with an agent acting under a written authority must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him, and he must at his peril observe that the act done by the agent is legally identical with the act authorized by the power."

The principle applies as well where the agency is that of a public officer, clothed with defined and limited powers and prescribed duties to be found in existing laws, as where the agency is created by writing signed by an individual firm or corporation. See, also, *Mayor of Baltimore, etc., v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

We are of opinion that upon every branch of this case the decree complained of is erroneous, and has to be reversed and annulled; and this court will enter the decree the circuit court should have entered, dissolving the injunction awarded appellee and perpetuated, and dismissing appellee's bill
Reversed.

(109 Va. 845)

DONITHAN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 17, 1909.)

INTOXICATING LIQUORS (§ 216*)—UNLAWFUL SALE—CIDER—INDICTMENT—"ARDENT SPIRITS."

Under Acts 1908, p. 275, c. 189, § 1, declaring that all mixtures, preparations, and liquids which will produce intoxication shall be deemed "ardent spirits," within the meaning of the act, an indictment charging the sale of spirituous and malt liquors, whisky, brandy, wine, ale, beer, or mixtures thereof is insufficient to sustain a conviction, on proof of sale of cider which would produce intoxication, since while all spirituous liquors are intoxicating, and all intoxicating liquors are ardent by force of the statute, not all ardent liquors are not spirituous liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 230-233; Dec. Dig. § 216.*]

For other definitions, see Words and Phrases, vol. 1, p. 491.]

Appeal from Circuit Court, Pulaski County.

One Donithan was convicted of unlawful sale of liquors, and appeals. Reversed and remanded.

H. C. Gilmer and J. L. Wysor, for appellant. William A. Anderson, Atty. Gen., for the Commonwealth.

KEITH, P. Donithan was indicted in the circuit court of Pulaski county for the unlawful sale by retail of "spirituous and malt liquors, whisky, brandy, wine, ale, beer, or mixtures thereof." Upon the trial the evidence failed to prove the sale of any of the articles specifically mentioned in the indictment, but evidence was admitted of the sale of cider which produced intoxication, and upon this proof the jury rendered a verdict against the defendant, and fixed his fine at \$50, upon which judgment was entered.

During the progress of the trial the defendant excepted to the ruling of the court allowing the witness to testify as to the sale of intoxicating cider, upon the ground that no such offense was charged in the indictment, and this ruling presents the only question which need be here considered.

The sale of cider cannot be brought within the terms of the indictment, unless cider is to be considered a spirituous liquor, as it certainly is not a malt liquor, whisky, brandy, wine, ale, beer, or any mixture thereof.

Section 1 of the act of assembly approved March 12, 1908 (Acts Assem. 1908, p. 275, c. 189), declares, that "all mixtures, preparations and liquids which will produce intoxication shall be deemed ardent spirits, within the meaning of this act."

If, therefore, the term "ardent spirits" had been used in the indictment, there would have been room to contend (though we do not here decide) that the charge would have been supported by the proof of sale of any mixture, preparation, or liquid which would

produce intoxication. But while all spirituous liquors are intoxicating, and all intoxicating liquors are by force of the statute ardent spirits, it is certain that all ardent spirits are not spirituous liquors. Malt liquors, for instance, are intoxicating, but cannot be classified as spirituous. 17 A. & E. Enc. L. 208; State v. Oliver, 26 W. Va. 422, 53 Am. Rep. 79; Commonwealth v. Livermore, 4 Gray (Mass.) 20; Feldham v. Morrison, 1 Ill. App. 460.

We are of opinion that the indictment does not warrant proof of the sale of cider.

It follows that the judgment of the circuit court must be reversed, and the cause remanded, for further proceedings to be had therein not in conflict with this opinion.

Reversed.

(109 Va. 625)

JORDAN & DAVIS et al. v. ANNEX CORPORATION et al.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. CORPORATIONS (§ 30*)—LIABILITY OF PROMOTER.

A promoter of a corporation is accountable to it as if the relation of principal and agent or of trustee and beneficiary had actually existed; and he is precluded from taking a secret advantage of other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 98; Dec. Dig. § 30.*]

2. CONTRACTS (§ 98*)—EFFECT OF FRAUD—REMEDIES.

Where a person has been induced by fraud to enter into a contract, he may elect to rescind the same if he can restore what he has received, and sue for the consideration he has paid, or, if he has not paid anything, repudiate the contract, and rely, when sued, on the fraud as a defense, or he may elect to retain what he has received, and bring an action for damages sustained by the deceit.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 98.*]

3. CORPORATIONS (§ 80*)—STOCK SUBSCRIPTION—EFFECT OF FRAUD BY PROMOTER.

Where the parties cannot be placed in statu quo, a subscription for corporate stock cannot be rescinded for the fraud of the promoter in secretly taking the profit to himself in form of rent of property leased to the corporation, but the remedy of the stockholder is a recovery by the corporation of such profit from the promoter.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 80.*]

4. CORPORATIONS (§ 565*)—INSOLVENCY—RIGHTS OF FRAUDULENT PROMOTER.

Though the promoter through fraud secretly received a profit to which he was not entitled, on a recovery of such profit by the corporation, he is entitled as a creditor for money actually advanced to share in all the corporate assets.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 565.*]

Appeal from Circuit Court of City of Norfolk.

Action by Jordan & Davis and others against the Annex Corporation and others.

From the decree rendered, plaintiffs appeal. Affirmed.

R. Randolph Hicks, for plaintiffs in error. Loyall, Taylor & White and H. H. Rumble, for defendants in error.

BUCHANAN, J. Prior to March 14, 1907, W. G. Davis and R. E. Jordan, partners trading as Jordan & Davis, Garrett Smith, and Benjamin Lowenberg obtained a charter of incorporation under the name of the Annex Corporation, for the purpose of conducting a hotel business. The firm of Jordan & Davis, Smith, and Lowenberg each subscribed for \$5,000 of its capital stock, which was fully paid up. Subsequently each of the said shareholders made advances for the purpose of carrying on the business.

On the 14th of March, 1907, the Annex Corporation entered into an agreement with the Pine Beach Hotel Corporation, by which it leased from the latter a certain parcel of land upon which it agreed to erect a hotel building of the dimensions named in the lease, and to have it ready for use not later than June 1st of that year, and to operate it in the manner provided therein to the end of the Jamestown Exposition, scheduled to close November 30, 1907. It was further provided, among other things, that the lessee was to pay the lessor as rent \$5,000 and 10 per cent. of the gross receipts from all sources from the operation of the hotel, was to remove the building within 30 days from the expiration of the lease, and, in the event of nonpayment of the rent or any other breach of the agreement during the lease on the part of the lessee, the lessor had the right to cancel the lease and take possession of the building and all the assets of the lessee thereon, and to operate the same upon certain conditions.

The building provided for was erected and the business conducted until September of that year by the lessee corporation, when Jordan & Davis and Smith instituted this suit.

Briefly stated, and as far as is material to the questions involved in this appeal, in addition to what has already been stated, the complainants (appellants here) allege in their bill that B. Lowenberg, before the creation of the Annex Corporation, represented to them that he had an option from the Pine Beach Hotel Corporation to erect and operate a hotel upon lands adjoining it upon the terms and conditions above stated; that he proposed to organize a corporation to be known as the "Annex Corporation" with a minimum capital of \$30,000, of which \$15,000 was to be preferred and paid for in cash; that he requested the appellants each to subscribe for \$5,000 of the preferred stock, and stated that he would subscribe for the other \$5,000; that they inquired of him whether or not there were any promoter's fees or secret profits coming to him, and upon his replying there were not, and that he

and they would become stockholders upon the same terms, they, relying on those representations, subscribed for \$5,000 each of the said preferred stock, applied for and obtained the charter under the name of the "Annex Corporation," in which the appellants Jordan and Smith, respectively, were named as president and vice president, and said Lowenberg as secretary and treasurer, and all were named as directors, that, after the organization of the company, it made the agreement hereinbefore referred to with the Pine Beach Hotel Corporation, erected and equipped the hotel as required by the lease, and opened the same, expecting large profits to accrue from its operation by reason of the fact that the Jamestown Exposition would be in progress during the term of the lease, but that up to the time of filing their bill their expectations had not been realized and the hotel had been operated at a loss. It was further alleged in the bill that they had just discovered that the \$5,000 which the lease provided to be paid to the lessor was a fiction, and that the real agreement between Lowenberg and the Pine Beach Hotel Corporation was that Lowenberg and the Lowenberg Corporation of which he was a stockholder should receive that sum as a promoter's fee, and that it was put in the lease as rent by collusion between the lessor and Lowenberg and the Lowenberg Corporation; that of the said \$5,000, \$2,500 was paid in cash, and a note for \$2,500 made by the lessee to the lessor, and immediately both were turned over by it to the Lowenberg Corporation, which was a large stockholder in the lessor corporation; that, in addition to the amounts due the appellants on account of the fraudulent representations made, the Annex Corporation was indebted in the sum of about \$12,000, and that its only asset was the hotel operated by it which was worth nothing more than what the lumber in it would sell for; that the Annex Corporation had been unable to pay the 10 per cent. of its gross income to the lessor as provided for by the lease; that, if the lessor for the failure to pay the rent should take possession and operate the hotel as it had a right to do under the terms of the lease, it would result in loss to all concerned, and this fact was recognized by the lessor, since it was threatening to have the Annex Corporation placed in the hands of a receiver.

The Pine Beach Hotel Corporation, the Annex Corporation, the Lowenberg Corporation, and Benjamin Lowenberg were made parties defendant to the bill.

The prayer of the bill was that the appellants' subscriptions to the stock of the Annex Corporation be annulled; that it be adjudged insolvent and dissolved, and a receiver appointed to distribute its assets to those entitled thereto; that the defendants be required to return to it the said \$5,000 unlawfully obtained from it as rent, and apply the same to the liquidation of the claim of

appellants; and that so much of their claims as is not thus paid the defendants be required to pay, and for general relief.

The trial court refused to annul the subscriptions of appellants to the stock of the Annex Corporation, holding them to be valid and binding, required B. Lowenberg and the Lowenberg Corporation to pay to the receivers who had been appointed in the cause the sum of \$2,500 with interest, and directed the \$2,500 note given for the residue of the alleged rent to be surrendered and canceled, and directed the moneys advanced by the said stockholders in excess of their subscriptions to be paid pro rata out of the proceeds of the assets of the Annex Corporation. From that decree this appeal was taken by Jordan & Davis and Garrett Smith.

The first error assigned is to the action of the court in refusing to annul or rescind the contracts of subscription made by the appellants to the stock of the Annex Corporation.

Although a promoter is not strictly an agent of or a trustee for a company before its creation, the principles of law of principal and agent and of trustee and beneficiary have been extended to meet such cases, and a promoter of such a company is accountable to it as if the relation of principal and agent or of trustee and cestui que trust had actually existed. His acts are carefully scrutinized, and he is precluded from taking a secret advantage of other stockholders. See *Sydney, etc., Iron Ore Co. v. Bird*, 33 Ch. Div. 85; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 811, 44 L. Ed. 423; *Va. Land Co. v. Haupt*, 90 Va. 533, 537, 19 S. E. 168, 44 Am. St. Rep. 939; *Central Land Co. v. Obenchain*, 92 Va. 130, 143, 22 S. E. 876; and note to *Telegraph, etc., v. Loetscher*, 4 Am. & Eng. Ann. Cas. pp. 669, 670.

Where a party has been induced to enter into a contract by fraud, he has in general, as was said in the case of *Wilson v. Hundley*, 96 Va. 96, 100, 30 S. E. 492, 70 Am. St. Rep. 837, the choice of two remedies. He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given; or, if he has not paid anything, repudiate the contract and rely when sued upon fraud as a complete defense, or he may elect to retain what he has received under the contract, and bring an action to recover damages for the injury he has sustained by the deceit.

For the fraud of B. Lowenberg which the evidence clearly establishes either the Annex Corporation or the appellants had a cause of action. But under the facts of the case there could be no rescission of the agreement to lease or of the appellants' contracts of subscription because of the chang-

ed condition of affairs. When this suit was brought, two-thirds of the time during which the lease was to run had expired, the money paid in by the stockholders had been spent, and the corporation was insolvent. The parties could not be placed in statu quo. The only relief, therefore, that can be had in this case is the recovery of the promoter's fees or profits made by B. Lowenberg or the Lowenberg Corporation. This relief the trial court gave.

It is insisted by the appellees upon cross-assignment of error that in no event were the profits or fees of the promoter more than one half of the \$5,000, because, as is claimed, the Lowenberg Corporation was really entitled to one half of the \$5,000 as rent, and that only the other half, which was ostensibly due the Pine Beach Hotel Corporation, was the promoter's fee or profit.

The trial court was of opinion that the whole sum of \$5,000 agreed to be paid as rent was promoter's profits, and, under all the facts and circumstances of the case, we cannot say that it erred in so holding.

The remaining assignment of error is to the action of the trial court in permitting B. Lowenberg and Pine Beach Hotel Corporation to participate as creditors in the restored promoter's profits.

While the corporation is entitled to recover from the promoter the amount of profits which he has made out of the secret agreement, we know of no rule of law or of equity which deprives him as a creditor of the corporation for money actually advanced by him in carrying on its business from sharing in its assets along with its other creditors.

We are of opinion that there is no error in the decree appealed from, and that it should be affirmed.

Affirmed.

CARDWELL, J., absent.

(109 Va. 694)

SAVAGE v. CAUTHORN et al.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. APPEAL AND ERROR (§ 569*) — RECORD — STATEMENT OF FACTS—SIGNING.

Where an order overruling a motion to set aside the judgment and grant a new trial, bill of exceptions, and statement of facts as set out in the record were all of the same date, and clearly made up and signed by the judge at the same time in open court, and certified by the clerk, the fact that the judge signed his name at the end of the bill of exceptions, and also at the end of the statement of facts which immediately followed, when his signature only at the end of the statement of facts would have been sufficient, would not exclude from the record the statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 569.*]

2. CONTRACTS (§ 62*)—CONSIDERATION—SUFFICIENCY.

Plaintiff took an option signed by the owner of land and her husband for the purchase of land. The owner and husband conveyed it to plaintiff by deed with general warranty of title, and plaintiff reconveyed to a trustee to secure payment of purchase-money notes. There was at the time a trust deed of prior date on record, of which plaintiff had actual and constructive notice, executed by the owner and husband. At the time of plaintiff's purchase there was an alleged promise of the owner's husband and the trustee under plaintiff's trust deed that plaintiff's first two payments should be used in paying the debt secured by the prior trust deed. This was not done, and plaintiff refused to make subsequent payments. The trustee sold the land under the trust deed to the former owner for the amount of plaintiff's unpaid purchase-money notes. Subsequently plaintiff was dispossessed by ejectment proceedings. *Held*, that plaintiff could not recover the amount paid on the land against the husband of the owner and the trustee for breach of the promises to apply her payments to satisfaction of the former trust deed, there being no consideration therefor alleged or proved, the wife being the sole owner of the land.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 62.*]

3. DEEDS (§ 94*)—MERGER OF CONTRACT IN DEED.

Fact that both the owner and her husband signed the option taken by plaintiff to purchase the land would not aid the cause of action for breach of the husband's promise, as the dealings between the parties culminated in the deed to plaintiff and her deed to secure deferred payments.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 266; Dec. Dig. § 94.*]

4. COVENANTS (§ 102*)—WARRANTY—BREACH.
The covenants in plaintiff's deed of general warranty of title would not avail her, as she was not evicted by a paramount title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 157; Dec. Dig. § 102.*]

Error to Circuit Court, Mathews County.

Action by Mary Jane Savage against L. E. Cauthorn and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. N. Stubbs, for plaintiff in error. J. Boyd Sears and C. B. Garnett, for defendants in error.

CARDWELL, J. At the threshold of this case we are asked to consider whether or not the facts proven on the trial in the circuit court have been properly incorporated into the record before us.

The action is trespass on the case in assumption, and upon issue joined in the circuit court both parties agreed to waive the intervention of a jury and to submit the case, both as to the law and the facts to the court for decision, and the court rendered its judgment for the defendants. Whereupon the plaintiff moved the court to set aside its judgment and award a new trial, which motion was overruled, and to this ruling plaintiff excepted; and here follows the judgment of the court and the only bill of exceptions taken and made a part of the record:

"And now at this day, to wit, at a circuit court continued and held for the county of Mathews at the courthouse thereof, on Thursday, the 21st day of May, 1908, it being the same day and year as that first herein mentioned, the following order was entered:

"Mary J. Savage v. L. E. Cauthorn and Others.

"The court having maturely considered the motion made by the plaintiff on the 21st day of November, 1907, to set aside the judgment entered against her on the 19th day of November, 1907, and grant her a new trial, doth overrule said motion.

"Memorandum.—To the opinion of the court in refusing to set aside the said judgment and grant the plaintiff a new trial the plaintiff, by her attorney, tendered the following bill of exception and the facts proven during the trial of said case, which she prayed might be received, signed and sealed by the court and made a part of the record, which is accordingly done.

"Exceptions Filed by Plaintiff.

"Mary Jane Savage v. G. T. Cauthorn, L. E. Cauthorn, and E. M. Maxwell.

"Be it remembered that after both plaintiff and defendants had waived a jury and consented for the court to hear the case, and after all the evidence had been heard and argument of counsel, the court entered the following judgment: 'It is considered by the court that the plaintiff take nothing by her declaration, but for her false clamor be in mercy, etc., and that the defendants go thereof without day and recover against the plaintiff their costs by them about their defense in this behalf expended.' The plaintiff then moved the court to set aside the said judgment and grant her a new trial, as being contrary to the law and the evidence. After argument, the court refused to set aside the judgment and grant the plaintiff a new trial. To the opinion of the court refusing to grant a new trial, the plaintiff excepts and tenders this her bill of exception, which she prays may be signed, sealed and enrolled and made a part of the record in this case, which is accordingly done.

"Given under my hand and seal this 21st day of May, 1908. Claggett B. Jones. [Seal.]"

Immediately following the foregoing we find this statement: "Here follows all the facts proven on the trial of this case." Then is inserted the statement of facts, containing deeds and acknowledgments, etc., and at the end thereof is found: "Given under my hand and seal this 21st day of May, 1908. [Signed] Claggett B. Jones. [Seal.]"

Now, if the presiding judge had withheld his signature, and only affixed it at the end of the statement of the facts proved at the trial, which immediately follows the judgment of the court on the motion for a new

trial, and the bill of exceptions to that ruling, it would hardly have been questioned that the statement of the facts proved, as well as the judgment and the exception thereto, would have become a part of the record. The judgment, the bill of exceptions, and the statement of the facts proved are all of the same date, and unmistakably were made up and signed by the judge at the same time, in open court, and certified by the clerk.

The case of *U. S. Mineral Co. v. Camden & Driscoll*, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028, so much relied on by the defendants, is distinguishable from this case. In the first case, as the opinion states, the statement purporting to be the evidence could not be identified as a part of the record, as there was nothing to show how and when it got among the papers of the case. There the statement of the evidence was without date, and there was nothing whatever about it to show when or how it was made up or got into the record; while in this case the judgment of the court, the exception to the refusal of a new trial, and the statement of the facts proved are all embodied in the record on the same date, and had the signature of the presiding judge been affixed only at the end of the record thus made, it could not have been questioned that the facts proved, as well as the exception to the court's ruling on the motion for a new trial, would have been incorporated into and become a part of the record, properly to be considered upon this writ of error.

The case is simply this: The presiding judge signed the bill of exception taken to the ruling on the motion for a new trial, and identified the facts proved immediately following the statement of the exception in two places, when his signature as affixed at the end of the bill and statement of the facts would have been sufficient; and it would be an extremely technical ruling to hold that the signing by the judge of the bill of exceptions and statement of the facts, made up at one and the same time, in two places instead of at the end of the record thus made, excludes from the record the statement of the facts proved and certified. There is not the slightest difficulty in determining "how and when this statement got among the papers in this case," and there is no authority to which we have been cited or have found for our refusing to consider it as a part of the record.

Upon its merits the case is as follows: On the 1st day of July, 1905, L. E. Cauthorn and her husband, G. T. Cauthorn, in consideration of the sum of \$1,500, \$650 paid in cash and the balance secured, conveyed with general warranty of title to Mary Jane Savage, plaintiff in error, two certain parcels of land, aggregating about 16 acres, situated in Mathews county; and upon the same day plaintiff in error reconveyed the land to one E. M. Maxwell, in trust, to secure the pay-

ment of the two notes of \$450, each executed by plaintiff in error to Mrs. L. E. Cauthorn for unpaid purchase money, and payable respectively at 6 and 12 months from their date, with interest. At the time of the execution and recordation of these deeds, there was of record in the clerk's office of Mathews county a deed of trust of prior date, and of which plaintiff in error had actual as well as constructive notice, executed by defendants in error, L. E. Cauthorn and her husband, conveying the same parcels of land to one Sands Smith, in trust to secure two bonds of L. E. and G. T. Cauthorn, executed to and held by Levin H. Miller, in the sum of \$500 each, with interest.

It is alleged that when plaintiff in error on July 1, 1905, paid the \$450 on her purchase of the 16 acres of land, the Cauthorns and Maxwell, trustee, promised that this money and the \$200 paid by plaintiff in error on November 14, 1904, should be used in paying off the debt secured on the land by the said deed to Sands Smith, trustee, but this was not done, and, when plaintiff in error's note for \$450 given for the first deferred payment on the land she had bought of the Cauthorns fell due, she declined to pay it on the ground that the debt secured by the deed to Sands Smith, trustee, had not been paid.

In February, 1906, plaintiff in error went to the house of G. T. Cauthorn, and then and there it is alleged the latter agreed that he would return to the former the \$650 she had paid and take back the land conveyed to her July 1, 1905; but this was not done, and on July 1, 1906, Maxwell, trustee, advertised the land for sale under the trust deed given by plaintiff in error, and sold the same to defendant in error, L. E. Cauthorn, on August 3, 1906, and made her a deed therefor, the purchase price of the land at this sale being the amount of the two purchase-money notes given by plaintiff in error due and to become due as about stated.

After the deed from Maxwell, trustee, conveying the land to defendant in error L. E. Cauthorn had been executed, the latter instituted against plaintiff in error an action of ejectment in the circuit court of Mathews county, and a judgment was rendered in that action against plaintiff in error, and she was ejected from the premises.

It further appears that before the sale made by Maxwell, trustee, to L. E. Cauthorn, Maxwell told plaintiff in error that there was only due on the deed to Sands Smith, trustee, a little more than \$190, and this amount could be paid out of the last payment to become due from plaintiff in error, and she would be protected; but as it seems she declined to agree to this, and the sale by Maxwell, trustee, of the land followed.

In this action, brought in December, 1906, plaintiff in error sought to recover of defendants in error, L. E. Cauthorn and G. T. Cauthorn, and Maxwell, trustee, the \$650 paid on her purchase of the 16 acres of land,

and damages for "much trouble and cost and damages in moving away," which she estimated at not less than \$150. The declaration rests the right of recovery solely upon a breach of the promises made by G. T. Cauthorn and Maxwell, trustee, to apply the \$200 and the \$450 paid by plaintiff in error on the purchase from L. E. Cauthorn to the discharge of the debt secured by the deed to Sands Smith, trustee; and, besides the failure to show the alleged breach, plainly the action could not be maintained against G. T. Cauthorn or Maxwell, trustee, for the want of a consideration for the promise claimed to have been broken, as L. E. Cauthorn was the sole owner of the land sold and conveyed to plaintiff in error.

Moreover, upon the facts of the case, there was no time prior to the sale, by Maxwell, trustee, when plaintiff in error could not have protected herself against the loss she is in this action seeking to recover, as there was only due on the Miller debt, secured by the deed to Sands Smith, trustee, a balance of about \$190, and the purchase money due and to become due from her amounted to a much larger sum; so that she might have upon a bill in equity enjoined a sale by Maxwell, trustee, until the Miller debt was paid, or so much of what she owed on her purchase of the land set apart for that purpose. But instead of this course, she permitted the land to be sold, and unfortunately for her it only brought enough to pay the balance of the purchase money unquestionably due to Mrs. L. E. Cauthorn. In fact, plaintiff in error might have paid the \$190 due on the Miller debt, and required the amount to be credited on her unpaid purchase money, a right that a court of equity would have had jurisdiction to enforce.

The fact that both L. E. Cauthorn and her husband signed the option taken by the plaintiff in error to purchase the land avails the latter nothing, as the dealings between the parties culminated in the deed of conveyance to plaintiff in error and her deed to secure the deferred payments of the purchase money for the land. Nor could the covenants in her deed avail her as she has not been evicted by a paramount title. Nor could the alleged promises of G. T. Cauthorn and Maxwell, trustee, avail plaintiff in error, since no consideration for these promises is either alleged or proved.

We are of opinion that the judgment of the circuit court complained of is right, and it is therefore affirmed.

Affirmed.

(109 Va. 717)

SLINGLUFF v. COLLINS.

(Supreme Court of Appeals of Virginia. June 10, 1909.)

1. EXECUTION (§ 335*)—RETURN—NECESSITY OF SIGNATURE.

Under Code 1904, § 900, providing that an officer to whom process is directed shall make

return thereon and subscribe his name to such return, and section 3577, providing that any return by an officer on an execution showing that the same has not been satisfied shall be a sufficient return, an unsigned return to an execution, reciting that no property could be found to levy on, is not a nullity, in view of other sections of the Code, showing that the signature to a return was not considered part of the return.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 335.*]

2. EXECUTION (§ 338*)—RETURN—SIGNATURE—AMENDMENT.

Where such return was made by an officer legally qualified to make the return, it is proper to allow him to amend it by adding his signature thereto.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1020; Dec. Dig. § 338.*]

3. EXECUTION (§ 338*)—RETURN—SIGNATURE—AMENDMENT—LAPSE OF TIME.

The fact that 17 years elapsed before motion was made to amend the return by adding the officer's signature thereto will not affect the right to amend, where the debtor was notoriously insolvent, and the rights of third parties have not intervened.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1018; Dec. Dig. § 338.*]

4. EXECUTION (§ 333*)—RETURN—WHEN MADE.

Where a firm is notoriously insolvent, and remains so, it is not incumbent on an officer levying an execution thereon and making a return of no property found to hold the execution to the return day to see that the firm may have property in which execution could be levied.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1002; Dec. Dig. § 333.*]

5. EXECUTION (§ 338*)—AMENDMENTS—WHEN ALLOWED.

Courts pursue a liberal policy in allowing amendments whenever they can see it will be in furtherance of justice.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 338.*]

Error to Circuit Court, Madison County.

Action by Horace Slingluff against G. T. Collins. From an order quashing an execution, plaintiff brings error. Reversed.

Hiram M. Smith, for plaintiff in error. L. O. Wendenburg and Stuart Bowe, for defendant in error.

HARRISON, J. The facts agreed in this case are: That in the year 1889 the firm of Slingluff, Disney & Co. obtained in the circuit court of Madison county a judgment against the firm of Collins & Yager for the sum of \$611.56, with interest from the 1st day of May, 1889, till paid, and costs in the sum of \$16.06. That in September, 1889, an execution was issued on this judgment, returnable to the first December rules, 1889, and was placed in the hands of T. N. Berry, deputy sheriff of Madison county. That the debtor firm was at the time notoriously insolvent. That Berry, the deputy sheriff, made on this execution the following indorsement, "No effects known to me this 8th day of November, 1889," but did not sign the indorsement. That the execution with the unsigned indorsement was returned to the clerk's office on or before

the return day thereof, and the unsigned indorsement was entered by the clerk in his execution book, and no other execution was issued on the judgment within 17 years after the return day of such execution. That on the 1st day of January, 1908, a third execution was issued on this judgment, directed to the sheriff of Henrico county, and returnable to the first March rules, 1908. That, prior to the issuing of this last-mentioned execution, Horace Slingluff, the plaintiff in error, had become the successor to the firm of Slingluff, Disney & Co., and the sole owner of all its assets, and G. T. Collins had become the sole surviving partner of the debtor firm, his two partners, W. A. Collins and W. C. Yager, having died, the former in 1900, and the latter in 1896; and that T. N. Berry, the deputy sheriff who made the unsigned indorsement on the first execution, is still living.

The record shows that after the execution of January, 1908, was issued and levied upon property of the surviving judgment debtor in the county of Henrico, notice of a motion to quash the execution was served on the plaintiff in error, upon the ground that no return having been made upon the original execution, and no other execution having been issued within 10 years, the same was not enforceable under section 3577 of the Code of 1904. Thereupon the plaintiff in error served the defendant in error with notice of a motion for leave to amend the return upon the original execution by having the deputy sheriff sign the return he had indorsed thereon.

These two motions were heard together, and the circuit court refused to allow the sheriff to amend the return on the original execution by signing the same, and quashed the execution issued in January, 1908. To this judgment the present writ of error was awarded.

It is contended on behalf of the defendant in error that the indorsement by the sheriff on the execution in question is invalid without his signature affixed thereto, and cannot be made valid by now affixing his signature to such return; the position taken being that inasmuch as section 900 of the Code of 1904 provides that the officer to whom the process is directed "shall make true return thereon of the day and manner of executing the same, and subscribe his name to such return," the present is not a proper case for amendment, and that the absence of the sheriff's signature makes the return a mere nullity. In other words, that a return not signed by the officer is no return at all.

"A return on a writ or process is the short official statement of the officer indorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing." *Rowe v. Hardy*, 97 Va. 674, 676, 34 S. E. 625, 75 Am. St. Rep. 811.

The signature is not a part of the return proper. Its function is merely to authenti-

cate the return. That the signature was not regarded by the Legislature as an integral part of the return is plain from an examination of the statutes. Section 900 of the Code of 1904, contains two provisions: (1) Of what the return shall be; and (2) that the officer shall subscribe his name to such return. Section 901 provides for failure to make return and for a failure to subscribe the return. Other sections of the Code show that the signature of the officer to the return was not intended as part of the return, but merely as an authentication of the memorandum as a true return by the proper officer. Section 3577 of the Code of 1904, expressly provides that: "Any return by an officer on an execution showing that the same has not been satisfied shall be a sufficient return within the meaning of this section."

The courts pursue a liberal policy in allowing amendments whenever they can see that it will be in the furtherance of justice.

In *Shenandoah R. Co. v. Ashby's Trustees*, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898, this court stated that the amendment should not be allowed unless the court could see that it would be in the furtherance of justice, and added: "In a proper case, however, leave to amend, so as to make the return speak the truth, ought to be, and usually is, liberally granted, and, when the amendment is made, the same effect is to be given the return, as amended, as though it had at first been put in its present form."

In *Hamilton v. McConkey's Adm'r*, 83 Va. 533, 2 S. E. 724, the point was made that a defective or insufficient return was no return; but this court held otherwise, saying: "Whether this return is true or false, sufficient or insufficient, is not a question which can arise under the statute. Section 3577. The statute does not prescribe concerning a true or sufficient return, but concerning a return of an officer. The law provides ample and speedy methods by which all irregularities of an officer may be corrected, ample machinery by which any injury the officer may do by a false or insufficient return may be speedily redressed."

The indorsement upon the execution in the present case measures up to the statutory requisites of a return, for it is not questioned that it was made by an officer clothed with authority and acting in the discharge of his duty. Being a return, the amendment, by adding the omitted signature of the sheriff, must be allowed so as to make it speak the truth authoritatively.

Freeman on Executions, vol. 3, p. 2044, citing a number of authorities in support of the text, says: "A return may be amended by affixing to it the signature of the officer, and thus making valid that which before had no appearance of official authenticity."

Again, at page 2135, this author says: "Where the truth of a return is not questioned, and no good reason to the contrary is

shown, the officer should be allowed to amend by signing it."

In the case of *Excelsior Mfg. Co. v. Boyle*, 48 Kan. 202, 28 Pac. 408, it is held that the failure of the sheriff to sign his return on an execution was amendable error which could be corrected by allowing him to affix his signature thereto.

It is further insisted that, because there was no property subject to the execution when it came into the hands of the officer, it does not follow that the debtor will continue to have none until the return day.

The execution in this case was returnable to the first December rules, 1889. The return of the sheriff is: "No effects known to me this 8th day of November, 1889." The position is that the officer was without power or authority to return the execution until the return day had arrived; that in the interval between the date of the indorsement on the execution and the return day the debt might have been collected.

One of the agreed facts in this case is that, at the time this execution was put into the hands of the sheriff of Madison county, the debtors therein were notoriously insolvent. Under such circumstances it cannot be assumed, without evidence, that the sheriff was derelict in returning the execution, "no effects known to me," before the return day.

In 3 Freeman on Executions, p. 2019, it is said: "There is no good reason why the sheriff should delay returning the writ, when it is apparent that nothing can be found out of which to satisfy it. It is rather his duty, by promptly returning the facts, to open the way for supplemental proceedings, and aid the purpose for which the execution was put into his hands."

It is true that a long time has elapsed since the return of the original execution in 1889, and the motion to amend the return by affixing the signature of the sheriff thereto in 1908; but there is no specific limitation of time within which the power to amend may be exercised. After a considerable lapse of time, however, such power should be exercised with caution, and in no case is it to be exercised unless the court can see that it will be in furtherance of justice.

In the case at bar, the agreed facts show that, at the time the original execution was returned, the defendants therein were notoriously insolvent. There is nothing in the record to suggest that the judgment has been paid—indeed, no effort is made to show that it has been satisfied—nor is there anything to indicate that there has ever been a moment that it could have been enforced until the present effort was inaugurated. It is manifest from the record that the judgment has lain dormant for the reason that there was no opportunity to enforce it. The rights of third parties, have not intervened or attached

in the meantime, and it does not appear that any injustice can result to any one from permitting the plaintiff in the judgment to compel its satisfaction by the surviving judgment debtor. On the contrary, such a course would seem to be in furtherance of justice.

For these reasons the judgment complained of must be reversed and set aside; and, this court proceeding to enter such judgment as the circuit court ought to have entered, it is ordered that T. N. Berry, deputy sheriff for Madison county, be allowed nunc pro tunc to amend his return on the original execution in question, by affixing his signature in his official capacity to such return. And it is further ordered that the motion of the defendant, G. T. Collins, to quash the execution issued January 1, 1908, be, and the same is hereby, overruled.

Reversed.

(109 Va. 768)

SAFFELL et al. v. ORR.

(Supreme Court of Appeals of Virginia. June 24, 1909.)

1. ACKNOWLEDGMENT (§ 37*)—ACKNOWLEDGMENT OF MARRIED WOMAN—SUFFICIENCY.

A certificate of acknowledgment of a married woman, which shows that she personally appeared before two justices of the peace, who examined her privily and apart from her husband and read and explained the deed to her, and that she acknowledged that she had willingly executed the same and did not wish to retract it, is sufficient.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 199-216; Dec. Dig. § 37.*]

2. COURTS (§ 93*)—RULES OF PROPERTY.

A decision of the Supreme Court of Appeals that a certificate of acknowledgment of a married woman is insufficient because the requisite "acknowledged the deed to be her act" appeared in the certificate before the privy examination, and that a certificate is insufficient which fails to show that she acknowledged the deed to be her act, and that she willingly executed the same, but which recognized that a certificate which substantially complies with the statute is sufficient, does not establish a rule of property, and does not prevent the court from determining that a certificate of acknowledgment in substantial compliance with the statute is sufficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 336; Dec. Dig. § 93.*]

3. ACKNOWLEDGMENT (§ 25*)—CERTIFICATE—SUFFICIENCY.

A substantial compliance with the statute as to taking and certifying a married woman's acknowledgment is sufficient.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 133-148; Dec. Dig. § 25.*]

4. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE.

One purchasing an estate which is subject to the right of another, as shown by the chain of title papers, is charged with notice of all that the papers disclose on complete examination.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 515; Dec. Dig. § 231.*]

5. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER.

A purchaser of land from one whose title depends on a decree taken against a minor is bound with notice of the right of the minor to show cause against the decree after attaining full age, as authorized by Code 1887, § 3424 (Code 1904, p. 1817), especially where the purchaser had actual notice of the rights of the minor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 515; Dec. Dig. § 231.*]

Appeal from Circuit Court, Lee County.

Suit by Perdle Orr for herself and next friend of R. S. Orr against S. M. Saffell and another. From a decree for complainants, defendant appeals. Affirmed.

J. W. Orr and Irvine & Morison, for appellant. Pennington Bros. and Duncan & Sewell, for appellees.

CARDWELL, J. The pleadings and facts in this case necessary to be stated are as follows: On the 7th day of April, 1883, David M. Orr and Rebecca Orr, his wife, were joint owners of a certain tract of land situated in Lee county, Va., each owning an undivided moiety; and on that day, for a valuable consideration, they conveyed this land as a whole to R. S. Orr, their son, the deed being acknowledged by the grantors and certified as to Rebecca Orr, the wife, by two justices of the peace, as was then required by law, and the deed duly admitted to record.

David M. Orr and R. S. Orr having departed this life, the first in 1883, and the latter in 1888, leaving a widow, Lizzie Orr, and one child, an infant (Perdle Orr), at the November rules, 1888, Rebecca Orr filed her bill in the circuit court of Lee county against E. W. Pennington, administrator of the estate of R. S. Orr, deceased, Lizzie Orr, and Perdle Orr, the object of which was to have set aside and annulled the deed of April 7, 1883, upon several grounds, among them that she (Rebecca Orr) had not acknowledged the deed as the law required.

The bill was answered by Pennington, administrator, Lizzie Orr, and a guardian ad litem duly appointed on behalf of the infant, Perdle Orr; the answer of Lizzie Orr denying the allegations of the bill, and alleging the validity of the certificate of acknowledgment in question.

Upon the hearing of this cause, a decree was entered September 12, 1889, holding that the acknowledgment to the deed of Rebecca Orr was defective, setting aside the deed, and appointing a commissioner to report on the questions of rents, profits, etc.

On April 2, 1890, a supplemental bill was filed, which set forth that since the last decree another child, to wit, R. S. Orr, had been born to Lizzie Orr, and this posthumous child was made a party defendant. On the same day an answer was filed by the guardian ad litem for this infant, and the

administrator and the widow of R. S. Orr, deceased, filed their respective answers to the supplemental bill. Another decree was thereupon entered on that day, reaffirming the principles of the cause as they had been settled by the prior decree of September 12, 1889. A suspension of this last decree was asked for the purpose of appealing the case to this court, but the appeal was never prosecuted.

The result of the decrees mentioned was that Rebecca Orr recovered her half of the original tract of land which was made the subject of litigation, and, having had partition thereof made in the aforesaid cause, sold and conveyed the land she thus acquired to her son-in-law, S. H. Wells; but the deed thereto was not executed and delivered until February 27, 1892, and Wells, by deed dated December 28, 1897, conveyed the same land to S. M. and A. B. Saffell, his wife. The grantees took possession of the land at or about the date of that deed, and have remained in possession thereof.

On December 19, 1897, Perdle Orr, having a few months before attained her majority, for herself, and as next friend of her brother, R. S. Orr, filed their bill of review against Saffell and wife, in which was set up the aforesaid chancery cause of Rebecca Orr v. Pennington, Administrator, etc., and the action taken in that cause, the sales and conveyances from Rebecca Orr to S. H. Wells, and from him to Saffell and wife, the decree of September 12, 1889, and the certificate of the justices of the peace attached to the deed of April 7, 1883, and alleged that the said decree was erroneous on its face, because the certificate of the acknowledgment of Rebecca Orr to that deed was a valid certificate; no other invalidity in the decree being alleged. The prayer was that the bill of review be allowed in the original cause above mentioned, that the said decree be reversed and set aside, and that the land be returned to the plaintiff.

At the March rules, 1908, Perdle Orr, for herself and her next friend, R. S. Orr, filed an amended bill of review, which repeats the allegations of the first bill, and, in addition to the matters in said first bill, sets out the decree of April 2, 1890, and alleges error in it, as well as in the decree of September 12, 1889; the additional error alleged in the supplemental bill of review being a matter that need not be here stated. This amended and supplemental bill of review was answered by the defendants thereto, Clamanda Wells, Mary W. Wells, William A. Orr, and S. M. Saffell and wife, in all of which answers it was insisted that there was no error in the decrees complained of apparent upon the face of the record, and other matters set out not material to the question here presented.

Upon these pleadings a decree was enter-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed on the 14th day of May, 1908, annulling and setting aside the decrees of September 12, 1889, and April 2, 1890, in so far as they affected the title of the plaintiffs, Perdrie and R. S. Orr, to the land in controversy, and appointing a commissioner to take an account of the rents, profits, and permanent improvements; and from that decree this appeal was taken.

The question presented is whether the certificate of acknowledgment by Rebecca Orr to the deed of April 7, 1883, was valid or invalid; and this court is of opinion that this question is ruled by its decision in the case of Gell v. Gell, 101 Va. 773, 45 S. E. 325.

A comparison of the certificates of acknowledgment will disclose that they are substantially the same.

In the Gell Case, the certificate was as follows: "We do further certify that Rebecca Gell, wife of Henry Gell, whose name is likewise signed to the writing hereto annexed bearing date as aforesaid, also personally appeared before us in our said county, and having the writing aforesaid fully explained to her, and being examined by us privily and apart from her said husband, she, the said Rebecca Gell, declared that she had willingly executed the same and does not wish to retract it."

The following is the certificate in the Orr case: "We, John B. Pennington and W. R. Yearly, two justices of the peace in and for the said county and state aforesaid, do certify that Rebecca Orr, wife of David M. Orr, whose names are signed to the foregoing deed, bearing date on the 7th day of April, 1883, personally appeared before us in our county, and being examined by us privily and apart from her said husband, and having said deed read and fully explained to her, acknowledged that she had willingly executed the same and does not wish to retract it."

The only difference in the two certificates are: First, the Gell certificate has the requisite of explaining the deed stated before the requisite of privy examination; and, second, in the certificate the word "declared" is used, instead of the word "acknowledged," whereas, it is vice versa in the Rebecca Orr case.

But counsel for appellants say that, if the court adheres to its ruling in Gell v. Gell, they should prevail on this appeal for the reasons that appellants acquired their right to the land after the decisions of this court in the cases of Hockman v. McClanahan, 87 Va. 33, 12 S. E. 230, and Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. 878, that they are innocent purchasers for value without notice, and that, as those cases established a rule of property, neither the immediate grantee of Rebecca Orr nor his grantees, Saffell and wife, can be disturbed in their rights by reason of the decision of this court in Gell v. Gell, supra.

This contention is wholly without merit,

for the reason that the court in Gell v. Gell expressly held that the two cases relied on by appellants did not constitute a rule of property, and that the decision in the later case was in line with the weight of authority prior to Hockman v. McClanahan and Clinch River Veneer Co. v. Kurth. The court sees no reason whatever for receding from either of those views. In the first place, the case of Hockman v. McClanahan held the certificate of the married woman's acknowledgment insufficient because the requisite "acknowledged the deed to be her act" appeared in the certificate before the privy examination; and in Clinch River Veneer Co. v. Kurth the certificate failed to show that the married woman acknowledged the deed to be her act, and also that she had willingly executed the same. So that it will be seen that in each case the certificate was held invalid upon different grounds, and as a matter of fact both decisions recognized, as did the decision in Gell v. Gell, and many others that precede it, that all that was required in the certificate was a substantial compliance with the statute. Therefore the court, in its last decision (Gell v. Gell), was unquestionably right in holding that the cases of Hockman v. McClanahan, and Clinch River Veneer Co. v. Kurth, did not establish a rule of property, and that the rule of construction established by this court prior to the decisions in those cases was in accordance with the view the court took in Gell v. Gell.

We have taken occasion again to examine the "prior decisions" referred to in the last-named case, and have found that they uniformly adhere to the rule that a substantial compliance with the statute as to taking and certifying a married woman's acknowledgment, as the law then stood, was all that was required; and, in the cases in which the certificate of a married woman's acknowledgment was held invalid, it was for the reason that there had not been a substantial compliance with the statute.

"The effect of overruling a decision and refusing to abide by the precedent there laid down is retroactive and makes the law at the time of the overruled decision as it is declared to be in the last decision." 28 Am. & Eng. Enc. L. 179.

There is a second reason why the contention of appellants, Saffell and wife, that they are protected in their right to hold the land in question by reason of the doctrine of stare decisis and the fact that they are innocent purchasers from S. H. Wells, who purchased of Rebecca Orr after the decision in Hockman v. McClanahan, cannot be sustained. We have seen that the doctrine of stare decisis is unavailing to these appellants, and their claim of being innocent purchasers for value without notice is equally as unavailing. They stand on no better footing than did S. H. Wells, under whom they claim, and Wells could occupy no higher ground than Rebecca Orr, his grantor. Had

he, as was his duty, looked to the chain of title to the land which Rebecca Orr proposed to convey to him, he would have found the cause of Rebecca Orr v. Pennington, Administrator, etc., open and in effect a pending cause in the circuit court of Lee county as to the infant defendants Perdie and R. S. Orr, in which they had, under the existing statute—now section 3424 of the Code of 1887 (Code 1904, p. 1817)—until six months after they attained the age of 21 years to show cause against the decrees entered therein prejudicial to them.

It is an established rule in Virginia that, where a party purchases an estate which is subject to the right of another, and that right is shown by the chain of title papers, the purchaser is charged with notice of all that the title paper or papers to which they refer may disclose upon complete examination. *Effinger v. Hall*, 81 Va. 105; *Burwell's Adm'r's v. Fauber*, 21 Grat. 446; *Va. Iron, etc., Co. v. Roberts*, 103 Va. 679, 49 S. E. 984, and authorities there cited. Also, *Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674, where the court, considering a statute similar to section 3424 of our Code, supra, said: "A purchaser of land from one whose title depends on a decree taken against a minor is bound with notice of his right to show cause against the decree. This statute is notice to all the world in cases where it applies, and there can be no such thing as an innocent purchaser in such cases."

Not only was S. H. Wells bound by notice of the rights of appellees, but appellants claiming under him are so bound. That Saffell and wife had actual notice of appellants' rights when they purchased the land in question from Wells is conclusively shown by the fact appearing in this record that they took from Wells a bond of indemnity against loss or damage should the infant parties interested (appellees), when they arrived at the age of 21 years, assert their right to the land they (Saffell and wife) purchased of Wells, or any part thereof, and also binding Wells to pay all costs of a suit by said infants for that purpose.

There are other questions raised and argued on this appeal; but, in the view we have taken of the case, it becomes unnecessary to consider them.

For the foregoing reasons, the decree appealed from must be affirmed.

Affirmed.

(109 Va. 754)

NEW YORK, P. & N. R. CO. v. WILSON'S ADM'R.

Supreme Court of Appeals of Virginia. June 10, 1909. On Rehearing, June 24, 1909.)

1. EVIDENCE (§ 507*)—OPINION EVIDENCE—EXPERT TESTIMONY.

How far a red lantern used as a railroad danger signal could be observed on a foggy

morning is not a matter of expert knowledge requiring expert testimony, being a matter resting on common experience.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 507.*]

2. EVIDENCE (§ 483*)—OPINION EVIDENCE—MATTERS OF COMMON KNOWLEDGE.

In an action for a railroad fireman's death by the collision of his train with a freight train which was standing still because plaintiff's train crew did not observe a red light signal sent back by the freight train crew, a witness who was on the freight train the morning of the accident, and saw the fog and the signal lanterns, could testify how far such lantern could be observed under the circumstances; that being a matter depending upon common experience.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 483.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—PREJUDICIAL EFFECT—ADMISSION OF TESTIMONY.

In an action for a railroad fireman's death by the collision of his train with a freight train ahead caused by the crew on decedent's train not observing the red lamp signals sent back by the freight train, any error in admitting testimony by one who was on the train at the time of the accident as to how far the red lantern could be seen through the fog was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

4. EVIDENCE (§ 539½*)—OPINION EVIDENCE—EXPERT TESTIMONY—OPERATION OF RAILROADS.

One who had been a railroad brakeman and engineer for a number of years was qualified to testify as to what the usual railroad danger signals were and their meaning.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 539½.*]

5. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF TESTIMONY—FACTS OTHERWISE PROVED.

Even if a witness was not qualified to testify as to what were the usual danger signals used in the operation of a railroad, the admission of his testimony was not reversible where such facts were proved without objection by another witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

6. MASTER AND SERVANT (§ 265*)—INJURIES—NEGLIGENCE—BURDEN OF PROOF.

Plaintiff must show that his intestate was injured by his employer's negligence in order to recover therefor; that he was injured being of itself insufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

7. MASTER AND SERVANT (§ 137*)—MASTER'S DUTY—CARE REQUIRED—OPERATION OF TRAINS.

Where a freight train which was running ahead of intestate's train stopped because of an accident, it was the company's duty to use reasonable care to give proper warning of the danger to intestate's train, but its duty was performed when proper signals were given, even though they were not observed by the employees on intestate's train.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 137.*]

8. MASTER AND SERVANT (§ 236*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

Plaintiff could not recover for intestate's death by collision with a freight train, which

was running ahead of his train, if the failure to observe the danger signals given by the employes of the freight train was due to intestate's failure to keep a proper lookout, as he was required to do.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 236.*]

9. MASTER AND SERVANT (§ 296*)—INJURIES—ACTIONS—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In an action for intestate's death in a collision of his engine with a freight train which had stopped ahead of it, because of the failure to observe danger signals sent back by the freight train, a requested instruction that, if intestate did not use ordinary care by keeping a proper lookout for danger signals, he contributed to his death, and could not recover, though defendant was also negligent, correctly stated the law, and it was erroneous and misleading to qualify it by adding, "provided such lookout would have prevented the accident"; the qualification having already been sufficiently covered by other instructions.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 296.*]

10. MASTER AND SERVANT (§ 137*)—INJURIES—NEGLIGENCE.

Where a freight train which was running ahead of intestate's train stopped and sent back a flagman to signal intestate's train, if, under the circumstances the only proper signal was a fusee, the flagman was negligent in not supplying himself with them before leaving the caboose.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 137.*]

11. MASTER AND SERVANT (§ 137*)—MASTER'S DUTY—CARE REQUIRED.

It is a railroad company's duty to exercise reasonable care for the safety of its employes, but it need not exercise more than ordinary care under the circumstances, however hazardous the employment may be.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 137.*]

12. TRIAL (§ 203*)—INSTRUCTIONS—ISSUES AND THEORIES OF CASE.

In an action for intestate's death by the collision of his engine with a freight train ahead of it, because intestate's crew did not see the red lantern sent back by the freight train, where plaintiff claimed that a lantern signal was not adequate under the circumstances, but that a fusee signal should have been used, but there was evidence to support defendant's theory that a red lantern signal was sufficient, a requested instruction embodying its theory should have been given.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 203.*]

Error to Circuit Court, Northampton County.

Action by Wilson's administrator against the New York, Philadelphia & Norfolk Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Plaintiff requested the court to give the following instructions, which were given over objection.

"(1) The court instructs the jury that if they believe from the evidence that Nelson, the flagman of train No. 1, went back a sufficient distance to have warned Parker, the engineer on train No. 49, by the use of tor-

pedoes or fusees, in time for Parker to have stopped his engine and prevented the collision, and that the said Nelson could, in the exercise of ordinary care, have carried with him and used said torpedoes or fusees, but that he either did not carry them with him, or, if he did, did not use them, and, if he had done so, Parker would have stopped his engine in time to prevent the collision, and that his not doing so was a lack of ordinary care on his part, and was the proximate cause of the collision, then they will find for the plaintiff. The court further instructs you that the plaintiff in this case is entitled to recover, although they may believe that Parker was guilty of negligence contributing to the accident, if Wilson was not so guilty, and the brakeman was guilty as aforesaid.

"(2) The words 'ordinary care' as used in these instructions means such care as a man of ordinary prudence would have used under similar circumstances in view of the dangers incident to the service, but what could have been ordinary care under some circumstances might be negligence under other circumstances, and it is for the jury to decide from all the evidence whether ordinary care was used in this case.

"(3) If the jury believe from the evidence that the plaintiff is entitled to recover in estimating the damages, the jury should find the sum with reference:

"First. To the pecuniary loss of his mother and sisters, at a sum equal to the probable earnings of the deceased, considering his age, business capacity, experience, habits, energy, and perseverance during his lifetime.

"Second. They may consider the loss of his care, attention, and society to his mother and sisters.

"Third. They may add such sums as they may deem fair and just by way of solace and comfort to his mother and sisters for the sorrow, sufferings, and mental anguish occasioned by his death. The plaintiff in his declaration claims \$10,000 in damages, and the jury are authorized to award such sum as the evidence justifies, if any, not exceeding the sum so claimed by the plaintiff."

And thereupon the defendant, by counsel, asked the court to instruct the jury as follows:

"(A) The court instructs the jury that, in an action against a railroad company to recover damages for an injury negligently inflicted on a servant of the company, the burden of proof is on the plaintiff to establish the negligence of the defendant by affirmative evidence, which must show more than a mere probability of a negligent act. The evidence of negligence must not be left wholly to conjecture, and, in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master (railroad company) is not compelled to

foresee and provide against that which reasonable and prudent men would not expect to happen.

"(B) If the jury believe from the evidence that Daniel J. Parker, the engineer on train No. 49, was notified at Hallwood Station, a station of the New York, Philadelphia & Norfolk Railroad Company, about 25 miles north of the place of the collision, between trains No. 49 and No. 1, at or about the hour of — o'clock a. m., on the 10th day of April, 1906, the day of the collision between said trains, both being south bound on the same track, a single track, by William D. Nelson, a flagman on train No. 1, to look out for his train No. 1, that it was running ahead of train 49, with a driving hot box, and that fireman, George R. Wilson, of train 49, the plaintiff's intestate, was present and within the hearing of William D. Nelson when said Nelson gave this notice to the said Daniel J. Parker (the said engineer), and that train 1 left Hallwood Station only about five minutes ahead of train 49, and that the weather was very thick and foggy, and that train 49 ran behind train 1, at a speed of about 30 to 40 miles an hour, and if the jury further believe from the evidence that the plaintiff's intestate (George R. Wilson) fireman as aforesaid on train 49 did not keep a faithful and proper lookout with D. J. Parker, the engineer of train 49, for danger signals and obstructions on the said railroad track, in so far as he could in the discharge of his duty as fireman, then the said George R. Wilson, the plaintiff's intestate, was guilty of having participated in the negligence of said D. J. Parker, the engineer, should they believe Parker was in fact negligent, and the plaintiff is not entitled to recover in this action:

"(C) If the jury believe from the evidence that the plaintiff's intestate did not use ordinary care by keeping a faithful and proper lookout for danger signals on the right of way and track, then he contributed to his death, and is precluded from recovering in this action, although the defendant (company) may be chargeable with negligence also.

"(D) If the jury believe from the evidence that the death of the plaintiff's intestate (George R. Wilson) was caused by circumstances which show it was an accident pure and simple, which could not have been anticipated by any reasonable foresight on the part of the company, they must find for the defendant company.

"(E) The court instructs the jury that it is the duty of the railroad company to exercise reasonable care for the safety of its employes, but it is not bound to provide the latest inventions or the most newly discovered appliances. It is not bound to use more than ordinary care, no matter how hazardous the business may be in which the employe is engaged.

"(F) The court instructs the jury that if they believe from the evidence that brakeman Nelson stopped train 49 at Hallwood the

morning of the collision with his red lantern alone, without difficulty, during a fog, that when freight train No. 1 parted just before reaching Exmore the fog was no denser than it was at Hallwood when he flagged No. 49 with his lantern alone, he was not guilty of negligence in going immediately back and attempting to again flag No. 49 with his red lantern, provided the same was swung and used as a danger signal should have been swung or used.

"(G) The court instructs the jury that flagman Nelson was in the exercise of reasonable and ordinary care in attempting to signal train 49 to stop with a red lantern alone immediately preceding the collision, if he had stopped the same train at Hallwood a short time before with the same lantern, provided the weather conditions, such as fog and light, were practically the same at both places at the time the red lantern was used to stop the train, provided the same was swung and used as a danger signal should have been swung or used."

To the granting of which instructions, the plaintiff, by counsel, objected, and thereupon the court granted instructions A, B, D, and E, as prayed for, but refused to grant instructions C, F, and G, as prayed for, but gave instruction C modified as follows:

"(C, as given) If the jury believe from the evidence that the plaintiff's intestate did not use ordinary care by keeping a faithful and proper lookout for danger signals on the right of way and track, in so far as he could in the proper discharge of his duties as fireman, then he contributed to his death and is precluded from recovering in this action, although the defendant (company) may be chargeable with negligence also, provided they believe from the evidence such a lookout would have prevented the accident."

And refused to grant instructions F, and G, to which action of the court in granting the instructions prayed for by the plaintiff, and in refusing to grant instruction C, as prayed for, and in giving the same as modified, and in refusing to give instructions F and G, as prayed for, defendant excepted.

Thos. H. Willcox and E. H. Spady, for plaintiff in error. G. S. Kendall, J. E. Heath, and R. G. Houston, for defendant in error.

KEITH, P. Passenger train No. 49 of the New York, Philadelphia & Norfolk Railroad Company ran into the rear of a freight train on that road, the collision resulting in the death of Wilson, the fireman upon the engine of the passenger train, and this suit was brought by his administrator to recover damages. There was a verdict and judgment for the plaintiff. During the progress of the trial certain exceptions were taken to rulings of the court, which are now before us for review upon a writ of error.

The evidence tends to prove that on the 10th of April, 1906, a freight train consisting

of an engine and 20 cars was moving south upon the roadway of plaintiff in error. Near Hallwood Station the engineer discovered that his engine had a hot box, and his flagman was at once dispatched to notify passenger train No. 49 of the fact. The flagman had instructions to flag the train, to stop it, and to inform the engineer upon that train of what had occurred upon the freight train. The flagman went back a sufficient distance, and, using a red lantern as a signal, flagged passenger train No. 49, brought it to a stop, and delivered his message. The proof is that at the time there was quite a heavy fog; but, notwithstanding that fact, the signal with the red lantern was observed and obeyed by the engineman upon passenger train No. 49. Both trains on this single track were moving southward in the direction of Cape Charles, the terminus of the road, and it appears from the evidence that the train dispatcher at Cape Charles notified the engineman on passenger train No. 49 of the trouble with respect to the hot box upon the freight train, and the telegram giving this information was found upon the person of Parker, the engineman, after his death, he also having been killed by the collision which subsequently occurred.

After leaving Hallwood, and as it approached Exmore, a station 29 miles distant, a coupling on the freight train gave way and the train parted. It was speedily halted, and the flagman, who was in the caboose, was at once sent to the rear to give warning of the situation. His testimony is that, when he left his train and got upon the ground, he could hear No. 49 approaching. He ran as rapidly as he could back along the railroad for a distance of 8 telegraph poles, or 480 yards, waving his red lantern across the track, and continued to wave it until the passenger train had approached so nearly that he was compelled to stand aside to escape being run over. The engineer did not acknowledge his signal or diminish the speed of the train, but rushed by, with the result that his engine collided with the rear of the freight train, and both the engineman and his fireman were killed.

There is evidence tending to prove that both trains had been inspected that morning; that their couplings and appliances were such as complied with the rules of the Interstate Commerce Commission and with the rules in the United States for standard couplings; and that, so far as was disclosed by recent and careful inspection, all of these appliances were in good order.

The rules of the company prescribe that flags of the proper color must be used by day, and lamps of the proper color by night, or whenever from fog or other cause the day signals cannot be clearly seen; that red signifies danger, and is a signal to stop; that an explosive cap or torpedo placed on the top of the rail is a signal to be used in addi-

tion to the regular signals; that the explosion of one torpedo is a signal to stop, the explosion of two torpedoes not more than 200 feet apart is a signal to reduce speed, and look out for a danger signal; that a fusee is an extra danger signal, to be lighted and placed on the track at night in cases of accident or emergency; that a train finding a fusee burning upon the track must stop, and not proceed until it has burned out; that a lamp swung across the track is the signal to stop. And rule 78 provides that "all signals must be used strictly in accordance with the rules, and trainmen must keep a constant lookout for signals." Rule 99 provides that "when a train stops or is delayed, under circumstances in which it may be overtaken by a following train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two torpedoes on the rail when the conditions require it."

When the flagman went back on this occasion, he had with him a red lantern, as already stated, and torpedoes, but no fusees. The evidence is that the passenger train was running at between 30 and 40 miles an hour. At 35 miles an hour the train would have covered the 480 yards between the point at which the flagman made his signal and the rear of the freight train in 28 seconds.

The first assignments of error are to the rulings of the court in admitting certain testimony over the objection of plaintiff in error as set forth in bills of exceptions Nos. 1 and 2.

A witness, C. H. Ames, was introduced on behalf of the defendant, and testified as follows:

"Q. Did you get off the train when the accident occurred? A. Yes, sir.

"Q. Was it foggy there? A. Yes, sir.

"Q. Was it just as foggy as it was at Keller? A. It was later and lighter.

"Q. The same conditions prevailed there as at Keller? A. The day was lighter.

"Q. Was the fog as heavy? A. Yes, sir.

"Q. Was it possible with the conditions that prevailed at the place where the accident occurred to see any kind of light very far?"

To which question defendant, by counsel, objected; but the court overruled the objection, and allowed the witness to answer the question.

"A. Do you want me to specify some distance?

"Q. We want you to specify how far you could see a light."

He was then asked: "Will you please state at what distance you think it possible to have seen the lanterns used ordinarily by the railroad company, if you know what they are, as signal lights?"

"A. I should not think you could see it very far—the length of the car."

To which ruling of the court in allowing the questions to be asked and answered in the connection in which they were asked the plaintiff in error excepted.

The bill of exceptions assigns no reason why the answer should have been excluded. Its object was to get from the witness an opinion as to how far under the conditions which existed the signal given by a red lantern could have been observed on the occasion in question. This is not a matter of expert knowledge. It is a matter of opinion, it is true, resting on common experience, the value of which must be determined by the jury, which has the witness before it and can form some idea of the weight to be attached to his evidence. In this case the witness was upon the train on the morning of the accident. He saw the fog and the lanterns, and was able to give some idea of the distance at which the light of the red lantern in use by railroads on such occasions could be seen.

We think, therefore, that the question and answer were proper; but, even if they were not, we should be indisposed to attach to them such importance as to make them the ground of reversing the judgment.

The second bill of exceptions is to the testimony of James Driscoll. The questions which he was asked were as follows:

"Q. From your knowledge and experience as a railroad man, do you feel qualified to speak as to the running of trains and the use of signals? A. Yes; I think so.

"Q. I would ask you what are the danger signals ordinarily used by railroad companies? A. Red flag by day and red lamps by night, and also they use torpedo and fusee. The torpedo can be used in the daytime and also at night, and the fusee especially goes at night.

"Q. What is a torpedo? A. It is something about the size of a silver dollar, and has two straps to it about two inches long of soft metal. I don't know what the metal is made of. In case of danger, this is a special danger signal used. This torpedo is placed on the rail. One means to stop still, and for the engine not to go any further. It explodes in a terrible way, and that means to stop there. Two placed one rail length apart is a signal to proceed on, and to look out, danger ahead.

"Q. How long does it take to fix or apply a torpedo to the rail? A. You can almost place it as quick as the hand can be used. The metal is very soft, and the rail has the over projection, and you slip it on as quick as that.

"Q. What is a fusee? A. It is a piece about that long, and it has an explosive to the end of it, and it has a piece of steel about that long. They are kept where you can put your hand on it, and you can strike it so, and you can throw it so (indicating), and it burns 10 or 15 minutes. It burns a large

red light. The smoke goes up, and is a danger signal, and that means stop, and not move until that burns out. That is another extra danger signal used by railroad men.

"Q. Did I understand you to state how high a fusee burns? A. It burns tremendous high, and the smoke casts a large red light. I could not tell just how many feet it would show in the elements from the ground up; but it is a tremendous big light."

To this examination plaintiff in error excepted, and assigns the ruling of the court upon it as error.

It appears that Driscoll had been in the railroad business for a number of years as brakeman and engineer, and was therefore qualified to speak and to give his opinion upon the subjects with reference to which he testified. But, even if this were not so, the same facts were proved, without objection, by another witness, and we are of opinion that this assignment of error is not well taken.

When the evidence was concluded, the defendant in error asked for certain instructions, all of which were given; and, while they were excepted to in the trial court, there is no assignment of error with respect to them.

Plaintiff in error also asked for certain instructions, marked "A," "B," "C," "D," "E," "F," and "G." The court gave A, B, D, and E, refused to give instruction C as asked for, but gave it with an amendment, and wholly rejected instructions F and G.

Instruction C, as asked for, told the jury that, if they believed "from the evidence that the plaintiff's intestate did not use ordinary care by keeping a faithful and proper lookout for danger signals on the right of way and track, then he contributed to his death, and is precluded from recovering in this action, although the defendant company may be chargeable with negligence also." The court added to it these words: "Provided they believe from the evidence such a lookout would have prevented the accident."

The fact that his intestate was injured does not entitle defendant in error to recover. He must show that the injury was the result of negligence upon the part of the railroad company. The duty of the railroad company was to use reasonable care to give proper warnings of the danger which threatened the train upon which plaintiff's intestate was an employe. If that was done, then it had discharged its duty, and, if for any cause the signal was not observed, that was no fault of the railroad company. If the failure to observe the signal was due to inattention upon the part of plaintiff's intestate—to his failure to keep "a faithful and proper lookout," as it was his duty to do—of course, there could be no recovery. But suppose the railroad company discharged its duty, could it be made answerable to the plaintiff, although his intestate, with-

out any dereliction of duty upon his part, failed to see, or was unable to see, a proper and sufficient signal of danger?

We think that instruction C, as asked, correctly stated the law; that the proposition contained in the qualification attached to it had already been sufficiently covered by other instructions; and that attaching it to instruction C tended to mislead the jury, and was erroneous.

This brings us to consider instructions F and G. It appears from the evidence and from the instructions asked and given at the instance of defendant in error that the conflicting theories of plaintiff and defendant in the court below were as follows: The theory of plaintiff, defendant in error here, was that under the circumstances as they existed immediately before and at the time of the collision, when the flagman went back up the track to stop passenger train No. 49, it was his duty to take with him not only the red lantern, but torpedoes and fuses, to go back as far as he safely could under the circumstances, and attach a torpedo and a fusee to the track in the proper manner. This theory of the case is presented in instruction No. 1. The theory of the defendant, plaintiff in error here, is that the danger signal provided by the rules and in customary use on such occasions is the red lantern at night; that the proper use of the torpedo and fusee is to put them upon the track as a warning to a following train when the flagman has been recalled by a signal from his own train, and this is the theory presented by instructions F and G.

It will be recalled that the testimony of the flagman tends to prove that he went as rapidly as possible to the rear, and as far as he could go with safety; that he waved his red lantern as a signal, as he had done a very short time before at Hallwood Station; that the conditions at Hallwood and at Exmore were substantially the same; that he met the on-coming passenger train at a distance of 480 yards from the rear of the freight train; that it was running at a rate of 35 miles an hour; and that he had no time to put down a torpedo or a fusee. And when it is recalled that a train going at that rate of speed would cover the distance of 480 yards in 28 seconds, and that, if he had stopped a sufficient length of time before meeting the passenger train to have attached the torpedo or fusee to the track, it would have resulted in his giving a signal at a distance short of 480 yards from the rear of the freight train by so much space as would have been covered by the passenger train while he was placing the torpedo or fusee, we cannot say that the flagman confronted with these difficulties which he had to meet within the brief period of 28 seconds judged unwisely in confining himself to giving the signal with the red lantern. As a matter of fact, he did not have the fusee with him, but that we presume does not affect the sit-

uation; for, if that was under the circumstances the only proper signal to have been given, then he was not in the exercise of reasonable and proper care in not supplying himself with them.

As the court told the jury in instruction E, it was the duty of plaintiff in error to exercise reasonable care for the safety of its employes; but it was not bound to use more than ordinary care no matter how hazardous the business in which the employe was engaged. There being evidence, then, tending to show that, under all the circumstances a signal with a red lantern would have satisfied the obligation of plaintiff in error, the instructions in question should have been given.

In *Richmond Traction Company v. Martin's Adm'r*, 102 Va. 209, 45 S. E. 886, Judge Whittle says that: "Where two theories of a case are presented by the evidence, upon one of which the jury has been sufficiently instructed, it is error to refuse an instruction based upon the other theory of the case which, if sustained, would require a different verdict, or to add to such an instruction a qualification which would withdraw from the jury the consideration of the last-mentioned theory."

And in *Richmond Passenger, etc., Co. v. Gordon*, 102 Va. 498, 46 S. E. 772, Judge Buchanan says: "Where there is evidence tending to prove that the injury sued for was caused by the concurrent and co-operative negligence of both plaintiff and defendant, and also evidence tending to prove that the defendant's negligence alone was the proximate cause of the injury, each party has the right to have his view or theory of the case presented to the jury by proper instructions for that purpose." See, also, *Phillips on Instructions to Juries*, § 101, and cases there cited.

We are of opinion that the judgment of the circuit court must be reversed, and a new trial awarded.

Reversed.

Upon Petition to Rehear.

This case is before us upon a petition to rehear the judgment entered at a former day of the present term reversing the judgment of the circuit court and directing a new trial.

The petition points out an error of fact in the opinion which is the basis of the estimate made by the court as to the time in which the passenger train which the flagman was sent back to signal, running at the rate of 35 miles an hour, would cover the distance between the point at which the signal was given and the freight train, which by the breaking of a coupling had parted and been brought to a standstill. The opinion, as filed, after stating that immediately upon the accident to the freight train the flagman had been hurried to the rear to notify an approaching passenger train, and had go-

at a run for the distance of eight telegraph poles, goes on to refer to that distance thus covered by the flagman as 480 feet, and repeats the error whenever thereafter in the opinion the distance between the freight train and the point reached by the flagman is mentioned.

Telegraph poles it is a matter of common knowledge are 60 yards apart, and it is agreed in the case that such is the fact. The true distance, therefore, was 480 yards, or 1,440 feet, and the time required for the passenger train to cover that distance was about 28 seconds, instead of 9½ seconds as stated in the opinion.

We admit the error, and thank counsel for giving us the opportunity to correct it.

The fact that Nelson, the flagman, went back 480 yards, instead of 480 feet, does not place the defendant in error in any better or stronger position, and, after giving the several points made in the petition a careful consideration, we are still of opinion that the conclusion heretofore announced was right, and the rehearing asked for is denied.

Refused.

(132 Ga. 677)

WAY v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 17, 1909.)

1. CARRIERS (§ 185*)—CARRIAGE OF GOODS—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

Where several articles of household furniture, included in a single shipment and covered by one bill of lading, which mentioned them in detail, were delivered in good order to the first of a connecting line of common carriers, for transportation over the entire line, and where the last of the connecting carriers delivered some of the articles to the consignee, but not all of them, in a suit by the consignee against the final carrier, based on its common-law liability, upon proof of such facts and of the value of the articles lost, he made out a prima facie case, and shifted the onus to the defendant to show that it did not receive the lost articles, or otherwise was not liable for the loss; and it was error to direct a verdict for the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 835; Dec. Dig. § 185.*]

2. CARRIERS (§ 177*)—CARRIAGE OF GOODS—LOSS OF GOODS—RIGHT TO RECOVER.

If in such a case the plaintiff was not entitled to recover for articles of clothing claimed to have been packed in a washstand and dresser which formed a part of the shipment and were lost, this would not authorize the direction by the court of a verdict for the defendant, denying any right to recover for the lost furniture.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 177.*]

Atkinson, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Walter G. Charlton, Judge.

Action by W. R. Way against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Way brought suit against the Southern Railway Company for the loss of certain personal property. The evidence for the plaintiff showed the following facts: Through an agent he caused certain household furniture and personal chattels to be shipped from Watertown, N. Y., to Savannah, Ga., consigned to himself. The initial carrier was the New York Central & Hudson River Railroad Company. The final carrier in the line of transportation was the defendant. The first-mentioned company issued a bill of lading acknowledging the receipt of the goods, of which an itemized statement was given, consisting of two bed ends, two bed rails, one washstand, one dresser, and other named articles. The weight was given, in bulk, as 1,625 pounds. The plaintiff was named as the consignee, and the place of destination as Savannah, Ga. It stated that the initial carrier had received the property in apparent good order, "consigned and destined as indicated below, which said company agrees to carry to said destination if on its road, otherwise to deliver to another carrier on the route to said destination." One of the conditions printed on the back of the bill of lading was that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route. At Savannah some of the articles included in the shipment were delivered to the consignee, but others were not. On application by the plaintiff to the delivery clerk of the defendant at Savannah, the latter told him that the goods had been lost in transit, that they would probably turn up, and, if not, that the plaintiff should file his claim with the defendant. The plaintiff then saw the claim clerk, who said he would investigate the matter. The lost goods were never received by the plaintiff. Evidence was introduced as to their value, and that the articles shipped were in good condition when delivered to the first carrier. Among the articles for the loss of which suit was brought was certain wearing apparel, which the plaintiff claimed was packed in the dresser and washstand which were lost. The defendant introduced its agent as a witness, who testified that as between household goods, such as furniture, and such goods as clothes, the higher freight rate was on clothing, and that "freight from Watertown, N. Y., is subject to the southern classification." It also introduced a decision reported in 51 N. Y. 168, 10 Am. Rep. 575 (Belger v. Dinsmore) on the subject of limiting the common-law liability of a carrier, and the valuation of the property shipped, by stipulations in a receipt given by the carrier for the freight. Upon the close of the evidence, the presiding judge directed a verdict for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted.

Saussey & Saussey, for plaintiff in error.
Osborne & Lawrence, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The controlling question is whether the plaintiff made out such a case as required its submission to the jury, or whether the presiding judge was authorized to direct a verdict. The plaintiff showed a shipment of household goods consisting of various articles mentioned, covered by a single bill of lading, and of which the weight was stated in bulk. They were received at Watertown, N. Y., by the New York Central & Hudson River Railroad Company, in good order. The shipment was to be carried to Savannah, Ga., and delivered to the plaintiff. Some time later at Savannah the Southern Railway Company, the last carrier in the line, delivered a portion of the articles included in the shipment to him. The defendant's delivery clerk informed the plaintiff that the goods which were not delivered had been lost in transit, that they would probably "turn up," and that, if they did not do so, the plaintiff should file a claim with the defendant company. The plaintiff never received the lost goods. This suit was not brought on an express contract or based on Civ. Code 1895, § 2298, but upon the common-law liability of the defendant as a common carrier.

1. It is well established that, where personal property is delivered in good order to the first of a connecting line of common carriers for transportation, and the last connecting carrier delivers it to the consignee in a damaged condition, such final carrier may be held liable in an action for the damage, without other proof that such damage was occasioned by his fault, unless he can show that he received the property in the condition in which he delivered it, or that the damage was caused by the act of God or the public enemy. In reference to some kinds of property also it has been held that proof that the damage arose from inherent qualities, and without negligence on the part of the carrier, might furnish a defense. In such a suit against the final carrier, it is not incumbent on the plaintiff, as a part of his case, to show by direct evidence that the property was delivered to the final carrier in good order; but the burden is on the defendant to show that it was not responsible for the damaged condition at the time of delivery. *Forrester v. Georgia Railroad Co.*, 92 Ga. 699, 19 S. E. 811; *Bell v. Western & Atlantic R. Co.*, 125 Ga. 510, 513, 54 S. E. 582. In the decisions of various courts three different reasons have been assigned for this ruling: (1) The presumption of continuity of condition once shown, by virtue of which, upon proof of delivery in good order to the first carrier, the property would be presumed or inferred to continue in the same condition until the contrary was shown. This has been applied even to such articles as cabbages and melons, as will appear from the cases above cited. (2) That a

carrier is not obliged to receive goods in such a damaged condition as to be unfit for shipment, or, if it must receive property from a preceding carrier in a damaged condition, it does not have to receive them as in good order, but may receive them specially as in bad order; and that, if it does receive and deliver them, in the absence of any proof that they were not received as in good order, it may be presumed that they were so received. *Breed v. Mitchell*, 48 Ga. 536; *Paramore v. Western R. Co.*, 53 Ga. 383, 386. (3) That, when the shipper resigns his property into the custody of the initial carrier, it becomes practically impossible for him to watch it at all points during the progress of transportation over the connecting lines, or to know just where the damage was done, or in the custody of which carrier the property was at the time, that the condition in which each carrier received it lies peculiarly within such carrier's knowledge, and not that of the shipper, and the proof of such facts is peculiarly in the power of the carrier, and therefore, when the last carrier delivers the property in a damaged condition, and is called on to answer for having done so, the burden is on such carrier to show that it was not responsible for the damage.

Sometimes one of these grounds has been advanced as a basis of a decision, sometimes more than one. They often merge into each other. Thus the statement, in the second ground, that the burden is on the carrier because he might protect himself by expressly receiving the goods as not in good order, involves also the third proposition that it is peculiarly within his knowledge as to whether he did in fact receive the goods as in good order, or as in bad order. In *Smith v. New York Central R. Co.*, 43 Barb. (N. Y.) 225, it was said broadly that: "The owner of goods, suing a common carrier to recover damages for an injury happening to the goods through negligence, must give evidence sufficient to show that the goods were in good condition when they came to the possession of the defendant, as a part of the evidence that they have been injured while in his custody." But, in deciding what would be sufficient evidence for that purpose, it was held that: "Where property is delivered to a railroad company, to be transported by that and another company over their respective roads to its place of destination, it is enough for the owner, in an action against the company delivering the property to recover damages for negligence, to show that he delivered the property to the first company in good order; and the burden is then cast upon the company delivering the goods thus injured of proving that they were not injured while in its possession, or that they came to its possession thus injured." In the opinion *Johnson, J.*, said: "The general rule is that things once proved to have existed in a particular state are to be presumed to have continued in that state

until the contrary is established by evidence, either direct or presumptive. * * * Unless this rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point or in the hands of which company the injury happened. * * * The general rule undoubtedly is that the burden of proof is always upon the party who asserts the existence of any fact which infers legal responsibility; but the exception is equally well established that in every case the onus probandi lies on the party who is interested to support his case by a particular fact, which lies more particularly within his knowledge, or of which he must be supposed to be cognizant."

Counsel for the defendant in error did not controvert the rule that proof of delivery of property in good order to the initial carrier for shipment, and of delivery of it by the final carrier in a damaged condition, will suffice to shift the burden of proof to the defendant, when the last carrier is sued; but they deny that this rule is applicable to a case like the present one, where separate articles were included in the shipment and only some of them were delivered by the final carrier. The authorities have not drawn any distinction as to this rule, between damage and partial loss, and the reasons on which the ruling as to delivery of property by the final carrier in a damaged condition rest, taken as a whole, warrant a like ruling as to partial loss of a shipment. In *Susong v. Florida Central, etc., R. Co.*, 115 Ga. 361, 41 S. E. 566, suit was brought against the final carrier of a car load of stock, and the evidence showed that on delivery one horse was missing, and one was injured. The case as to both was treated as resting on the same basis; but the jury found for the defendant, and it was held that there was sufficient evidence to show that the loss and damage did not occur on the line of the last railroad company, and that it was not liable therefor. In the opinion Mr. Justice Cobb said: "The defendant company having received the car load of horses from the Southern Railway Company at Columbia without exception, there was a presumption that they were received as in good order, and so long as this presumption prevailed the onus was upon the defendant to account for the horse which was missing when the car arrived at Savannah, and to explain the injuries to the horse which was then in a damaged condition."

And so other authorities treat damage and partial loss before delivery as governed by like principles. In 3 *Hutchinson on Carriers* (3d Ed.) § 1348, it is said: "But a connecting carrier, who has completed the transportation and delivered the goods to the consignee in a damaged condition or deficient in quantity, will be held liable in an action for the damage or deficiency, with-

out proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them. * * * And the presumption which applies to the last of a line of connecting carriers, that the goods were delivered to it in the same condition as they were delivered to the first carrier, applies also to any intermediate carrier in whose possession the goods have been found in a damaged condition." In *Savannah, Fla. & Western Ry. Co. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551, it was held that where goods are transported by connecting carriers, and some of them are lost or injured, and the last carrier is sued therefor, it will be held liable, in the absence of proof that the loss or injury occurred on some preceding line, on the presumption that the goods were delivered to it in the same condition in which they were delivered to the first carrier. In the opinion of Maxwell, J., a number of authorities on the subject were cited and discussed. He said: "The reason of the rule of evidence is founded upon the better means the connecting carriers have to ascertain where the loss occurred." In that case the shipment was of a car load of household goods and building material, some of which were lost and others damaged. The railroad sued was not in fact the final carrier, but was the last railroad company, which delivered the shipment to a boat line for transportation to the destination. In *Laughlin v. Chicago & Northwestern Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493, a considerable quantity of cloth was shipped in three boxes, and transported by successive carriers. When delivered it was found that four pieces of cloth were missing. In a suit brought against the last carrier, it was held that the presumption was that the loss occurred through the fault of the defendant, and the burden of exculpating itself was shifted to it. In the opinion Dixon, C. J., said: "If the plaintiffs knew or could prove in whose custody the boxes were when the clothes were taken, there would be no hardship, perhaps, in requiring them to sue that company; but the plaintiffs do not know, nor is it possible for them to ascertain, this, and, unless aided by presumption, they are without remedy, which is a positive and certain injustice. * * * The clothes may have been taken while the boxes were in its custody. It is not certain that they were not, and therefore not certain that injustice has been done the defendant. On the other hand, the wrong and injustice done the plaintiffs, if they are dismissed without remedy, are certain. They are no matter of doubt or speculation. If there were no redress in such case, it could no longer be the boast of our law that there is no wrong without its remedy, and the strict liability of common carriers, whenever two or more are associated in the transportation or connected in the line of route, would be at an

end." In *Gwyn Harper Mfg. Co. v. Carolina Central Railroad*, 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675, a large amount of flour was shipped under one bill of lading, and all of it was delivered except 20 bags, which were lost. In the opinion Douglas, J., said: "This court has repeatedly held that, 'among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption.' * * * We think that the same rule holds good where only a part of the shipment is lost, because that is the nature of the damage to the shipment, and the carrier in whose hands the remainder is found is fully as able to protect itself as it would be in the case of breakage or other damage. Whether this rule would apply where no part of the shipment is found in anybody's hands may be a different question." In *Atlanta & West Point R. Co. v. Broome*, 3 Ga. App. 644, 60 S. E. 355, the suit was for shortages in several shipments of coal. It was shown that the plaintiff delivered the cars of coal to the initial carrier, that the final carrier received the cars, collected the freight, and effectuated delivery to the consignee, but that when delivered there was a shortage in the amount of the coal. The same principle was applied. See, also, *Southern Express Co. v. Hess*, 53 Ala. 19; *Adams Express Co. v. Walker*, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412; *Elmore v. Naugatuck R. Co.*, 23 Conn. 482, 63 Am. Dec. 143.

The case of *Southern Ry. Co. v. Allison*, 115 Ga. 635, 42 S. E. 15, does not conflict with the ruling now made. There suit was brought against the railway company for the loss of two bales of cotton alleged to have been delivered to it. The evidence showed that the plaintiff had a lot of cotton in his yard about 100 yards from the defendant's depot, and it was sought to prove that 45 bales had been delivered to the defendant for transportation. All were transported and delivered except two bales, but the evidence failed to show that they were ever placed in the custody of the carrier at all. It was not a case of successive common carriers, but a failure to prove any shipment of the two bales. Nor does this ruling conflict with that in *Cohen & Hargrove v. Rome R. Co.*, 45 Ga. 293. In that case suit was brought for the nondelivery of certain goods which were alleged to have been shipped from New York to Rome, Ga. There was no proof that the defendant ever had or undertook to carry the goods on account of which suit was brought, and the proof was very strong that they never came into the possession of that company or upon its road. The jury found for the defendant. A motion for a new trial was overruled, and this judgment was affirmed.

On behalf of the defendant in error it was urged that the cases, if any, where partial

loss could be analogized to damage should be confined to those in which goods were shipped in a car load lot, or in a single box, bundle, or package, or the like, and in which the receipt of the car or of the box, bundle, or package might carry some inference of the receipt of that which was in it when in the hands of the initial carrier; and that the rule has no application in this case, where the bed, washstand, dresser, and other articles were mentioned specifically in the bill of lading, and were not shown to have been fastened together or included in a single car load, or even forwarded together. It was urged that delivery of some of the articles by the final carrier raised no presumption or inference that it received the other articles which were not delivered, and that, if it never received them, it was not liable for their loss. The authorities cited above do not make any distinction as to whether or not the shipment was included in a single car or box, nor do they refer to that as a controlling factor in the decisions made. In the *Laughlin Case*, a considerable quantity of cloth was shipped in three separate boxes, though apparently in one shipment. In the case of *Gwyn Harper Mfg. Co.*, it was only stated in the opinion that the action was to recover for the loss of 20 bags of flour forming part of a shipment. If the goods were included in a single car or box, it might add greater force to the presumption and make it more difficult to be overcome; but the nonexistence of that fact would not destroy the rule as to property included in one shipment as one lot or aggregate, under one bill of lading. Here the articles of personalty were included in a single shipment, a single bill of lading was issued for them, and their weight in bulk was marked upon it, emphasizing the fact that the shipment was treated as an entirety. The freight charges were apparently upon the whole, not upon separate articles. In pursuance of this shipment the defendant, as the final connecting carrier, undertook to act, and did deal with and handle at least a part of the property which was to be transported. It was shown to have been in touch with the shipment, at least with a part of it, and the shipment was single, though composed of details. Whether the last carrier received only a part of such shipment was peculiarly within its knowledge. It was almost impossible for the shipper to prove just where the loss occurred. The sound reasoning on which the rule above announced rests is sufficient to cover the facts of the case, and to shift to the defendant the burden of showing that it did not receive the other articles which formed part of the shipment, or that it was not responsible for their loss. The rule against founding a presumption of fact on a presumption of fact is not relevant. It is a question of what proof will make a *prima facie* case against a common carrier. Whether this is done by direct proof alone or with the aid of a presumption, if a sufficient case

of loss by a common carrier is shown—sufficient, if not rebutted—the law then declares the liability of the carrier and the defenses open to it.

2. It was contended that the suit was not only for certain household goods, such as a dresser and a washstand, but also for certain articles of wearing apparel, which were claimed to have been packed in those pieces of furniture, but which were not mentioned in the bill of lading, and that this was a fraud which would prevent any recovery. If it should be conceded that certain articles were packed in the dresser and washstand, and that for them no recovery could be had, proof of this fact alone would not authorize the presiding judge, as matter of law, to direct a verdict for the defendant altogether. On this subject, see *Charleston & Savannah Ry. Co. v. Moore*, 80 Ga. 522, 5 S. E. 769.

What has been said shows that the judge erred in directing a verdict, and renders it unnecessary to discuss the question of practice as to the grant of a nonsuit or the direction of a verdict if the plaintiff's evidence failed to make out a prima facie case, or as to the effect of the New York decision introduced in evidence.

Judgment reversed. All the Justices concur, except ATKINSON, J., who dissents.

ATKINSON, J. (dissenting). In a suit for a breach of contract, the burden is upon the plaintiff to establish both the contract and the breach. If a common carrier undertakes to carry goods over its line, it does so under a contract, express or implied, faithfully to perform the service undertaken. If no express contract is made, the mere fact of receiving goods to be carried will be a circumstance from which a contract will be implied. As will be seen from the cases cited by the majority, it has been held that, if the last carrier of a line of connecting carriers delivers goods to the consignee in a damaged condition, the burden of proof will be upon such carrier if it would avoid liability for the injury. So, too, where goods are shipped in bulk, and the car or crate in which they were contained is delivered by the last carrier with some of the goods missing, the burden of proof will be upon such carrier. Such rulings must rest upon the theory that the fact that the last carrier was found in possession of the goods in a damaged condition, or that it was found in possession of the car or crate in which the goods in bulk ought to be, was in each instance a circumstance sufficient to show an undertaking by that carrier to carry the particular goods which were damaged or lost, and consequently connect the carrier with the contract of shipment, or at least to show an implied contract by such carrier to transport the goods. But the reasons suggested do not apply to a shipment of the character involved in the present case,

where the goods were not found in possession of the last carrier, and where the goods were not shipped in bulk. The loss of the goods sued for may have occurred before any of them reached the defendant. They were separate articles, and not a part of a common bulk. Proof of mere loss is consistent with a loss either before or after the goods went into the hands of the defendant. So long as this consistency exists, the burden will remain upon the plaintiff in order to charge the defendant. Otherwise the presumption will be that the defendant did its duty by delivering such of the goods as actually came into its custody consigned to the plaintiff. As applied to the facts of this case, the argument of inconvenience to the shipper in making proof of loss is not sufficient reason upon which to presume the existence of a contractual relation between the plaintiff and defendant. With respect to the goods sued for, the evidence furnishes no basis for a contract, express or implied, upon the part of the defendant to carry them; and, as the plaintiff's case must rest upon the establishment of the liability arising under contract, there was nothing upon which a verdict for the plaintiff could have been founded.

(132 Ga. 719.)

RORIE v. RORIE.

(Supreme Court of Georgia. July 18, 1909.)

1. DIVORCE (§ 181*)—WRIT OF ERROR—PREMATURE.

Where a suit was brought for a total divorce, and on the first trial the presiding judge directed a verdict for the plaintiff, the defendant could bring such ruling to this court for a review by direct bill of exceptions.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 181.*]

2. DIVORCE (§ 147*)—TRIAL—DIRECTION OF VERDICT.

If the judge of the superior court can in any case direct the jury to find a verdict for a total divorce, it is erroneous to do so where the ground on which the suit is predicated is desertion of the husband by his wife, and the defendant pleads and introduces testimony tending to show that a separation was rendered necessary by reason of cruel conduct on the part of the husband.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 147.*]

(Syllabus by the Court.)

Error from Superior Court, Haralson County; Moses Wright, Judge.

Divorce by J. E. Rorie against F. A. Rorie. Judgment for plaintiff, and defendant brings error. Reversed.

J. E. Rorie brought suit against his wife, seeking a total divorce on the ground of desertion. She pleaded to the jurisdiction, and also filed an answer in which she admitted that they were living separate and apart, but alleged that the plaintiff had been guilty of repeated acts of cruelty which affected her health, and rendered it impossible for her to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

live with him. She admitted that he had asked her to return to his house, but alleged that this was not done in good faith, but only for the purpose of covering up his cruelty. On the trial the plaintiff testified that his wife had continued to live in the house with him until 1898, when she left, and thereafter remained in a state of desertion from him; that the birth of her first child caused injury to her, and for the last two or three years during which she remained in his house she was in bed almost constantly, "pretending to be sick"; and that from 1894 to the time when she left his house she declined to cohabit with him as his wife, though she was able "to walk straight and go where she pleased." He said: "I do not think that she was too sick to have been as a wife to me." He further stated that he had placed his wife under the care of a physician, and had afterwards caused a surgical operation to be performed upon her, and then carried her home, "hoping that she would treat me better than she had in the past, but she became worse instead of better, until she finally left me when we lived at Atlanta Heights in 1898"; that he had at all times been willing to take her back, and had invited her to return, but she had refused to do so; and that he had spoken to her probably 20 times, but she had never spoken to him once. The defendant testified that within two weeks after they were married her husband began to quarrel with and abuse her, and continued to do so from that time until she left him; that she was only a little more than 15 years of age when she married, while he was between 35 and 36; that at the time of the birth of their first child she received injuries from which she had never entirely recovered, and which grew worse until an operation was performed in 1898; that her husband was jealous of her without cause, abused her, and accused her of being too free with other men, though he did not allege actual immorality; that on more than one occasion he used physical violence upon her, shaking his fist at her, threatening her with a whip, pulling her ears, throwing her to the floor, and dragging her; and that he stated that he wished she would leave and return to her people. A doctor who had treated her testified that she suffered from anæmia, neurasthenia, hysteria, and laceration of the perineum. He stated that he knew of no unhappiness between her and her husband; that he had examined her some time before he testified; that she had not entirely recovered from the nervous symptoms; and that her then present condition was such that she should have a servant with her all the time. The plaintiff denied all the charges of cruel treatment which his wife made against him. On the close of the evidence the presiding judge overruled the plea to the jurisdiction, and directed a verdict for a total divorce in favor of the plaintiff, which was entered accordingly. The defendant excepted.

E. S. Griffith, for plaintiff in error. Jas. Beall and Walter Mathews, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1. It was urged on behalf of the defendant in error that the case was prematurely brought to this court, as the verdict directed was a first verdict for a total divorce, and it required two concurrent verdicts at different terms for the dissolution of the bonds of matrimony. It was therefore contended that the case was still pending in the trial court, and could not be brought to this court under Civ. Code 1895, § 5528, which declares that: "No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause, or final as to some material party thereto." The procedure by which a total divorce may be obtained and the bonds of matrimony dissolved differs materially in several respects from ordinary cases at law. The underlying reason for some of these differences is no doubt to be found in the fact that marriage, while termed a civil contract, is very unlike ordinary contracts, which may be made, modified, or abrogated at the will of the parties in interest. In the contract of marriage, and in the preservation and protection of the family relation, and of the offspring, the public, as well as the parties, is concerned. As instances of the recognition of this difference, Civ. Code 1895, § 2431, declares that: "No court in this state shall grant divorce of any character to any person who has not been a bona fide resident of the state twelve months before the filing of the application for divorce." In no other suit is it required that the plaintiff shall reside in the state for a specified length of time. A respondent may recriminate and ask a divorce in his or her favor. Civ. Code 1895, § 2433. If one verdict is found in favor of the respondent, the libellant cannot dismiss his or her suit without the consent of the opposite party. Section 2434. In the dissolution of the marriage contract alimony may be awarded. Section 2435. After the separation of the parties and before final verdict, the power of transfer of his property by the husband is limited. Section 2436. These citations are sufficient to show a marked difference between proceedings to obtain a total divorce and ordinary actions to enforce or rescind contracts, or to recover damages for torts.

The Constitution (article 6, § 15, par. 1; Civ. Code 1895, § 5367) declares that: "No total divorce shall be granted, except on the concurrent verdicts of two juries at different terms of the court." A divorce from bed and board may be granted on the verdict of one jury. Civ. Code 1895, § 2425. Before the

bonds of matrimony are dissolved, there must be two distinct and separate trials, in each of which a verdict shall be rendered in favor of a total divorce. If the first verdict should be in favor of the defendant, no further proceeding could be had by the plaintiff towards obtaining another verdict. Where the basis of the suit is cruel treatment or habitual intoxication, the jury in their discretion may grant either a total or partial divorce. Section 2427. In some respects, a proceeding to obtain a total divorce is like two suits, consolidated into one, the verdict in the first of which is necessary before proceeding to obtain one in the second. The second verdict declares the rights and disabilities of the parties. Section 2445. It has been held that, after the rendition of two verdicts in favor of a total divorce, it is not indispensable that a judgment declaring the divorce granted should be entered up in order for the marriage to be legally dissolved. *Burns v. Lewis*, 88 Ga. 592, 13 S. E. 123 (2). This was under the Constitution of 1868, but the provision on this subject there made was similar to that in the present Constitution. Civ. Code 1895, § 2441, provides that "new trials may be granted from verdicts on applications for divorce, as in other cases." This applies to either verdict. If a motion for a new trial after the rendition of the first verdict for a total divorce is overruled, it has been held to be a proper subject of exception to this court. *Gholston v. Gholston*, 31 Ga. 625. If so, there would seem to be no sound reason why a direction of a verdict by the presiding judge cannot be brought up by bill of exceptions without the formality of moving for a new trial. The first verdict is not a mere interlocutory ruling entering into or leading up to the second trial, and as to which a bill of exceptions pendente lite should be filed. If unreversed, it stands as final, though its effect is not to grant a total divorce until the second verdict is rendered. The two trials are conducted as distinctly as if they were based on two separate suits. It would be folly, if the court erred in the admission of evidence or in a charge to the jury on the first trial, to file exceptions pendente lite, and await the second trial. Even though the jury should fail to grant a total divorce on the second hearing, there would stand on the record unreversed a verdict of one jury declaring that the defendant had been guilty of the misconduct on which the suit was predicated; and, if he could not by a motion for a new trial or exceptions set aside that verdict, though erroneous, he would have no remedy against being branded by this unreversed declaration of the jury, whatever might be the second verdict. Such is not the law. Each trial is so far distinct that quod hoc it may be treated as a termination of the case within the meaning of the statute, so as to allow a motion for a new trial to be made

and exception taken to the judgment thereon, or direct exception taken to the direction of a verdict.

2. Was the presiding judge right in directing a verdict in favor of the plaintiff for a total divorce? We think not. In addition to what has been said above in regard to the peculiar nature of actions for divorce, and the interest of the public therein, it is declared by Civ. Code 1895, § 2440, that "no verdict or judgment by default shall ever be taken in a suit for divorce, but the allegations in the petition must be established by evidence before the juries." Section 2430 declares that the confessions of a party to acts of adultery or cruel treatment must be received with great caution, and, if unsupported by corroborating circumstances, and made with a view to be evidence in the cause, shall not be sufficient for the granting of a divorce. Section 2429 provides that, if the adultery, desertion, cruel treatment, or intoxication complained of shall have been occasioned by collusion with the intention of causing a divorce, or if the party complaining was consenting thereto, or if both parties have been guilty of like conduct, or if there has been voluntary condonation and cohabitation subsequently, and with notice of the acts, no divorce shall be granted; "and in all cases the party sued may plead in defense the conduct of the party suing, and the jury may, on examination of the whole case, refuse a divorce." In divorce cases which are proceedings ex parte the duty is expressly placed upon the judge to see that the grounds are legal, and sustained by proof, or to appoint the Solicitor General, or some other attorney of the court, to discharge that duty for him. Section 2455. He should not allow a divorce to be granted by mere consent or default or collusion, or where no ground therefor is made out. It may be gravely doubted if it would not be erroneous for him to direct a verdict granting a total divorce in any case. At least it was so in this case. The wife pleaded and testified that her husband had been guilty of a long series of cruel acts, and had even told her on several occasions that he wished she would leave and go to her people, as she was no longer of any service to him, and that he caused the separation by his own conduct. There was evidence indicating that the defendant by reason of an injury resulting from childbirth was afflicted with hysteria. But the jury saw her and heard her evidence, as well as that in conflict with it, and they could determine whether her statements were accurate or were the result, in whole or in part, of her unfortunate condition. The judge should not have laid hold of the situation, determined these facts for them, and directed a verdict.

Judgment reversed. All the Justices concur.

(132 Ga. 726)

ATLANTA, B. & A. R. CO. v. SMITH.

(Supreme Court of Georgia. June 18, 1909.)

1. EMINENT DOMAIN (§ 239*)—PROCEEDINGS TO TAKE PROPERTY—APPEAL—CONSIDERATION OF ASSESSOR'S AWARD.

Upon the trial of an appeal from the award of assessors in proceedings for the condemnation of private property, the verdict of the jury should be in favor of the owner for the value of the property and the amount of damages, if any; and the court will in rendering judgment upon such a verdict reduce the amount found by the jury by the amount paid under the award if the award is for a less amount than the verdict, but, if the verdict is for a less amount than the award, the judgment shall be against the owner for the excess of the amount of the award over that of the verdict.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 239.*]

2. APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT APPROVED BY TRIAL COURT.

There was sufficient evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]

(Syllabus by the Court.)

Error from Superior Court, Talbot County; U. V. Whipple, Judge.

Condemnation proceedings by the Atlanta, Birmingham & Atlantic Railroad Company against T. F. Smith. From the award of the assessors, Smith appealed to the superior court, and, from the judgment of that court, the railroad company brings error. Affirmed.

J. J. Bull and A. J. Perryman, for plaintiff in error. Persons & McGehee, for defendant in error.

BECK, J. The plaintiff in error instituted proceedings to condemn a right of way through the lands of defendant in error. The amount condemned was a strip of land containing 17.16 acres, and extending a mile and a half through the lands of the owner of the property sought to be condemned. The evidence as to the actual value of the land per acre varied from \$3 to \$20. The assessors made their award for the amount of \$175. The owner entered an appeal. Upon the trial of the issue arising upon the appeal in the superior court, the jury returned a verdict in favor of the owner for \$500. To the judgment of the court below overruling the motion for a new trial made to set aside the verdict, the railway company excepted. The motion for a new trial in addition to the general grounds contains exceptions to the following portions of the charge: (1) "Now, gentlemen, under these instructions, it becomes necessary for you to find a verdict in favor of Mrs. Smith at least for a fair, reasonable, adequate, and just compensation for her land." Error is assigned upon this charge, because "the proceeding was under a condemnation proceeding, and

the assessors had made an award of certain sum to the defendant as being the value of the land, which said award had been paid, and the court should have charged that this award should have been considered and deducted, provided the jury found that she was entitled to more damages than the award."

(2) "In any event, as I have charged you in this case, your verdict will be for the appellant, Mrs. Smith, and the form of your verdict will be, 'We, the jury, find for the appellant' so many dollars—whatever amount you have ascertained to be her damages under the rules which I have given you—'We, the jury, find for the appellant' so many dollars, with costs of suit." Error is assigned upon this charge, because "it was a direction to the jury to find a verdict, and no qualifications to the jury that, if under the evidence the appellant had been paid the full value of the land under the condemnation proceeding, then she would not be entitled to recover, or that the sum she had been paid should be deducted from the verdict the jury might find."

1. Civ. Code 1895, § 4678, makes the following provision for appeal and the issue to be submitted to the jury upon the appeal: "In case either party, or the representative of either party, is dissatisfied, he or they have the right, within ten days from the time the award is filed, to enter in writing an appeal from the award to the superior court of the county where the award is filed; and at the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property taken or the amount of damage done, with the same right to move for a new trial and file a bill of exceptions as in other cases at common law." Section 4680 declares: "The tender, payment, or acceptance of the amount shall not prevent either party from prosecuting the appeal. If the amount so awarded by the assessors is less than that found by the final judgment, the company shall be bound to pay the sum so finally adjudged, in order to retain the property; and if it be less than that awarded by the assessors, the owner shall be bound to refund any excess paid to or received by him, and a judgment for such excess shall be rendered against him, to be collected by levy as in other cases." Construing these two sections together, the evident scheme of the legislative provisions is that the trial upon appeal is a de novo investigation, in which the jury are to determine the value of the land taken and the amount of damages, if any. In any event, where land is condemned, the owner, of course, is entitled to the actual value of the property taken, and is entitled to a verdict at least for that amount; and this was the evident meaning of the instructions of the court excepted to. Counsel for the plaintiff

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in error insists, however, that the amount of the award rendered by the assessors should have been considered by the jury; and that it should have been deducted from the amount of the damages, provided the jury found that the owner was entitled to more damages than the award. The court properly withheld from the jury the consideration of the amount of the assessors' award. There was no reason why the finding of another tribunal upon the facts of the case should have been before the jury. The question submitted to them for solution was to be determined by them independently of the antecedent action of the assessors. The jury had to ascertain under the evidence submitted to them the value of the land and the amount of the damages. The finding of the assessors could not have been evidence for their consideration. In cases like this the amount of the award, which is entered on the minutes of the court, is to be deducted in entering up the judgment from the amount found by the jury if the verdict is for a greater amount than the award; and, should the verdict be for a less amount than the award, then judgment should be rendered in favor of the condemnor against the owner. And the court below, in accordance with the law, when the judgment was entered, preserved the rights of the plaintiff in error by deducting from the amount which the jury had found in favor of the owner the sum which the plaintiff in error had already paid under the award of the assessors.

2. There was evidence to support the finding of the jury; and that finding, having received the sanction of the trial judge, will not be disturbed here.

Judgment affirmed. All the Justices concur.

(123 Ga. 778)

HOOD v. HOOD.

(Supreme Court of Georgia. June 22, 1909.)

1. INJUNCTION (§ 26*)—SUBJECTS OF RELIEF—PROCEEDINGS AT LAW—WANT OF JURISDICTION.

The general rule is that a proceeding at law will not be enjoined on the ground of want of jurisdiction in the tribunal in which the same is instituted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 29; Dec. Dig. § 26.*]

2. INJUNCTION (§ 74*)—SUBJECTS OF RELIEF—EXERCISE OF JUDICIAL FUNCTIONS.

An injunction will not be granted to restrain an official in the exercise of his judicial functions. The writ lies only against suitors in the proceedings before him. 16 Am. & Eng. Enc. L. 365; 22 Cyc. 787; 1 High, Inj. § 46; Joyce, Inj. § 545.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 142; Dec. Dig. § 74.*]

3. INJUNCTION (§ 26*)—SUBJECTS OF RELIEF—PROCEEDINGS AT LAW—WANT OF JURISDICTION.

Where a husband and wife were living separately, and no divorce suit was pending, and

the wife brought a petition for alimony under Civ. Code 1895, § 2467, and thereafter brought before the ordinary a petition for habeas corpus against her husband, for the purpose of obtaining the custody of their minor children, and while this last-mentioned proceeding was pending the husband filed a suit for total divorce, and subsequently presented to the judge of the superior court a petition wherein he sought to enjoin the wife and the ordinary from proceeding in the habeas corpus case, on the ground that the ordinary had no jurisdiction to issue the writ of habeas corpus and to decide the question thereby raised, and that the divorce case ousted any jurisdiction which he might otherwise have had, and if he should determine such question in favor of the wife she might remove the children beyond the jurisdiction of this state, and prayed that the custody of the children should be awarded to the petitioner, and the wife be enjoined from interfering with his custody of them, there was no error in refusing to grant the injunction prayed for.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 26.*]

(Syllabus by the Court.)

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by Ben Hood against Beulah Hood. Judgment for defendant, and plaintiff brings error. Affirmed.

R. L. J. Smith and J. J. Strickland, for plaintiff in error. J. A. B. Mahaffey and Shackelford & Shackelford, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(123 Ga. 687)

SPRINGFIELD FIRE & MARINE INS. CO. v. PRICE.

(Supreme Court of Georgia. June 17, 1909.)

1. INSURANCE (§ 378*)—FIRE POLICY—OWNERSHIP OF GROUND—ESTOPPEL.

Where a policy of fire insurance contained a stipulation that it should be void if the subject of insurance be a building on ground not owned by the insured in fee simple, but at the time the application for insurance was made the company, through its agent, knew that the applicant did not own the land on which the building sought to be insured was situated, the company, in defending an action on the policy, will be estopped from setting up the noncompliance of the insured with this condition of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 968; Dec. Dig. § 378.*]

2. INSURANCE (§ 378*)—FIRE POLICY—NOTICE TO COMPANY—KNOWLEDGE OF CLERK.

An agent of an insurance company fully authorized to make out and issue policies of insurance has power to employ clerks in the ordinary business of the agency; and, if such clerk solicits insurance, and a policy of insurance is duly issued, knowledge of facts material to the risk acquired by the clerk in the solicitation and prior to the issuance of the policy is notice to the insurance company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 973; Dec. Dig. § 378.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. INSURANCE (§ 378*)—FIRE POLICY—FAILURE TO READ—EFFECT.

Reformation is not necessary to avoid the defeat of a policy of insurance on account of any matter in existence at the time of the issuance of the policy, with which the company is charged with knowledge. So, where the duly authorized agent of an insurance company failed to note on the policy containing the stipulation specified in the first headnote that the building which was the subject of insurance was on leased land, the failure of the insured to read his policy, and to observe the company's omission in this respect, is not such laches as will defeat his recovery on the policy by destroying the estoppel of the defendant to dispute the validity of the contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 968; Dec. Dig. § 378.*]

4. INSURANCE (§ 377*)—FIRE POLICY—OWNERSHIP OF GROUND—ESTOPPEL.

Where a tenant rents land from year to year under a verbal contract with his landlord that, in consideration of the payment of an annual rental, the tenant may occupy the premises and erect thereon a building which is to be the property of the tenant and removable by him, and where such tenant erects a building and in his application for insurance notifies the authorized agent of the insurance company that the building is on "leased ground," such information is sufficient to put the insurance company on notice of the character of his interest in the building, and effectual to estop the insurance company from setting up as a defense the stipulation in the policy that the contract of insurance was to be invalid if the building which was the subject of insurance was not on ground owned by the insured in fee simple.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 966; Dec. Dig. § 377.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Paul E. Seabrook, Judge.

Action by L. S. Price against the Springfield Fire & Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Adams & Adams, for plaintiff in error. R. R. Richards and Saussy & Saussy, for defendant in error.

EVANS, P. J. This is a suit by L. S. Price against the Springfield Fire & Marine Insurance Company to recover damages sustained by reason of the destruction of two certain buildings described in a policy of insurance issued by the defendant to the plaintiff. The petition contained an equitable feature, in that it sought to reform the policy in case the court should hold that the pleaded facts required reformation of the contract as essential to recovery. The defendant demurred generally and specially, the plaintiff amended to meet the special demurrers, and the court overruled the general demurrer. The case resulted in a verdict for the plaintiff. The court refused a new trial, and the exceptions are to the overruling of the demurrer and the refusal of a new trial.

1. The policy sued on contains a clause that, "if the subject of insurance be a building on ground not owned by the insured in

fee simple," the "entire policy, unless otherwise provided by agreement indorsed hereon or added hereto," shall be void. The petition sets out that the ground on which the buildings were situated was not owned by the insured, but that at and before the date of the issuance of the policy a duly authorized agent of the company was informed by the insurer that the buildings upon which insurance was sought were upon leased ground, and the agent of the insurance company was instructed to so note upon the policy, which by accident or mistake he failed to do. The policy also contained the further stipulation that "no officer or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The insurance company defends its refusal to pay the amount of damage done the property insured because the buildings were upon ground not owned by the insured. In *Johnson v. Aetna Insurance Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92, it was held that: "Where a policy of fire insurance contained a stipulation that it should be void 'if the subject of insurance be a building on ground not owned by the insured in fee simple,' but at the time the application for insurance was made the company, through its agent, knew that the applicant did not own the land on which the building sought to be insured was situated, it will not be heard in defense to an action on the policy to set up the noncompliance of the plaintiff with this condition of the contract." Restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract, where it appears that the agent has delivered it, and received the premiums, with full knowledge of the actual situation. *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Mechanics' Ins. Co. v. Mutual Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457; *Johnson v. Aetna Ins. Co.*, supra; 3 Cooley's Briefs on Ins. 2351. From these authorities the conclusion follows that, if notice was given by the insurer to an authorized agent of the company that the buildings insured were upon leased ground prior to the issuance of the policy, the company could not avoid the policy if the proof showed that the buildings were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon leased premises, even if that fact was not noted on the policy.

2. The defendant, however, contends that the person whom the plaintiff notified at the time of the issuance of the policy that his buildings were located on leased ground was not its agent, but was a mere clerk or employé in the office of the company's agent, and that such clerk was not its agent for any purpose. On the trial it was developed that the defendant appointed George S. Haines as its agent, "with full power to receive proposals for insurance against loss or damage by fire in Savannah and vicinity, to receive moneys and countersign, issue, renew, and consent to the transfer of policies of insurance signed by the president and secretary of the said Springfield Fire and Marine Insurance Company, subject to the rules and regulations and to such instructions as may from time to time be given by the company." Haines did an insurance business in Savannah, rented and paid for his own offices, and employed and paid his clerks and other help without any participation by the company. He employed N. L. Bedford and J. A. Sullivan in the conduct of his insurance business. Bedford wrote up the forms of policies on the typewriter, filled in the descriptions, etc., and Haines would sign them. Bedford solicited insurance and delivered policies. In December, 1901, he solicited the plaintiff to insure with the defendant the buildings covered by the policy sued on, as plaintiff had his stock and some other buildings insured with defendant. Prior to that time, the plaintiff had had them insured with A. G. Guarard & Sons, and the policy with that agency had noted on it that the buildings were on leased ground. When Bedford solicited this insurance, the plaintiff informed him that the buildings were on leased ground, and requested him to note that fact on the policy, as the Guarard agency had done. Bedford requested that he be furnished with the old policy to write the new one from, which was done. When the policy was delivered by Bedford, the plaintiff asked him if it was all right, and, on being assured it was, placed it in his safe. Later the plaintiff permitted one Andeppa to remodel one of the three buildings covered by the original policy, and insure it for himself, and at that time telephoned the office of Haines to send out a man, and Sullivan came. The plaintiff testifies that he explained his rights and those of Andeppa to Sullivan, and on March 20, 1902, the old policy was canceled, and a new one issued, covering the two remaining buildings of the plaintiff, insured in the canceled policy. At the expiration of the year, on March 20, 1903, a renewal policy was brought to the plaintiff by Bedford. When this policy was delivered, the plaintiff did not look at it, but placed it in his safe, and never had occasion to examine it until after the fire, when the adjuster told the plaintiff that his policy did

not have it noted thereon that the buildings were on leased premises. Bedford testified that the written part of the policy was in his handwriting. At the time it was written and delivered, he wrote policies, and did any work about the office that was necessary in the office of Haines. When an application was made for a policy, he would write it up and present it to Mr. Haines for his signature, and he would sign it. Applications for insurance were sometimes in writing, but usually oral or over the telephone. After a policy was signed, he would deliver it. He inspected risks about town, and reported to Haines, when Haines could decide whether he would effect the insurance or not. Soliciting insurance was a part of his business, and he was not paid extra for such work. He was aware that these buildings were on leased ground, but does not remember whether this fact was communicated to him when the first policy was written or not. On some occasions Haines would sign up blank policies and leave them with Bedford to be filled in and delivered. It was also in evidence that it is customary for local agents in Savannah to employ clerks to get information in regard to the condition of property and examine risks. Dependent upon the information received through clerks, they issue the policy. Haines had authority to have insured these buildings on leased ground, but would not have done so without communicating with the company. Bedford did not inform him that these buildings were on leased ground.

It is well settled that an agent who is supplied by the insurer with blank policies properly signed by the company, and who is authorized to fill up, countersign, and deliver policies to applicants for insurance, is a general agent of the insurance company in the matter of soliciting and accepting risks. *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; *May on Ins.* § 126; 1 *Cooley's Briefs on Ins.* 347; *Jesse French Piano Co. v. Cardwell*, 114 Ga. 340, 40 S. E. 292. So that the practical question is whether knowledge of facts material to the risk acquired by the soliciting agent in the employment of such general agent of a fire insurance company prior to the issuance of the policy, and while acting as such soliciting agent, is notice to the insurance company. Our Code declares that "whatever one may do himself may be done by an agent, except such personal trusts in which special confidence is placed on the skill, discretion, or judgment of the person called in to act; so an agent may not delegate his authority to another, unless specially empowered to do so." *Civ. Code* 1895, § 2999. The inhibition against an agent delegating his power as contained in this Code section is only declaratory of the common law, and is but another form of expression for the maxim, "*Delegata potestas non potest delegari.*" A principal may expressly authorize his agent to appoint a

subagent, and under some circumstances authority to appoint a subagent between whom and the principal a privity of contract will exist may be implied. Instances of an agent's implied authority to appoint a subagent may be found in cases where from the conduct of the parties to the original contract of agency, or from the nature of the particular business which is the subject of the agency, or where substitution is authorized by general custom or usage, or where substitution is authorized by necessity, it may reasonably be presumed that the parties to the original contract of agency contemplated that such authority should exist. 1 Clark & Skyles on Agency, § 345. The power of an insurance agent, authorized to contract for risks, receive and collect premiums, and deliver policies, to confer authority on his clerk or assistant to exercise the same powers, so as to create a privity between the clerk and the insurance company, has been frequently before the courts of last resort of this country. The consensus of judicial opinion is to the effect that the knowledge of facts material to the risk by a clerk of the agent sent by him to solicit insurance and take applications binds the company as much as if the agent, the clerk's master, knew it. *Electric Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225; *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721; *Carpenter Co. v. Insurance Co.*, 135 N. Y. 298, 31 N. E. 1015; *Bergeron v. Pamlico Ins. Co.*, 111 N. C. 45, 15 S. E. 883; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514, 46 S. W. 95; *Graham v. Am. Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707; *Goode v. Ga. Home Ins. Co.*, 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. Rep. 817; *Davis v. King*, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 1 S. W. 689, 4 Am. St. Rep. 744; *International Trust Co. v. Norwich Ins. Co.*, 71 Fed. 81, 17 C. C. A. 608; 1 Clement on Ins. 425, Rule 26; 19 Cyc. 812. The reason for the rule has been thus stated by the Supreme Court of Alabama: "The maxim, 'Delegatus non potest delegari,' does not apply in such case, though the service inherently is of a personal character, because authority to delegate delegated powers is found by implication from the extent and general nature of the business in the original authorization to the general agent." *Insurance Co. v. Thornton*, 130 Ala. 222, 30 South. 614, 55 L. R. A. 547, 89 Am. St. Rep. 30. In the case of *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 586, the court said: "We know according to the ordinary course of business that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to trans-

act." The Supreme Court of Michigan said: "Courts will recognize the ordinary course of business. It must be well known that these local agents do their business to a very large extent through clerks, who solicit insurance, make out applications and policies, and generally attend to the business of their employers. In such cases their acts are as binding as though done by the agents themselves." *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85. And Mr. Cooley in the third volume of his *Briefs on Insurance*, p. 2527, summarizes the law on this point as follows: "The business of an insurance agent is generally of such nature and extent that it requires the employment of subagents and clerks if it is to be taken care of properly. Such subagents or clerks may be regarded as agents of the company by an insured dealing with them. Hence it follows that notice given a subagent or clerk of matters vitiating a policy will be imputable to the company, the same as though communicated to the regularly appointed agent." This author states in the same connection that: "A contrary rule prevails in some courts, where the position is taken that a subagent or clerk will not be regarded as the agent of the company unless he is in the employ of the company"—citing *Morris v. Orient Ins. Co.*, 106 Ga. 472, 33 S. E. 430, as sustaining this exception. We do not think that a careful examination of the *Morris* Case justifies Mr. Cooley's classification. In that case *Morris* sought to escape the effect of a clause avoiding his policy if additional insurance was taken by showing that he had written Cobb, the company's agent, at the time of taking out this additional insurance, and in reply thereto a letter was received from a clerk of Mr. Cobb, acknowledging receipt of the communication, the writer saying: "Mr. Cobb isn't at home, but I will inform him as soon as he comes." It was said in the opinion that: "No attempt was made to show that the writer of the letter last above referred to was in any sense the agent or representative of the insurance company of which Mr. Cobb was the agent. On the contrary, we gather from the meager testimony brought out in this regard that this person was merely a clerk in the service of the agent, not in the employ of his principal in any capacity." In the *Morris* Case, as in the case of *Lippman v. Aetna Ins. Co.*, 108 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62, the waiver sought to be set up was of a condition subsequent to the issuance of the policy, and not of a condition precedent to its issue. The rule stated in reference to waivers of conditions precedent will not generally apply where the waiver relied on is one that has been taken subsequently to the delivery and acceptance of a policy, as the insured is then presumed to have knowledge of the restrictions, and will be bound thereby. 3 Cooley's *Briefs on Ins.* 2513; *Johnson v. Aetna Ins. Co.*, 123 Ga. 406, 407, 51 S. E. 339, 107 Am.

St. Rep. 92. Further, it did not appear in the Morris Case that the clerk had any authority whatever in reference to the insurance business of Mr. Cobb, or that he was even employed in such business, or performed any duties connected therewith. It does not appear that he had anything whatever to do with the soliciting, preparing, or delivering of policies, or even that his duties related to insurance in any way. Nor is there any other case in our reports which forbids us from adopting the rule as laid down by the current of authority, and so well supported on principle. We hold that a general agent, having authority to make and issue policies for an insurance company has power to employ clerks to discharge the ordinary business of the agency; and, where a policy of insurance is duly issued, knowledge of facts material to the risk acquired by such clerk while soliciting the insurance, and prior to the issuance of the policy, is notice to the insurance company.

3. By demurrer, plea, and in several grounds of the amended motion for new trial the defendant seeks to set up as a defense the alleged laches of plaintiff, who, with knowledge that it should be noted on his policy that his houses were on leased ground, received the several policies of insurance without such notation, and kept them in his possession through a period of many months, without reading his policy to see if it was so prepared. We do not think that such laches furnishes any ground of defense. In the first place, if plaintiff informed Bedford that his buildings were on leased premises when the application for insurance was made, it was not necessary that that fact should be noted on his policy in order to make it valid. That the plaintiff thought it necessary even after notice does not change its legal effect, nor make it necessary when in law it was not. In the second place, if the laches of the insured in failing to read his policy would in any event release the insurance company from liability to the insured where the insurer had notice of the broken condition at the time the policy was taken, it must do so in every case; for the real laches, if any, occurs in the first instance in receiving a policy without reading it, and in failing to note its conditions. It is a well-known fact of ordinary experience that papers such as insurance policies, deeds, etc., which are usually kept in one's "strong box," are seldom inspected except upon delivery, after which they are filed away not to be disturbed till some future happening again calls for them. It is true that the plaintiff's petition contains an alternative prayer for reformation by having the omitted clause inserted in the policy; but from the charge of the court, and the form of the verdict, the case was submitted to the jury to determine the defendant's liability independently of the prayer for refor-

mation. Reformation is not needed to avoid the defeat of a policy on account of any matter in existence at the time of the issuance of the policy with which the company is charged with knowledge. 1 Cooley's Briefs on Ins. 855. Even if reformation were proper in the present case, it was not necessary, as the plaintiff could have relied upon the estoppel in pais, without invoking affirmative equitable relief. And, granting that the plaintiff's laches might defeat his right to affirmative equitable relief, this would not deprive him of the right to recover what he might be entitled to on the policy in his suit at law. *Trust Co. v. Scottish Ins. Co.*, 119 Ga. 672, 46 S. E. 855.

4. It is insisted that, under the facts of the present case, the ground on which the insured buildings stood was not "leased premises," and, for that reason, plaintiff's information to Bedford was not true, and therefore was not notice to the company which would waive the condition in the policy. It is also contended that under the terms of the contract under which this ground was occupied the buildings became a part of the realty, and were not, in fact, the property of the plaintiff, and that he had no insurable interest therein. It appears from the evidence that the land on which these buildings were situated belonged to the estate of Mary Jane Roberts. The representative of that estate testified that the buildings belonged to plaintiff so far as this estate was concerned. The taxes on these improvements were not paid by the estate. Originally he had rented it as a vacant lot to W. A. Price for a term of years. He does not remember whether under a written lease or not. This was in 1893. Under that contract, Price had the right to place any improvements on it he saw fit, and remove them at any time he saw fit. In 1902 the rent was raised. At that time he assured plaintiff he had no claim to any of the improvements. Price has the same lease he has had since 1893, and he is now trying to arrange to give him a lease for seven years. Witness is prepared, as soon as he can arrange the lease, to give Price a written lease, and it will be stated that the estate makes no claim for the improvements. At the expiration of any rental season the understanding was that Price had the right to remove his improvements and the estate made no claim to them whatever. Since 1902 it had been rented by the year at \$700 per year. He was under the impression that the original lease was in writing. The plaintiff testified that his father had in 1893 rented the place, but the original lease was destroyed. He has seen the lease. Plaintiff was connected with his father in business and afterwards bought his father out, and in buying him out he secured the improvements. He does not remember whether the first lease was for five or ten

(122 Ga. 841)

BARTON v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 26, 1909.)

1. RAILROADS (§ 244*)—BLOW-POST LAW—CROSSING HIGHWAY.

The blow-post law, as embodied in Civ. Code 1895, § 2222, has no application where the track of the railroad company crosses the public highway upon a bridge or trestle above the latter.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 244.*]

2. RAILROADS (§ 360*)—ACCIDENT AT CROSSINGS—FRIGHTENING ANIMALS.

A railroad company, whose road passes over a highway by a bridge, is not liable to a traveler in the highway for an injury caused by the fright of his team, occasioned by the running of a train in the usual and customary manner, and without unnecessary or unusual noises, although the approach of the train to the overhead bridge was not signaled, and the topography of the country was such that accidents of a similar character are peculiarly liable to happen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1241-1244; Dec. Dig. § 360.*]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by D. C. Barton against the Southern Railway Company. Judgment of nonsuit. Plaintiff brings error, and defendant files cross-bill complaining of overruling of demurrer. Reversed on cross-bill of exceptions. Main bill of exceptions dismissed.

Barton brought his action for damages for personal injuries against the Southern Railway Company. The defendant filed a general demurrer to the petition, which was overruled, and pendent lite exceptions duly certified and filed. After the plaintiff had presented his evidence and closed, the court sustained a motion for nonsuit. The plaintiff's bill of exceptions complains of this ruling, and the defendant's cross-bill complains of the overruling of its demurrer. The substantial averments of the petition are as follows: The defendant's line of railway crossed the Rome and Summerville public road at a point in the city of Rome about a mile from the courthouse, upon a trestle about 12 or 15 feet above the bed of the public road. The public road at this point is in a depression between two hills, and the railroad approaches the trestle from both directions around a curve at the base of these hills, so that it is shut off from the view of one going along the public road in a direction away from Rome until he has arrived at the trestle; and for this reason it is impossible for one approaching the trestle from the direction of Rome to see, and difficult to hear, the approach of a train coming in either direction to this crossing. This public road was a frequented highway, where people traveling with vehicles and teams were almost constantly passing throughout the day, and

years. The writings transferring his father's interest are also destroyed. In 1902 he went to the representative of the estate, and requested a long lease. The representative told him to go ahead and put any improvements he pleased on the place, and that, as long as his rent was paid, he could continue as his tenant. On several occasions, it was stated the improvements were to be plaintiff's. On the strength of this agreement, in 1902 the plaintiff remodeled and enlarged the buildings. The price per year was agreed on at that time, and it was distinctly agreed that the plaintiff could remove his buildings any time he saw fit. The contention of the defendant is that this agreement did not satisfy the statute of frauds, and that for this reason the plaintiff had no title to the buildings. Even if it was necessary for the contract to be in writing in order to satisfy the statute, here the plaintiff had executed his part of the agreement, and the owner of the land could not have pleaded the statute as against his right to remove his improvements, if he chose. We think when the insurance company was notified through its agent that the buildings insured were on leased ground, and issued the policy, it was put on sufficient notice to have caused it to make a full inquiry into the title of the property. But, aside from this, we think, under the facts in this case, the buildings were on leased premises. Property may be leased in parol for one year. Civ. Code 1895, § 3117. Nor do we think that the contention that the buildings were not the property of plaintiff is sound. He was at least a tenant from year to year, and there was no necessity for such a contract to be in writing. Nor was it necessary that the agreement that he could remove the buildings at any time he chose should be in writing. It was a part of the yearly contract of rental, which is expressly excepted from the statute of frauds in this respect. Civ. Code 1895, § 3117. There is no pretense that the plaintiff did not have an insurable interest in the buildings, but the contention is that information to the insurance company that the buildings were upon "leased ground" was insufficient to apprise the company of the nature of the plaintiff's interest, and ineffectual as an estoppel against the company from availing itself of the stipulation in the policy that the contract of insurance was to be void if the ground on which the buildings were erected was not owned by the insured in fee simple.

What has been said above covers the various assignments of error on the part of the defendant. We are therefore of opinion that the court did not err in any of the rulings complained of.

Judgment affirmed. All the Justices concur.

frequently during the night. The running of a train over this trestle was at all times calculated to excite, frighten, and cause to run away ordinary roadworthy teams, and especially those that were nervous or easily frightened, when such teams were passing under this trestle, and in this way the running of a train over this trestle brought peril to every person driving a team under or near this trestle. All these facts and conditions were well known to the defendant, its servants and agents operating its trains.

About 5 o'clock in the afternoon of August 13, 1907, plaintiff was approaching this trestle as he was leaving Rome for his home, driving two mules to an empty lumber wagon. As he approached this trestle, he listened to ascertain if any train might be approaching from either direction, and hearing none, drove forward under the trestle; and just as he was passing under the trestle a train of the defendant came around the hill from the direction of Gadsden, passed over the trestle, and immediately over him and his team, at a high rate of speed, and by its terrifying appearance, rapid motion, and tremendous noise, it greatly excited and terrified the team which he was driving, which, becoming wild from fright, ran away and injured petitioner in spite of his efforts to control them. The servants in charge of defendant's train failed to blow the whistle or otherwise warn the plaintiff, or to check the train, at a point 400 yards from the crossing, or at any point nearer than 400 yards, as required by statute. Under the facts and conditions stated, the defendant owed all persons traveling this road, when one of its trains was approaching the crossing, the duty of warning them of such approach, in the exercise of ordinary care; but, disregarding this duty, the defendant entirely failed to warn plaintiff of the approach of its train, but ran its train at a high rate of speed, which itself naturally tended to frighten, and did frighten, plaintiff's team. After alleging that plaintiff was without fault, his injuries are minutely described, and the amount of damages alleged.

C. E. Davis and W. M. Henry, for plaintiff in error. Maddox, McCamy & Shumate and Geo. A. H. Harris & Son, for defendant in error.

EVANS, P. J. 1. The first ground of negligence alleged is the failure on the part of the servants of defendant in charge of the train to observe the blow-post law, as embodied in Civ. Code 1895, § 2222. In the case of *McElroy v. Georgia, C. & N. Ry. Co.*, 98 Ga. 257, 25 S. E. 439, it was held that this section of the Code has no application "where the track of the railroad company crossed the public highway upon a bridge or trestle above the latter." This ruling was by a divided court, and the plaintiff asks us to review and overrule the ruling there made.

We are satisfied that the decision of the majority in that case was correct, and adhere to the ruling made by them.

2. But it is also alleged and contended that, independently of the statutory duty imposed by Civ. Code 1895, § 2222, the obvious danger to the constantly passing public along this much traveled highway, of passing trains frightening horses, and the circumstances of the situation which prevented the public from observing the approach of a train unless heralded by whistle or other signal, raised a duty upon the railroad company, in the exercise of ordinary care, to warn the public, by proper signals, of the approach of a train to this place of constant and obvious danger. The negligence charged against the railroad company is, not that the train was run at an unusual rate of speed, or operated in such a manner as to produce unusual or unnecessary noises, or that the railroad company was negligent in constructing its track. The defendant's negligence is alleged to consist in running its train, without signal or other precaution, over a trestle which spanned a much traveled highway, and which from the configuration of the ground prevents a traveler driving a team on such highway, on approaching the passageway under the trestle, from seeing or hearing the train as he nears the span over the highway. There can be no doubt that the passing of a railroad above or beneath a highway, instead of at a grade crossing, reduces the chances of injury to travelers along the highway by the running of the train. Such crossings are to be encouraged in order to secure the safety of travel against the perils of a grade crossing. The difference between these two kinds of crossings is so radical that it does not stand to reason that the law will hold a railroad company to the same exactness of responsibility in each case. At grade crossings the traveler on the highway and the railroad company enjoy a common privilege on the highway itself, and each must use such privilege with due regard to the safety and rights of the other. This obligation requires the railroad company, in approaching a grade crossing, even in the absence of a positive statute to that effect, to exercise proper precautions to prevent injury to a traveler on the crossing, or who is about to cross, or who has just crossed. Where a railroad track crosses a trestle or bridge, it does not share with the traveler in the highway below the common use of the latter. We can see no difference between the basal elements of liability of a railroad company incurred by its train frightening horses of travelers on highways parallel to its track, and in passing across an overhead bridge. A railroad company has the right to make all the noises incident to the movement and working of its engines and cars, and to give the usual and proper signals of danger, and will not be liable for injuries occasioned by

horses driven upon a parallel highway taking fright at such noises, if it exercises such right in a lawful and reasonable manner. However, a railroad company is under the duty to so operate its cars as not unnecessarily to interfere with the rights of individuals traveling upon the highway, or to endanger such travel by unnecessary noises tending to frighten horses. Ga. R. Co. v. Carr, 73 Ga. 557.

The plaintiff attempts from the pleaded facts to raise a duty on the railroad company to warn a highway traveler of the approach of a train to the trestle over the highway, arising out of the special environments of the situation. In other words, it is insisted that the railroad company is running its train at a proper speed without unnecessary noises over a track, against the proper construction of which nothing is averred, and its liability for frightening the plaintiff's horses is based solely on a failure to signal the approach of the train to the crossing. The railroad company is under no duty to warn travelers on a parallel highway that it intends to use its track (Ga. R. Co. v. Carr, supra), and for the same reason it is under no duty to give notice to travelers using a highway over which its track is constructed that it intends to use its bridge which spans the highway. The law permits a railroad company to use its roadbed and bridges by running its trains over them in a manner customary and usual with railroad trains. If it runs its trains at a proper speed, and with no unusual or unnecessary noises, it is not liable for an injury which a traveler receives from a horse frightened by a train in passing over an overhead bridge. *Favor v. Boston & L. R. Corp.*, 114 Mass. 350, 19 Am. Rep. 364.

The defendant's demurrer should have been sustained. Since the question made in the cross-bill of exceptions is controlling upon the case as a whole, and the judgment therein is reversed, there is no necessity for considering the errors alleged in the main bill of exceptions. *Gay v. Gay*, 108 Ga. 739, 32 S. E. 846.

Judgment reversed on the cross-bill of exceptions. Main bill of exceptions dismissed. All the Justices concur.

(132 Ga. 745)

CUMMINGS v. WHEELER.

(Supreme Court of Georgia. June 19, 1909.)

NEW TRIAL (§ 70*)—GROUNDS.

There was sufficient evidence to support the verdict; and, the motion for a new trial assigning error only on the verdict as contrary to law, the evidence, and the principles of equity and justice, there was no error in overruling it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action between William Cummings, executor, and Houston Wheeler. From the judgment, Cummings brings error. Affirmed.

W. P. McClatchey, for plaintiff in error. R. J. McCamy and W. U. Jacoway, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(132 Ga. 780)

JONES v. WILLIAMS.

(Supreme Court of Georgia. June 23, 1909.)

1. DISMISSAL OF APPEAL.

The motion to dismiss is controlled by the recent case of *Mitchell v. Masury*, 132 Ga. —, 64 S. E. 275.

2. DEEDS (§ 155*)—BREACH OF CONDITION—FORFEITURE—WAIVER.

A deed from a grandfather to his granddaughter, which recites that the grantor, "for and in consideration of work and labor done and to be done, consisting of taking care and caring for the [grantor] for and during his natural life, upon the faithful performance of said duty upon her part this obligation is to be of full force and virtue, otherwise this deed to be and the above and foregoing to be null and void, the receipt whereof is hereby acknowledged, does hereby sell and convey unto the [granddaughter], her heirs and assigns," a certain tract of land in fee simple, conveys an estate in fee on a condition subsequent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.*]

3. DEEDS (§ 166*)—CONDITIONS SUBSEQUENT—WAIVER.

Forfeiture resulting from a breach of a condition may be released or waived, and a waiver may be either express, or implied from the circumstances.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522-525; Dec. Dig. § 166.*]

(Syllabus by the Court.)

Error from Superior Court, Union County; J. J. Kimsey, Judge.

Action by America Williams against Rachael Jones. Judgment for plaintiff, and defendant brings error. Reversed.

Henry B. Gurley was seised and possessed of a small tract of land upon which he resided. In 1893, upon his invitation, his granddaughter, America Gurley, then a young girl about 14 or 15 years old, came to live with him, and on the 14th day of March, 1896, he executed to her a deed to the tract of land, the material parts of which are as follows: "State of Georgia, Union County. This indenture made this the 14th day of March, 1896, between Henry B. Gurley and America E. Gurley, both of the county aforesaid, witnesseth: That the said Henry B. Gurley, for and in consideration of work and labor done and to be done, consisting of taking care and caring for the said Henry B. Gurley for and during his natural life, upon the faithful performance of said duty upon her part this obligation is to be of full

force and virtue, otherwise this deed to be and the above and foregoing to be null and void, the receipt whereof is hereby acknowledged, does hereby sell and convey unto the said America E. Gurley, her heirs and assigns, a certain tract of land [describing it], together with all the rights and privileges thereunto belonging, in fee simple," with warranty of title. The granddaughter remained on the premises, keeping house and caring for her grandfather, until the year 1900, when she married and left the premises to reside with her husband. Henry B. Gurley, who was then very much advanced in years, shortly thereafter moved into the house of his daughter, Rachael Jones, who resided about a half mile distant. On June 26, 1901, he executed to Rachael Jones a deed conveying the same land included in his previous deed to his granddaughter. Three or four years thereafter he died, and America E. Gurley (who had married Williams) brought suit against Rachael Jones to recover the land. In answer to the suit the defendant averred that the plaintiff had failed to support her grandfather according to the terms of her deed, whereby she forfeited all estate in the land conveyed to her by him, and that his subsequent deed to the defendant vested the title to the land in the defendant. It was also averred in the plea that the plaintiff was insolvent, and, if the plaintiff be permitted to recover the land, that the defendant was entitled to have judgment against the plaintiff for the value of the support and services rendered by the defendant to Henry B. Gurley, which should have been rendered by the plaintiff, and there was a prayer that such judgment be declared a special lien on the land. A verdict for the premises with mesne profits was rendered in favor of the plaintiff, which the court refused to set aside on motion for a new trial, and the defendant excepts.

W. E. Candler, J. B. Jones, John H. Davis, J. T. Davis, and B. F. Davis, for plaintiff in error. O. J. Lilley and C. J. Wellborn, Jr., for defendant in error.

EVANS, P. J. Both parties claim from the same grantor; the plaintiff's deed being of older date. The court instructed the jury that the language in the deed from Henry B. Gurley to America Gurley (now Williams), wherein it was stated that the consideration was for labor done and to be done in taking care of the grantor during his life, and upon failure of the grantee so to do the deed was to be void, was a covenant, and not a condition either precedent or subsequent, and that it amounted only to a contract on the part of the grantee to take care of the grantor, a breach of which would not divest her title. This construction of the deed is alleged to be erroneous; it being contended that these words in the deed are words of express condition, and the grant

therein one with a condition subsequent. We do not think that the deed was correctly construed by the court. A deed executed upon a consideration to support the grantor, without apt or proper words to create a condition, a breach of which would render the estate defeasible at the grantor's election, passes title to the grantee, and the failure of the grantee to maintain and support the grantor may give to the latter a right of action in equity to rescind the contract if the grantee is insolvent. *McCardle v. Kennedy*, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85. But a grantor may convey land to another on condition that the grantee shall care for him for life, and provide therein that a failure to perform the condition shall have the effect of defeating the estate granted. Civ. Code 1895, §§ 3136, 3137. The law inclines to construe conditions subsequent so as to render their breach remediable in damages, rather than by forfeiture; but, where the plain words of the grant declare that a breach of the condition shall defeat the estate granted, there is no room for construction. No precise technical words are required to create a condition subsequent, and the construction must always be founded upon the intention of the parties as disclosed in the conveyance.

In the deed under consideration the grantor not only stipulated that the consideration of the deed was that the grantee should care for him during life, but that, "upon the faithful performance of said duty upon her part, this obligation to be of full force and virtue, otherwise this deed to be and the above and foregoing to be null and void." This language can only mean that the estate was granted on condition that the grantee was to care for her grandfather during his life, and upon her failure to perform this condition her estate was to become forfeited. A forfeiture of the estate upon her failure to take care of her grandfather constituted the terms which the granddaughter consented to accept as a condition of the grant. The clause of the deed construed by the court in the instruction to which exception is taken created a condition subsequent, upon the breach of which the grantor, at his election, could have availed himself of the forfeiture. If the grandfather relieved the granddaughter from the obligation of caring for him, after she left his home, or if it was through his fault that she failed to continue her services, he could not claim a forfeiture from a failure to comply with the condition. As was said in *Moss v. Chappell*, 126 Ga. 196, 54 S. E. 968: "Forfeitures resulting from the breach of a condition may be expressly released, or may be the subject of a waiver, and a waiver may result from circumstances as well as express language to that effect. All this is well settled; and, where the release or waiver extends to the whole forfeiture, of course all benefit to be derived from the forfeiture is gone."

The case was tried on an erroneous theory, and a new trial is ordered.

Judgment reversed. All the Justices concur.

(132 Ga. 358)

SOUTHERN RY. CO. v. BROCK.

(Supreme Court of Georgia. May 13, 1909. Rehearing Denied June 29, 1909.)

1. CONTINUANCE PROPERLY REFUSED.

While the presiding judge would have been authorized to grant a continuance, it cannot be held that, under the showing and countershowing, he abused his discretion in refusing to do so.

2. CONTINUANCE (§ 44*)—AFFIDAVITS FOR.

Where a motion was made for a continuance on the ground of the illness of the mother of the leading counsel for the defendant, and was overruled on the showing and countershowing made, the production, on the hearing of a motion for a new trial, of the affidavits of such leading attorney and of another witness (no affidavits by them having been offered when the application for a continuance was made, and no reason being shown for the omission) will not require a reversal because of the overruling of the motion for a continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 128; Dec. Dig. § 44.*]

3. AMENDMENT PROPERLY ALLOWED.

The allowance of the amendment to the petition did not furnish ground for a motion for a new trial, nor is a reversal required on any ground duly made and urged against the amendment.

4. CONTINUANCE PROPERLY REFUSED.

There was no error in refusing to grant the second motion for a continuance, made after the allowance of the amendment to the petition.

5. NONSUIT PROPERLY REFUSED.

The motion for a nonsuit was properly overruled.

6. EVIDENCE (§ 471*)—CONCLUSIONS.

Where a petition, in an action against a railroad company for a personal injury, alleged that at the point in the limits of an incorporated town where the injury occurred, and in the immediate vicinity, the defendant's tracks, road-bed, and right of way were much traveled and frequented by the public, within its knowledge and that of its agents, an inquiry of a witness as to the extent to which those tracks and the spaces between them at that place were used by members of the public in walking, and the answer that they were used a great deal, and that almost everybody who came in from that side of the town used them, were not subject to the objection that the witness was asked to state a conclusion and not a fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.* Witnesses, Cent. Dig. §§ 833, 988.]

7. EVIDENCE (§ 192*)—PERSONAL INJURY ACTION—LOSS OF LIMBS—ATTEMPT TO WALK BEFORE JURY.

Where a plaintiff had suffered the loss of both legs by reason of a personal injury on a railroad, and testified on the trial of a suit because of it that he could walk a little on his knees, and that he also used a rolling chair, there was no error in permitting him to walk before the jury and exhibit to them the loss of his limbs and the effect thereof on his ability to walk.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 677; Dec. Dig. § 192.*]

8. TRIAL (§ 95*)—MOTION TO STRIKE EVIDENCE—SUFFICIENCY.

Where various witnesses had been examined by both sides as to the extent of the use made by the public of railroad tracks and the intervening and surrounding spaces as a pass-way, a general motion "to rule out all the testimony that has been introduced by both sides in connection with people walking anywhere there except on that line," without pointing out any particular evidence or the testimony of any particular witness as subject to objection in that "connection," was too vague and uncertain, and there was no error in overruling it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 246; Dec. Dig. § 95.*]

9. TRIAL (§ 295*)—INSTRUCTIONS.

Where authorized by the pleadings and evidence, there was no error in charging that, if there was a failure to comply with the law with respect to keeping engines and cars under control and ringing the bell at public crossings, while such failure would not within itself amount to such negligence as to become the basis of a recovery, yet, if the plaintiff was injured within 400 yards of a public street crossing, the jury might consider such failure to check or give the statutory signal as a circumstance in connection with all the other evidence in the case in determining whether the defendant was negligent or not; the judge charging also correctly on the subject of negligence generally as applicable to the case-made.

(a) The pleadings and evidence in this case authorized such a charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 295.*]

10. TRIAL (§ 295*)—INSTRUCTIONS.

The plaintiff, in a case involving permanent injury, having introduced in evidence the table of life expectancy contained in 70 Ga. 844 et seq., but not the annuity table, a portion of the charge, when considered with the entire charge as to damages, did not furnish ground for a new trial as failing to instruct the jury how to use such tables, and therefore being calculated to mislead them to the prejudice of the defendant, which part of the charge was as follows: "The plaintiff has introduced in evidence before you a mortality table, which you may consider upon the question of how long you believe the plaintiff would have lived, in awarding damages for a permanent physical injury in this case. You may consider the length of time the plaintiff would have lived, and you may consider also the extent to which his physical power has been impaired or reduced, if any. The value of plaintiff's services, however, up to his twenty-first year, could not be allowed by you."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

11. TRIAL (§ 280*)—REFUSAL OF REQUESTED INSTRUCTIONS.

Some of the requests to charge were properly refused as not correctly stating principles of law applicable to the case. In so far as any of them embodied principles which were legal and pertinent, they were sufficiently covered by the general charge, so that the failure to give them did not require a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 280.*]

12. DAMAGES (§ 132*)—PERSONAL INJURIES.

There was sufficient evidence to authorize a recovery by the plaintiff; and while the verdict was large, in view of all of the facts of the case, the extent of the injury, the absence of error in rulings of law, and the approval of

the presiding judge, this court will not grant a new trial on that ground alone.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372-385, 1396; Dec. Dig. § 132.*]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by G. T. M. Brock, by next friend, against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

McMillan & Erwin, C. R. Faulkner, A. G. McCurry, J. J. Strickland, and Julian McCurry, for plaintiff in error. Howard Thompson and R. R. Arnold, for defendant in error.

LUMPKIN, J. Brock, a minor about 18 years of age, brought suit against the Southern Railway Company and its engineer for damages resulting from being run over by an engine of the defendant company. His arm was broken and his legs crushed, rendering necessary the amputation of both legs below the knees. At the time of the injury he was walking on the track of the defendant company about 253 yards before reaching a public street crossing, and at a place which he alleged was in the limits of an incorporated town, and where the tracks, roadbed, and right of way were much traveled and frequented by the public as a passway, within the knowledge of the defendant company, its engineers, and other employes. It was alleged that the exercise of ordinary care would have charged the defendants with knowledge that the track was likely to be occupied by pedestrians at that point, and also that the track was straight for three-quarters of a mile before reaching such point, and that the engineer either did see the plaintiff, or ought to have seen him, and could have prevented the injury by the use of ordinary care. There were allegations of failure to comply with an ordinance limiting the speed to six miles per hour, or to keep a proper lookout, or to give any signal of approach, or to check the engine, or to comply with the law in reference to approaching public crossings. The plaintiff also alleged that there was a freight train on a side track of the defendant company, running alongside the track on which he was, which freight train was making so much noise as to prevent his hearing the approaching engine and to attract his attention temporarily. He further alleged that the engine which injured him was being run at a high and dangerous rate of speed, and that the defendants were guilty of other acts of negligence. The defendants denied the substantial allegations. It is unnecessary to set out the evidence. On the trial the jury found in favor of the plaintiff against the defendant company, \$20,000 damages. The

company moved for a new trial, which was denied, and it excepted.

Most of the rulings announced in the headnotes require no elaboration. Some of them are directly controlled by former decisions. See *Crawford v. Sou. Ry. Co.*, 106 Ga. 870, 33 S. E. 826; *Macon & Bghm. Ry. Co. v. Parker*, 127 Ga. 471, 56 S. E. 616; *Sou. Ry. Co. v. Chatman*, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283; *Georgia Railroad v. Williams*, 74 Ga. 723; *W. & A. Railroad v. Meigs*, 74 Ga. 857. In *Smith v. Cen. Railroad Co.*, 82 Ga. 801, 806, 10 S. E. 111, 112, where a person walked down a railroad track in the dark and was injured by a train coming up from behind and striking him, and no reason or explanation was given why he did not listen or look, or why he did not or could not hear or know of the approaching train, or that there was anything visible or tangible occupying his attention, it was held that he could not recover. *Bleckley, C. J.*, distinguished that case from the two last above cited by saying that in them "other trains were near, and the injured person's attention might have been directed to them, and thus withdrawn from the danger that threatened." None of the grounds of the motion for a new trial require a reversal.

It was contended that the verdict was excessive, and that the judgment should be reversed on that ground. The amount found was large, especially if the plaintiff was considered as a trespasser. Damages are given as compensation for the injury done, and this is generally the measure, where the injury is of a character capable of being estimated in money. In some cases, and in regard to some kinds of injury and their results, such as pain and suffering, the measure of damages is left to the enlightened consciences of an impartial jury. In *Davis v. Central Railroad*, 60 Ga. 329, a charge was approved which instructed the jury on this subject as follows: "This does not mean that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through their caprice; but it authorizes you to give reasonable damages where the proof shows that the law authorizes it; but the jury should exercise common sense and love of justice, and, from a desire to do right, fix an amount that will fairly compensate for the injury received." Civ. Code 1895, § 3903, declares that: "The question of damages being one for the jury, the court should not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." The judge of the superior court is vested with certain discretionary powers in regard to the granting of a new trial. Section 5477 provides that: "In any case where the verdict of a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jury is found contrary to evidence and the principles of justice and equity, the presiding judge may grant a new trial before another jury." And section 5482 provides that: "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding." Thus the judge of the superior court has by law conferred upon him the discretionary power to grant a new trial where the verdict is contrary to evidence and the principles of justice and equity, or is decidedly and strongly against the weight of the evidence; and it is his duty to exercise a sound discretion, and to grant new trials where it should be done. A court of errors has not the same discretionary power conferred upon it in this regard. When a case comes before the Supreme Court, after the refusal of a new trial by the judge of the superior court, it comes not only with the presumption in favor of the verdict of the jury, but also stamped with the approval of the presiding judge, after a consideration of the evidence and the verdict and the use of the discretionary power of review which the law confides to him as a right, and imposes upon him as a duty. Thus we are confronted with the question, not as one of primary discretion, but as to whether the trial judge has abused his discretion in approving the verdict, and whether there is any evidence sufficient to support it, or whether this court can say that the damages are so excessive as to authorize an inference of gross mistake and undue bias, in spite of the verdict and in spite of its approval.

In the present case a youth of 18 had an arm broken, and both legs so badly mangled as to require amputation below the knees. He testified, more than a year after the injury, that he had suffered, and continued to suffer, that he was unfit to do any active farm work, that he could walk a little on his knees, and also had to use a rolling chair, that he had never worked for wages, but had been offered work several times before the injury, and that he thought wages would be about \$25 per month. Having held that there was no error of law in the rulings of which complaint was made, after a careful examination of the evidence we are not able to say that the presiding judge erred in refusing to grant a new trial on the ground that the verdict was contrary to law and evidence, or that it was so excessive in amount as to justify the inference by us of gross mistake or undue bias, after its approval by the trial judge. For instances in which large verdicts have been sustained where no error of law has been committed, see: *Georgia Pacific Railway Co. v. Dooley*,

86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342; *Richmond & Danville R. Co. v. Allison*, 89 Ga. 567, 16 S. E. 116; *Atlantic Coast Line R. Co. v. Jones*, 132 Ga. 189, 63 S. E. 834; *Merchants' & Miners' Transportation Co. v. Corcoran*, 4 Ga. App. 654, 62 S. E. 130; *Seaboard Air Line Ry. Co. v. Miller*, 5 Ga. App. 402, 63 S. E. 299.

Judgment affirmed. All the Justices concur.

(132 Ga. 793)

MAYOR, ETC., OF EATONTON v. GRIFFITH.

(Supreme Court of Georgia. June 23, 1909.)

1. EMINENT DOMAIN (§ 9*)—POWER OF MUNICIPALITY.

A municipality cannot exercise the right of eminent domain unless the power to do so is conferred upon it in its charter or in some amendment thereto, expressly or by necessary implication.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 31; Dec. Dig. § 9.*]

2. EMINENT DOMAIN (§ 9*)—POWER OF MUNICIPALITY.

Neither in the act approved August 29, 1879 (*Laws 1878-79*, p. 315), nor in that approved October 21, 1891 (*Laws 1890-91*, p. 900), is there to be found any language which expressly or by necessary implication confers upon the city of Eatonton the right to condemn or take private property for the purpose of laying and constructing sewers thereon.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 30; Dec. Dig. § 9.*]

(Syllabus by the Court.)

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Action by L. B. Griffith against the Mayor and City Council of Eatonton. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. S. Turner and M. F. Adams, for plaintiff in error. W. T. Davidson, for defendant in error.

BECK, J. Mrs. Lizzie B. Griffith brought her equitable petition for injunction against the mayor and city council of Eatonton. It was alleged in the petition that the plaintiff was the owner of certain lands, and that defendant was seeking to condemn a strip of this land for the purpose of "digging and laying a trunk sewer thereon for a distance of 1060 feet," and that the mayor and council had instituted proceedings to condemn that part of the petitioner's lands referred to. Injunction was asked upon various grounds, but at the hearing the petitioner rested her right to the injunction sought upon the sole ground that the charter of the city did not confer upon it and the authorities the "power to condemn private property for the purpose of laying and constructing sewers in said city." The mayor and council insisted that the charter did confer this power; and this assertion of the right under

the charter by the city, and its denial by the petitioner, raised the sole question for the determination of the court below, and this question was decided in the negative.

Whether the city had the power which it is insisted was vested in the municipality depends upon the construction of certain sections of the charter to be found in an act approved August 29, 1879 (Laws 1878-79, p. 315), and entitled "An act to create a city government for the town of Eatonton, in Putnam county, and to confer upon the authorities thereof certain powers in lieu of the present town government, and for other purposes," and a section of an act amendatory of this act; the latter act being approved October 21, 1891 (Laws 1890-91, p. 900). In the first act referred to the only provisions in any way relating to the question under consideration are the following: Section 7: "That the mayor and aldermen of said city, sitting as a board of council, shall have power therein to lay off, vacate, close, open, alter, curb, pave, drain, and keep in good order, and repair the roads, streets, sidewalks, alleys, cross-walks, drains, and gutters for the use of the public, or any of the citizens thereof. * * * In case the board of council and owner of any land through which any street is to be opened or enlarged can not agree upon the value of the land to be used, the board of council shall choose one citizen, and the party owning the land, or his authorized agent, one, the two to choose a third, and the three so chosen shall decide the value of the land proposed to be taken, which decision shall be final." The act approved October 21, 1891, is entitled: "An act to amend an act to create a city government for the town of Eatonton, in Putnam county, and to confer upon the authorities thereof certain powers in lieu of the present town government, and for other purposes, approved August 29, 1879, by repealing that portion of said act which provides for the election of a marshal and providing for his appointment by the mayor and council, and by authorizing the mayor and council to pave the public streets of said city and assess the adjacent property owners for the payment thereof, by providing a more complete method of condemning private property for the public use of said city by enlarging the powers of the city authorities to punish offenders, and for other purposes." In the body of this act are to be found the following provisions:

"Sec. 8. Be it further enacted, that the following part of section 7 of said act contained in the twenty-ninth, thirtieth, thirty-first, and thirty-second, thirty-third, and thirty-fourth lines, thereof, to wit: The words, 'In case the board of council and owners of any land through which any street is to be reopened or enlarged can not agree upon the value of the land to be used, the board of council shall choose one citizen, and the party owning the land, or his au-

thorized agent, one, and the two to choose a third, and the three so chosen shall decide the value of the land proposed to be taken, which decision shall be final,' be, and the same is, hereby repealed.

"Sec. 4. Be it further enacted that the method of condemning private property for public use in said city of Eatonton shall be as follows: If the board of council and the landowners can not agree upon a price for the land to be used, then each shall select a citizen, the two thus chosen to select a third, and the three thus selected shall decide the value of the land proposed to be taken, and in the event either the landowner or the board of council fails or refuses to select an assessor, then the ordinary of Putnam county shall select for the party failing or refusing, each party having the right to appeal to the Superior Court from the decision of the assessors."

This excerpt from the amendatory act is the only portion of it having any reference to the question involved here. Clearly, under the provision of the act of 1879, no right of eminent domain under which the city could lay and construct sewers was conferred upon the city; and, unless that power is conferred by section 4 of the amendatory act, it does not exist. Section 4, however, provides nothing more than a method for assessing damages in the case of the taking of private property under the exercise of the right of eminent domain conferred by the charter. It does not in itself undertake to create, enlarge, or modify the right of eminent domain as it existed in the charter sought to be amended. The mere provision in a charter of a method of exercising the right of condemning private property is nugatory, unless somewhere in the charter the power is given, expressly or by necessary implication, to condemn. Possibly the embodiment in the charter of the method of exercising the right of condemning or taking private property might be considered in passing upon the meaning of words which were ambiguous and which might be so construed as to confer the right of eminent domain. If the right to condemn private property had been expressly given in the charter, or is to be necessarily implied from the language of that instrument, even if the method by which the power could be exercised had not been provided for in the charter, a method of condemnation might be found in the general law. The creation of the method for exercising a certain right did not create or confer the power to exercise the supposed right. In the case of *Stowe v. Newborn*, 127 Ga. 421, 56 S. E. 516, it was held that authority was conferred to lay out and open streets and to take the necessary property for doing so in the following section of the charter of that town: "That said mayor and council shall have power to lay out, open, and abolish streets and alleys of said town, extend and change the same as the public interest may require, by paying the

owners just compensation for the property taken for any such purposes." But authority for the exercise of the right of eminent domain was found in the section of the charter referred to, because "the use of the word 'taken' implies a seizure; and there is the provision that the owners shall be paid just compensation for the property so seized or taken. The Legislature in referring to compensation evidently meant the value of the property without reference to any agreement between the parties. Authority is conferred upon the municipality to lay out and open streets, and authority is further conferred to take the property necessary for laying out and opening such streets upon paying the owners just compensation for the property taken. * * * The power given to take property upon making just compensation necessarily carries with it the idea of voluntary appropriation of individual property for public use upon making just compensation therefor." Nowhere in the charter of the town of Eatonton, either subsequently or previously to the passage of the amendatory act, is there to be found language equivalent in meaning to that given by construction to the word "taken" in the case last referred to. See, also, the case of *Ga. R. & Bk. Co. v. Union Point*, 119 Ga. 809, 47 S. E. 183. If the right to exercise the power of eminent domain had been conferred by the Legislature upon the town of Eatonton, so as to authorize the laying and construction of sewers, the method for the exercise of such a right would be found in section 4 of the amendatory act quoted above. But, as the right itself had not expressly or by necessary implication been conferred upon the municipality, the provision of that section cannot be invoked as a source of such right; and the judge below properly held that the municipality did not have the right to condemn property for the purpose of laying and constructing sewers, and consequently that the injunction prayed for should be granted.

Judgment affirmed. All the Justices concur.

(132 Ga. 763)

KENNESAW GUANO CO. v. EDWARD O. MILES & CO.

(Supreme Court of Georgia. June 22, 1909.)

1. CONTRACTS (§ 296*) — PERFORMANCE — DEPARTURE FROM TERMS.

Where parties in the course of the execution of a contract depart from its terms, and pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given the other of intention to rely on the exact terms of the agreement. Until such notice, the departure is a quasi new agreement.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 296.*]

2. EVIDENCE AUTHORIZED FINDING.

The evidence authorized the finding in favor of the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by Edward O. Miles & Co. against the Kennesaw Guano Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward O. Miles & Co. brought suit against the Kennesaw Guano Company for \$888.05 principal, on an account for tankage delivered, as stated in an itemized account attached to the petition. The defendant filed its answer, wherein it claimed damages against the plaintiffs because of their failure to deliver to the defendant the amount of tankage which they were under obligation to deliver under the contract between them. The defendant claimed that the plaintiffs were indebted to it the difference between the contract price of the tankage which they failed to deliver and its actual value, and asked judgment against them for an amount as shown by the statement attached to the answer. The case was submitted to the judge without a jury. He awarded judgment against the defendant, and it filed exceptions. Upon the trial the following contract was introduced in evidence: "Atlanta, Ga., April 1st, 1898. This agreement between the Kennesaw Guano Company and Edward O. Miles & Company, witnesseth: That said Miles & Company may render tallow from butcher bones (which they agree to do for twelve months from May 1st, 1898), on the premises of said company at Clifton, Georgia, on the following conditions: Said Miles & Co. are to furnish all necessary appliances, and make all connections at their own expense, and said company is to furnish steam (at such times as they may have steam on) at the rate of \$1.00 for each rendering of not over five hours. Said Miles & Company are to pay, for the use of said premises, \$4.00 per month, and in addition thereto said company is to have the option of buying at \$8.00 per ton, when dry, all the by-product called tankage obtained in rendering tallow, which is guaranteed to be not less than ten tons per month, and to analyze not less than 4 per cent. ammonia and 35 per cent. bone phosphate. It is understood and agreed that said rendering is to be conducted in such manner as not to be offensive or inconvenient to said company (who are to be the sole judge of this), and the liquor from each rendering is to be sprayed on the pile of ammoniated goods in the pit of said company, without expense to them, and the necessary pipes, etc., for doing this thoroughly are to be furnished and connected by said Miles & Company. This arrangement or privilege may be canceled at the end of any month by said company giving said Miles & Company ten days notice." Indorsed on the contract was the following: "The within agreement is renewed to May 1st, 1900. sub-

ject to all the conditions named therein. This February 14th, 1899." The account sued upon by Miles & Co. showed a delivery of tankage by them to the defendant company on the following dates in 1901: February 1st, April 9th, July 18th, and October 1st. It was admitted upon the trial that this account was correct. The account attached to the answer of the defendant showed delivery of tankage under the contract on the following dates: August 1 and September 23, 1898; May 13, 15, September 14, and November 17, 1899; May 15 and September 27, 1900; May 10, 1901; and June 2, 1902. The total amount of tankage shown to have been delivered under this statement amounted to 167 and a fraction tons. The amount which the defendant company claimed it was entitled to have delivered was 410 tons, leaving a balance undelivered of 142 and a fraction tons. It was admitted that the tankage shown by the statement attached to the answer to have been delivered was actually delivered by Miles & Co. Mr. Ashford, the president of the defendant company, testified: "As to what was done at the expiration of the second term of this contract, which was May 1, 1900, there wasn't anything. I can't recall that anything at all was said about it. Edward O. Miles & Co. did not remove their plant from the premises, but they continued there just as they had been doing, operating the plant, rendering tallow, and making tankage. The tankage that was made was delivered to us at stated times; that is, at irregular times as they had accumulated enough to make a 'weighing,' as we called it. It was delivered to us when that had been done. There was no difference in the character of the business conducted by Miles & Co. on the premises after May, 1900, and that conducted before that time. They vacated this place October 1, 1901. I don't think they ever gave us any notice when they vacated. They just moved out. I don't remember that any notice was given at all. As a matter of fact, I do not think any notice was ever given. I have been in the manufacturing business about 12 years. As to what is meant by tankage, they gather up bones, scraps, and decayed meats that butchers put aside during the day. All of that has more or less tallow in it. They gather up so many pounds from one butcher and so many from another, so that every day there was a considerable quantity of it, maybe several wagon loads. Tankage is the stuff that remains after the tallow has been taken out. These bones were put into a steel tank that is air-tight, and steam is turned on, and it is cooked for several hours. When it cools down, the tallow rises to the top and is taken off. The residue is what is called tankage. It is a common product in the fertilizer trade. The large packers in Chicago have it in great quantities, and ship it down

here. It is a well-known commodity, and is in demand by fertilizer manufacturers. I was engaged in the fertilizer business and buying it at that time. I am familiar with the market price. The market price of tankage at the mills in Atlanta between the dates of May, 1898, and October, 1901, varied as to grades. There are various grades. Sometimes it runs high in ammonia. That is the important ingredient that is sought in tankage. Tankage with 4 per cent. ammonia and 35 per cent. phosphate would have been worth at the time \$13.50 to \$14 per ton. That is the minimum price. * * * I do not think there is any doubt about their having delivered to my company all of the tankage they made."

Edward O. Miles testified: "Nothing was ever said to me by Mr. Ashford after the making of this contract until October 1, 1901, about a failure to deliver the tankage. From the time of the execution of this contract, April 1, 1898, down to October 1, 1901, the time the last car load of tankage was delivered, they never said anything to me about demanding that we comply with the terms of the contract as to furnishing 10 tons per month. We delivered all the tankage we had. During that time we made a number of settlements with the Kennesaw Guano Company. Settlements in full between us were made. They paid us in full the amount they owed us at each settlement. We settled, I think, two or three times a year. Whenever the tankage was dry, and the company was ready to receive it, they would notify us. They paid us for the tankage we delivered. These papers handed me are statements they rendered us of our account with them. This settlement was made April 29, 1899. This statement shows the check inclosed for balance of \$79.52. That was paid. This statement shows a balance due us of \$278.80, and a check was inclosed in the statement. This is a similar statement dated November 10th. This shows a balance of \$185.58, which was paid by check inclosed. Here is a similar statement dated January 15, 1900, which shows a balance of \$3.99, which was paid by check inclosed." Elliott, a witness for the plaintiff, testified that from May 1, 1898, to October 1, 1901, he held the position of bookkeeper with the Kennesaw Guano Company, and further testified: "Yes; there was money paid to Miles & Co. I think it was paid two or three times a year during this period of three or four years. I think it was in the summer of 1902 that I gave up my position with them. What the Kennesaw Guano Company was paying Miles & Co. was for tankage on these statements."

Mr. Ashford, recalled, testified: "As to whether or not any settlement was made between me and Miles & Co. under this contract between the date of its execution and October 1, 1901, several settlements were made, according to these statements here.

These statements simply represent what tankage was turned over to us upon that contract at stated times; and, when that tankage was turned over, naturally they wanted money for it, and we made out a statement up to that date of the amount that was turned over, and the amount charged for steam, and \$4 per month was deducted from that tankage, and a check sent to them. As to any closing up of accounts, there were various times when I didn't know whether he was delivering more or less than 10 tons per month. * * * I called attention to the fact that they were behind in the delivery of tankage as soon as I found out that there was any considerable arrearage. I called Mr. Miles' attention to it, and he said he was giving us all he could get, but possibly he might be able to buy some. My recollection is that he said he would endeavor to do so. The fact is that I expected considerably more than 10 tons. * * * I cannot recall as to the date when I told him he was short. I told him that I noticed he had not been delivering as much as the minimum amount mentioned. I said that to Mr. Miles, but I don't remember when I said it. He was in my office. Mr. Miles is the only man I had anything to do with."

Edward O. Miles, recalled, testified: "I do not remember Mr. Ashford ever saying anything to me about not furnishing 10 tons of tankage, as he states, until I made a demand for payment for the dry bones shipped. As to when that was I would have to refresh my memory. It was about the time I filed this suit."

Wimblish, Watkins & Ellis and Franyston E. Ellis, for plaintiff in error. Howard & Bolding, for defendant in error.

HOLDEN, J. (after stating the facts as above). Miles & Co. brought suit against the Kennesaw Guano Company to recover the purchase price of a quantity of tankage delivered to the defendant. The defendant filed an answer, setting up a failure on the part of the plaintiff to deliver the quantity of tankage guaranteed under a written contract between the parties (a copy of which appears in the statement of facts), whereby it was damaged in the amount of difference between the contract price and the market value of the deficiency in the amount delivered; and praying judgment accordingly. The court, to whom the case was submitted without a jury, rendered judgment in favor of the plaintiffs for the full amount sued for, and to this judgment the defendant excepted. In the judgment the court said: "The court is further of the opinion that the evidence discloses a mutual departure from the exact terms of the written contract by the paying and receiving money thereunder by the parties thereto, which constituted a quasi new contract." The original written contract between the parties, among other things,

provided: "Said Miles & Co. are to pay for the use of said premises \$4.00 per month, and, in addition thereto, said company is to have the option of buying at \$8.00 per ton, when dry, all the by-product called tankage obtained in rendering tallow, which is guaranteed to be not less than ten tons per month." The plaintiffs delivered to the defendant all of the tankage they made, which was less than the 10 tons per month guaranteed under the contract. The plaintiffs contend that the various settlements made between them and the defendant, and the payment by the defendant to the plaintiffs for the tankage delivered, which was less than the 10 tons per month guaranteed, and other conduct of the defendant, shows that there was a mutual departure from the terms of the original contract and a quasi new contract between the parties made, which relieved the defendant of the necessity of fulfilling the guaranty in the original contract of furnishing 10 tons per month. Civ. Code 1905, § 3642, provides: "Where parties, in the course of the execution of a contract, depart from its terms and pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given the other of intention to rely on the exact terms of the agreement. Until such notice, the departure is a quasi new agreement." The original contract began May 1, 1898. The plaintiffs did not vacate the defendant's premises, and cease to operate its plant in the making of tankage until October 1, 1901. The plaintiffs furnished to the defendant all of the tankage they made. During these several years the defendant paid to the plaintiffs, two or three times each year, the amount due for tankage furnished by the plaintiffs to the defendant, as per statements rendered. According to the testimony of witnesses for the plaintiffs, nothing whatever was said when these various settlements were made about the failure of the plaintiffs to furnish 10 tons per month, as provided by the contract, or at any other time until about the time this suit was filed to recover for the last deliveries of tankage made by the plaintiffs to the defendant. This suit was filed June 7, 1902. These various settlements were made each year, and some of them occurred under the renewed and some under the original contract, and, when they were made, the guano company took from the value of the tankage delivered, computed at the contract price, the amount due by Miles & Co. for rent and steam, and paid Miles & Co. the difference. The tankage delivered was all Miles & Co. made, and these settlements were made without the guano company making any complaint whatever that the guaranty provided for in the contract was not fulfilled, or that the amount delivered did not fulfill the guaranty provided for in the contract. While Miles & Co. delivered all the tankage they made, they did not deliver the amount called

for by the guaranty; and if Miles & Co., on account of any deficiency in the amount of tankage delivered, owed the guano company the difference in the market price and the contract price of such deficiency at the time these various settlements were made, then the guano company at such times did not owe Miles & Co. anything, as the difference between the contract price and the market price of such deficiency would have been more at the date of the respective settlements than the amount due Miles & Co. by the guano company as the contract price of the tankage delivered less the amount due by Miles & Co. for rent and steam. The record does not show anything to indicate other than that both parties at the time the various settlements were made considered them as being an adjustment of all differences then existing between them. The contract imposed upon the parties thereto mutual obligations, requiring the guano company to furnish steam and a location for Miles & Co.'s plant, and on Miles & Co. the obligation to pay rent and for the steam furnished, in addition to giving the guano company the option to buy tankage. In the execution of this contract, Miles & Co. delivered to the guano company all the tankage they made, and the guano company received the same as it was delivered and paid therefor, after deducting the amount due by Miles & Co. for rent and steam. We think that under the facts appearing in the record the court was not required, but was authorized, to find that in the course of the execution of the contract the parties departed from its terms, and paid and received money under such departure, as a result of which the plaintiffs were relieved of the duty to fulfill its guaranty provided for in the original written contract. In this connection, see *Civ. Code* 1895, §§ 3642, 3674, 5152; *Eaves v. Cherokee Iron Co.*, 73 Ga. 459; *Hasbrouck v. Bondurant & McKinnon*, 127 Ga. 220, 56 S. E. 241; *Provident Savings Life Assurance Society v. Georgia Industrial Co.*, 124 Ga. 399, 407, 52 S. E. 289; *Sou. States Phosphate, etc., Co. v. Barrett & Doughty*, 130 Ga. 749, 61 S. E. 731; *Mathis v. Harrell*, 1 Ga. App. 358, 362, 53 S. E. 207; *Bush v. West Yellow Pine Co.*, 2 Ga. App. 295, 58 S. E. 529; *Fitzgerald Cotton Oil Co. v. Farmers' Supply Co.*, 3 Ga. App. 212, 216, 59 S. E. 713.

The original contract ended May 1, 1899. It was renewed by an agreement indorsed on it by both parties to the effect that it was extended to May 1, 1900. The president of the defendant company testified: "As to what was done at the expiration of the second term of this contract, which was May 1, 1900, there wasn't anything. I can't recall that anything at all was said about it. Edward O. Miles & Co. did not remove their plant from the premises, but they continued there just as they had been doing, operating

the plant, rendering tallow, and making tankage. The tankage that was made was delivered to us at stated times; that is, at regular times as they had accumulated enough to make a 'weighing' as we called it. It was delivered to us when that had been done. There was no difference in the character of the business conducted by Miles & Co. on the premises after May, 1900, and that conducted before that time." We think that the conduct of the parties, after the expiration of the contract made in writing, was such as to renew such contract as it previously existed, and each of the parties was bound by the terms of such previously existing contract as modified by the mutual departure therefrom. In this connection, see *Hill v. Goolsby*, 41 Ga. 289, 291; *Roberson v. Simons*, 109 Ga. 360, 34 S. E. 604.

The defendant alleged in its plea that the premises were worth more for rent than the amount provided for in the contract, and offered the following amendment: "Defendant says that in the event it should be held by the court that the written contract between plaintiff and defendant was not extended as contended by defendant from May 1, 1900, to October 1, 1901, by mutual consent, and by the continued use and occupation of defendant's premises by plaintiff, that the defendant says that for the use and occupation of its premises from May 1, 1900, to October 1, 1901, plaintiff became indebted to defendant for the reasonable rental value of the premises, which defendant says was the sum of \$50 per month." In view of the ruling above made, the court committed no error in refusing to allow such amendment.

Judgment affirmed. All the Justices concur.

(132 Ga. 758)

ELLIOTT v. STATE.

(Supreme Court of Georgia. June 19, 1909.)

1. CRIMINAL LAW (§ 921*)—NEW TRIAL—ADMISSION OF IRRELEVANT TESTIMONY.

The admission of irrelevant testimony will not generally warrant the granting of a new trial, unless it appears that the evidence was calculated to injuriously affect the complaining party, especially is this true when the evidence is not material, and not calculated to mislead the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2207; Dec. Dig. § 921.*]

2. HOMICIDE (§ 151*)—BURDEN OF PROOF—JUSTIFICATION.

The evidence relied upon by the state to establish the fact of the homicide not disclosing any circumstances of mitigation or justification, it was not error for the court to charge that, "when a killing is proven to be the act of the defendant, the presumption of innocence with which he enters upon the trial is removed from him, and the burden is then upon him to justify or mitigate the homicide."

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 276; Dec. Dig. § 151.*]

3. CRIMINAL LAW (§ 1156*) — APPEAL — DISQUALIFICATION OF JUROR—REVIEW.

One ground of the motion for a new trial charges that one of the jurors trying the case was disqualified because he was "biased and prejudiced" against the prisoner at the time of the trial; this charge being based upon certain expressions alleged to have been used by him in a conversation which took place subsequently to the killing and prior to the trial. The use of the expressions was testified to in the affidavit of two persons. The juror made affidavit denying the use of the expressions alleged to have been made by him. *Held*, that the affidavit tending to show disqualification and submitted for that purpose, and the counter affidavit of the juror submitted by the state, form an issue for determination by the trial judge, and his decision of the question thus made will not be disturbed by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8068; Dec. Dig. § 1156.*]

4. CRIMINAL LAW (§ 1156*)—REFUSAL OF NEW TRIAL—REVIEW.

There was evidence to support the verdict; and, that verdict having received the sanction of the trial judge, this court will not disturb the judgment refusing a new trial, no error of law being made to appear in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8067; Dec. Dig. § 1156.*]

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

J. M. Elliott was convicted of murder, and brings error. Affirmed.

W. D. McNeill and M. U. Mooty, for plaintiff in error. J. R. Terrell, Sol. Gen., Hatton Lovejoy, and John C. Hart, Atty. Gen., for the State.

BECK, J. The plaintiff in error was indicted in Troup county for the offense of murder. Upon the trial of the case a verdict of guilty was rendered. A motion for a new trial was filed, and upon the hearing it was overruled. To the judgment overruling the motion, the plaintiff in error excepted.

1. The motion for a new trial contains four grounds in addition to the general grounds set forth in the motion as originally filed. The first two of the grounds contained in the amendment to the motion relate to the admission in evidence, over objection of the prisoner's counsel, of certain testimony which was objected to on the ground that the testimony was "thoroughly immaterial." So far as can be judged from the grounds themselves, the testimony was, as contended by counsel, "thoroughly immaterial." Nothing is shown in either of these grounds as to any issue which would be affected by the evidence complained of injuriously to the plaintiff in error. Counsel for the movant in framing these grounds contented themselves with merely setting out this immaterial testimony, and did not undertake to state any issue involved in the case which was or could be affected by the testimony in such a manner as to harm the accused. "The superior courts may grant new trials in all cases

when any material evidence may be illegally admitted to, or illegally withheld from the jury against the demand of the applicant." Pen. Code 1895, § 1059. The admission of irrelevant testimony will not generally work the granting of a new trial, where it does not appear that the evidence was calculated to injuriously affect the complaining party. Especially is this true when the evidence is not material, and not calculated to mislead the jury. *Mayor, etc., of Gainesville v. Caldwell*, 81 Ga. 76, 7 S. E. 99; *Chestnut v. State*, 112 Ga. 366, 37 S. E. 364.

2. The judge charged the jury as follows: "When a killing is proven to be the act of the defendant, the presumption of innocence with which he enters upon his trial is removed from him, and the burden is then upon him to justify or mitigate the homicide." It is contended that this charge states "an incorrect proposition of law, for that the burden never shifts in a criminal trial." The criticism upon the charge contains within itself an incorrect proposition of law. "If the proof that shows the killing discloses that it was done without malice, of course, the presumption does not exist; but, if the accompanying proof does not, then the burden is thrown upon the defendant to show that it was done without malice." *Vann v. State*, 83 Ga. 44, 9 S. E. 945. See, also, the case of *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934, where the question raised in this ground of the motion for a new trial is fully discussed. In the instant case there was clear and uncontroverted evidence establishing the fact of the commission of the homicide alleged, and the evidence proving the homicide discloses no circumstance of mitigation or justification. Consequently the question which arose in the case of *Green v. State*, 124 Ga. 343, 52 S. E. 431, where a charge similar to the one here complained of was held to be error under the facts and circumstances of that case, does not arise. The distinction between cases in which the proof of a homicide is accompanied by circumstances of mitigation or justification and those cases in which there is proof of the homicide unaccompanied by circumstances that mitigate, excuse, or justify, with reference to the giving of instruction touching the shifting of the burden of proof, is clearly drawn in the case of *Mann v. State*, supra.

3. Another ground of the motion for a new trial was based upon the alleged disqualification of J. T. Pearson, a member of the jury which rendered the verdict complained of; and it is alleged that this juror "was biased and prejudiced against the defendant." Affidavits of the plaintiff in error and of his counsel showing that the fact of the alleged disqualification of the juror was unknown to movant and his counsel, and that it could not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have been known to them in the exercise of ordinary care and diligence, were duly filed and submitted in connection with the hearing of the motion. To establish the alleged disqualification of the juror counsel submitted the affidavit of J. A. Allen and J. D. Rhodes. In this affidavit the affiants depose that the juror referred to took part in a conversation on the night of the homicide relative to the probability of the lynching of the prisoner, J. M. Elliott, and that the juror said, in substance: "I am willing to do my part towards taking him out of jail, and lynching him. I also speak the sentiments of Tony Walker, but Tony Walker doesn't want his name mentioned in it. If the rest of you will go, I will do my part." The state submitted on the hearing the affidavit of the juror attacked, in which he deposed: "Deponent and J. A. Allen and J. D. Rhodes had a conversation in front of and near the store of deponent and the said J. D. Rhodes. The said J. D. Rhodes was drunk, and the said J. A. Allen was drinking. The said Rhodes and Allen were discussing the lynching of J. M. Elliott, defendant in above case. Said Rhodes and Allen were urging and talking about getting up a mob for this purpose. Deponent said little in the conversation, and did not say to them, neither has deponent said to any one else at that time nor at any other time, that he would lynch the said J. M. Elliott. Deponent would not have joined the said Rhodes and Allen in the lynching of the said Elliott, and deponent left the said Rhodes and Allen because of the condition that they were in and of what they were saying. Deponent went into the trial of the said Elliott, without prejudice against the said Elliott, and decided the case of said Elliott without bias or prejudice toward the state or the said Elliott." Fairly construed, we are of the opinion that the affidavit by the juror, submitted for the consideration of the trial judge on the hearing of the motion for a new trial, was a denial of the remarks attributed to him in the affidavit read to impeach his fairness and freedom from bias and prejudice. It is true that in the affidavit by which it is sought to establish the disqualification of the juror it is charged that the juror "in substance said, 'I am willing to do my part towards taking him out of jail and lynching him,'" and in the counter affidavit the juror under investigation denied saying in the conversation referred to or at any other time "that he would lynch the said J. M. Elliott." While the expression charged against the juror and the expression denied by him are not identical in words, in substance they are the same. The charge and the denial therefore made an issue for the decision of the trial judge, and his decision of that question is final. It was a matter within his discretion, and this court will

not interfere with the decision rendered by him.

4. The defense relied upon in this case was that the accused at the time of the commission of the homicide and prior thereto was of unsound mind, and that the diseased condition of his mind had assumed the form of "delusional insanity;" and that, although he committed the homicide charged, no criminal responsibility attached to him for the act. The question made by the defense urged was fully, fairly, and clearly stated to the jury in the able charge of the trial judge. There was strong evidence to support the contention of counsel for the accused, but there was also evidence which made it a question to be determined by the jury as to whether or not the defendant was of sound mind, and therefore responsible for his acts at the time of the homicide. Upon that issue the verdict of the jury was against the defendant; and there being evidence to support the finding, and the verdict having been sanctioned by the trial judge, it will not here be set aside on the ground that it was contrary to the law and the evidence.

Judgment affirmed. All the Justices concur.

(132 Ga. 712)

BROWN v. BROWN.

(Supreme Court of Georgia. June 18, 1909.)

1. DIVORCE (§ 295*) — SUPPORT OF MINOR CHILDREN—ACTION BY WIFE.

Where the wife, on account of the misconduct of the husband, obtains a decree granting her a divorce and awarding to her the custody of their minor child, and no question as to the support of such child by the father has been made or passed on, the father is not relieved of his legal obligation for a proper support of the child. If he fails or refuses to discharge this obligation, the mother in an original action may recover of the father the amount of expenditures made by her after such decree for a proper support of such child.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 295.*]

2. DIVORCE (§ 295*) — SUPPORT OF MINOR CHILDREN—ACTION BY DIVORCED WIFE.

The petition was subject to special demurrer on the ground that it did not set forth with sufficient particularity the expenses incurred by the plaintiff in the support of the child.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 295.*]

(Syllabus by the Court.)

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by M. O. Brown against Oscar Brown. Judgment for plaintiff, and defendant brings error. Reversed.

H. H. Perry, for plaintiff in error. J. J. Strickland and Fletcher M. Johnson, for defendant in error.

HOLDEN, J. The defendant in error brought suit against the plaintiff in error

to recover from him the amount alleged to have been expended by her in support of their son. Among other allegations in the petition, the following, in substance, appears: At the September term, 1902, of Gwinnett superior court, a total divorce was granted her from the defendant, the present plaintiff in error, and by the terms of the decree the custody and control of the child were awarded to her. The question of alimony was not involved or passed upon in the divorce suit, and the plaintiff did not insist upon any judgment therefor. She has managed to support the child from the income from her property and by encroaching on the corpus thereof and with the proceeds of her labor. The plaintiff insists that the defendant "reimburse her for what she has paid out since the separation [in support of the child], the same amounting approximately to \$1,200," and alleges that the defendant is able to do so. The plaintiff filed an amendment to the petition, alleging that "she has expended since the divorce was granted the sum of \$1,200 for the board and support of their child Fred, the same being expenses for necessities; that said necessities were not furnished by said Oscar Brown, and she was compelled to furnish them in order to maintain said son; that said expenses has been an average of \$20 per month, including board, clothing, medicinal attention, and other necessities; that while at the beginning the expenses was possibly less, it has grown with his age." The defendant filed a demurrer on the ground that no cause of action was set forth and a special demurrer on the ground "that plaintiff fails to specify what article was furnished by her." After the plaintiff filed the amendment hereinbefore referred to, the defendant filed a demurrer to such amendment and to the petition as amended on general grounds, and because the "petition fails to state what the other necessities are, and fails to state what expenses were incurred for tuition or medical services, or what items of clothing were furnished, or what expenses were paid for board, and fails to itemize or state any particulars of her said claim, or to show the time when or to whom any amounts were paid." The demurrers were overruled. A verdict was rendered for the plaintiff for \$480, and a motion for a new trial was overruled. The defendant excepted to each of these rulings.

1. The defendant in error brought suit against the plaintiff in error for a divorce on the ground of habitual intoxication, and obtained a verdict and decree for a total divorce. In the decree the custody of their minor child was awarded to the defendant in error, who afterwards brought this suit against the plaintiff in error, the father of the child, for an amount expended by her for the necessary support of the child, and obtained a verdict. The plaintiff in her petition alleged: "Your petitioner did not in-

sist at the time on a judgment for alimony, for the reason that the said Brown promised he would contribute the necessary amount to pay the expenses of their child, and could do this better without a judgment against him than with one." This, together with other allegations, merely gave the reason why the plaintiff did not in the divorce proceedings seek alimony for the child; and a proper construction of the petition, in view of all the allegations, is that it does not set forth a suit on any express promise of the defendant to pay her for any support she might give the child after divorce was granted. In one of the grounds of the amendment to the motion for a new trial the plaintiff in error complains that the court committed error in charging the jury as follows: "The law imposes the obligation upon the father to support his children until majority; and the court instructs you that the plaintiff is entitled to recover, can recover in this case, against the defendant for what she has thus expended." In another ground of the amendment to the motion for a new trial the plaintiff in error contends that the court committed error in charging the jury as follows: "The court has left it to the jury to determine whether the question of alimony or support of the child was passed upon and adjudged in that trial [the divorce proceeding]. If it was not, the court instructs you that any one, including the mother, who had furnished a support for the child, would have a right of action against the father for money expended therefor." The general demurrer filed by the defendant and the assignments of error upon the charges quoted make for determination the question as to whether or not a wife, who has obtained a verdict and decree of divorce from her husband, where the custody of the children has been awarded her in the decree, and the question as to the support of the child has not been passed on, can recover from the father the amount expended by her subsequently to the decree for the necessary support of such children. If the wife obtains a total divorce, she does not after the verdict and decree sustain the relation of wife to her former husband, and he is no longer under legal obligation to support her, except such support as may be imposed upon him in the divorce proceedings. After the verdict in the divorce case, the husband is not liable for necessities furnished by third persons to the divorced wife, nor is she entitled to inherit any interest in his estate when he dies. A divorce between the husband and wife does not bar the children from being heirs of the deceased father, nor is there anything in our statute relieving such father from his legal obligation to support his children simply because there has been a divorce granted to his wife. Civ. Code 1895, § 2452, gives the court, in divorce proceedings, the right to award the custody of the children to the parent not in

default; but under this section the court may award the custody to persons other than the parents, or to "guardians appointed by the ordinary." The father is primarily entitled to the custody of his children; but, if his conduct has been such as not to entitle him to their custody and to cause their custody to be awarded to some other person in divorce proceedings, this award of the custody to another by reason of misconduct on the part of the father of itself does not relieve him of his legal obligation to support his children. The fact that the custody of the children has been awarded to the mother does not change this rule. The fact that her former relation was that of wife to the father of the children could not relieve such father of his legal obligations to his children. Civ. Code 1895, § 2462, is as follows: "If the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support; and in what manner, how often, and to whom, and until when, it shall be paid; and this they may also do, if, from any legal cause, the wife may not be entitled to permanent alimony, and the said children are not in the same category, and when such support shall be thus granted, the husband shall likewise not be liable to third persons for necessities furnished the children embraced in said verdict who shall be therein specified." The only instance in which it is provided in this section that the father is relieved of liability to third persons for necessities furnished to his child is "when such support shall be thus granted," meaning when support is provided for the children in the verdict and decree in the divorce proceeding. Civ. Code 1895, § 2469, provides: "Until such provision is made, voluntarily, or by decree or order of the court, the husband shall be liable to third persons for the board and support of the wife, and for all necessities furnished to her, or for the benefit of his children in her custody." Where, because of the misconduct of the husband, a divorce is granted to the wife and the custody of the children awarded to her, and no support by way of alimony is provided for the children in the divorce proceedings, we know of no law relieving the father of his legal obligation to support the children, or of his liability for necessities furnished them by third persons. The wife stands as such third person, and can recover from the father for the proper support furnished his children by her after the divorce proceedings, even though the custody of the children was awarded to her. The legal obligation of the father to support his children, and his liability to third persons for proper support furnished the children, exists after as well as before a decree of divorce granted the wife because of the misconduct of the husband, where no support for

the children is provided for in the divorce proceedings; and where, in such proceedings, the custody of the children is awarded to the mother and she furnishes proper support to the children, she can recover from the father, on account of expenditures made by her, an amount to be determined under all the facts and circumstances in the case.

There is much conflict in the authorities on this question, and some courts hold that the father is not liable to the mother for expenditures made by her in support of the children under such circumstances. A majority of the authorities, however, seem to be in accord with the view which we entertain and have hereinabove expressed, to the effect that the father is liable. One of the reasons given in the authorities holding the contrary view why the father is not liable is that support and service are reciprocal duties, and that the father cannot be liable for the support of his children when he loses their services by reason of their being awarded to the mother. We do not think, however, this argument is sound, because the services of the children are lost to the father by reason of his wrongful act, if the divorce is granted because of his misconduct, and the court only acts to protect them in taking them from him and awarding them to the mother; and it would not be proper to allow the father to be relieved of liability for necessary support furnished his children because of his own wrongful conduct. The view just stated is very concisely set forth in the case of *Dolloff v. Dolloff*, 67 N. H. 512, 38 Atl. 19, 20, in the following language: "Nor is it material that the plaintiff was awarded alimony to the amount of \$600. Alimony in its proper signification is not maintenance to the children, but to the wife, and, when no order is made for the children's maintenance upon the allowance of alimony with custody of children, the father's obligation to support them is in no wise affected. In brief, when the father has been found by a judicial decree like the one in this case to be an unfit person to exercise parental control by reason of his own voluntary misconduct, the law does not allow him to convert such misconduct into a shield against his parental liability." Another reason given in this line of cases for holding that the father is not liable is that, when the children are awarded to the mother without any provision for their support, it is to be presumed that the court made such provision for their support as was necessary, and that the decree is conclusive as to the father not being under any obligation for their support after the decree, unless such decree is afterwards modified by continued proceedings in the original action. It would seem that, if it was proper for any presumption at all to be had in such a case, it would be that the court omitted to make any provision for the support of the children in the decree because it was deemed proper to leave

the obligation to support his children where it legally and ordinarily belonged, to wit, with the father, until there was some legal proceeding in regard thereto. In 14 Cyc. 812, it is said: "At common law the father remains primarily liable for the support of the children of the marriage as well after as before a divorce." We know of no statute in this state changing this common-law rule. In the case of *Spencer v. Spencer*, 97 Minn. 56, 105 N. W. 483, 114 Am. St. Rep. 695, 2 L. R. A. (N. S.) 851, it was held: "The legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of his wife for his misconduct, which gives the custody of the children to her, but is silent as to their support. If he refuses or neglects to support them, under such circumstances, the mother may recover from him in an original action a reasonable sum for necessities furnished for their support after such decree. The law implies a promise on his part to pay for such necessities." In this connection, see the cases cited in the note to this case in 114 Am. St. Rep., above cited; also notes to the same case in 7 Am. & Eng. Ann. Cas. 903. See, also, *Seely v. Seely*, 116 Mo. App. 362, 91 S. W. 979; *Dolloff v. Dolloff*, 67 N. H. 512, 38 Atl. 19; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817; *Zilley v. Dunwiddie*, 98 Wis. 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. Rep. 820; *Graham v. Graham*, 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N. S.) 1270; 2 Bish. Mar. Div. & Sep. § 1223; 14 Cyc. 812. In order for the wife to recover the amount expended by her for such support, where no provision for the support of the children was made in the divorce proceedings, we do not think it necessary, if proper, to institute any proceeding in the original case in which the divorce was granted her and the children awarded her; but she could bring an independent suit for such recovery. In such a case there is no order for maintenance of the children to review. In this connection, see *Seely v. Seely*, supra. In the case of *Maddox v. Patterson*, 80 Ga. 719, 721, 6 S. E. 581, 582, it was held, where the wife had been granted a total divorce and the custody of the children, with no order for alimony for either, that the minor child was entitled to an allowance of a year's support out of the estate of the deceased father under the facts of that case, and Chief Justice Bleckley, in rendering the opinion, said: "The judgment of divorce did not grant alimony, either permanent or temporary, to the wife or the child; and, so far as appears, there was no discharge of the father from his liability to support his child." If a minor child under such circumstances was entitled to a year's support out of the estate of the deceased fa-

ther, we see no good reason why he should not be entitled to a yearly support from the father while in life.

The defendant, in his amendment to the motion for a new trial, assigns as error the first part of the charge last quoted in the beginning of this opinion, and alleges that such charge was error, because the court gave instructions that it was for the jury to determine whether the question of alimony or support for the child was passed upon and adjudged in the trial for divorce. The record discloses the fact that this question was not passed upon in the divorce proceeding, and this fact is not disputed or in doubt; and we therefore do not see how the defendant was harmed by the charge to which reference is made. We do not mean to hold that in an action by the wife for the recovery of expenditures made by her for the support of the child after she obtains a divorce and an award of the custody of the child it would not be a good defense for the husband to show, as plaintiff in error contends, that in consideration of his withdrawing any objections to the award of the custody of the child to her she agreed to thereafter support the child and to relieve him from any liability for its support.

2. The plaintiff in her petition, or in the amendment thereto, did not set forth with proper particularity the expenditures made by her in the support which she alleges she gave the child. We think the special demurrer to this part of the petition and the amendment thereto should have been sustained. In a suit against the father by the mother for expenditures made by her in the proper support of the child it was proper that the defendant be made acquainted with such items of expense, in order that he might be enabled to properly prepare his defense, both on the question as to whether or not such expenses were for the proper support of the child and whether or not they were actually made. The amendment alleges that "said expenses had been an average of \$20 per month, including board, tuition, medical attention, and other necessities; that, while at the beginning the expenses were possibly less, it has grown with his age." This allegation did not properly set forth the different items of expense incurred, nor did any allegation in the petition or amendment thereto do this; and the special demurrer should have been sustained. The error in failing to sustain such demurrer requires a new trial. *Kilkeny Plantation v. Furber*, 130 Ga. 492, 61 S. E. 13. No other question referred to in the briefs of counsel for plaintiff in error involves error requiring a new trial.

Judgment reversed. All the Justices concur.

(132 Ga. 762)

GILLIS v. BOWMAN (three cases).**BOWMAN v. GILLIS.**

(Supreme Court of Georgia. June 22, 1909.)

1. NEW TRIAL (§ 21*)—GROUNDS—EXAMINATION OF WITNESS BY COURT.

The trial judge has the right to propound a question or a series of questions to any witness, for the purpose of developing fully the truth of the case; and the extent to which the examination conducted by the court shall go is a matter within his discretion; and a lengthy examination by the court of a witness called by either party will not be cause for a new trial, even though some of the questions propounded by the court were leading in character, unless the court, during the examination of the witness by himself, expresses or intimates an opinion on the facts of the case, or as to what has or has not been proved on the examination takes such course as to become argumentative in character; and it not appearing, in any of the numerous exceptions contained in the motion for a new trial, that there was any abuse of discretion upon the part of the presiding judge as to the extent of the examination of the witness by himself, nor that the examination took such course as to become argumentative in its character, nor that any opinion was expressed or intimated by the court as to what had or had not been proved, no cause for reversing the judgment and ordering a new trial is shown in any of the grounds of the motion containing exceptions to the examination of the witness by the court itself. *Bowden v. Achor*, 95 Ga. 244, 22 S. E. 254; *Harris v. State*, 61 Ga. 359; *Epps v. State*, 19 Ga. 102; *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 30; Dec. Dig. § 21.*]

2. APPEAL AND ERROR (§ 302*)—ASSIGNMENT NOT SUSTAINABLE IN PART—EFFECT.

Where a lengthy examination of a witness by the court, containing numerous questions and answers, is set forth in one ground of the motion for a new trial, and it is complained that all of the questions and answers were objectionable for certain reasons, and it appears that some of the questions and answers were not clearly open to the objections urged, the judgment of the court below overruling this ground of the motion for a new trial will not be disturbed here.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 302.*]

3. CHARGE NOT SUBJECT TO OBJECTIONS MADE.

Those portions of the charge excepted to upon the ground that they were argumentative or defective, in that they failed to state fairly and fully the contentions of the plaintiff in error, or that they contained expressions or intimations upon the facts of the case, or were not authorized by the evidence, are not subject to the criticisms made.

4. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the court below did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Four actions—three by W. D. Gillis against S. E. Bowman, and the fourth by Bowman against Gillis. In the three cases in which Gillis was plaintiff there were judgments for Bowman, and also for him in the case in which he was plaintiff, and Gillis brings error. Affirmed.

J. H. Tipton and Perry & Williamson, for plaintiff in error. Jno. D. Pope, Sam S. Bennett, and Claude Payton, for defendant in error.

BECK, J. Bowman was the tenant of Gillis during the years 1887 and 1888, and in the course of their dealings with each other they carried mutual accounts. In April, 1889, Bowman brought suit on account against Gillis for \$443.50. In September of the same year Gillis sued out a distress warrant against Bowman for rent due and to become due, amounting to \$317.50. Later in the same month Gillis brought suit on account against Bowman to foreclose his landlord's lien for supplies furnished to the amount of \$86.66. Again, in December, 1890, Gillis brought an action in trover against Bowman to recover two bay mares, to which he claimed title, and for which he claimed Bowman had never paid him, of the alleged value of \$240. In the three cases in which Gillis was plaintiff the jury rendered a verdict in favor of defendant; and in the case of Bowman against Gillis the jury gave a verdict in favor of Bowman for \$413.50. Motions for a new trial were made in each of the cases, and to the judgments overruling them Gillis excepted. The motions in all of the cases contained the same grounds and raise the same questions for decision.

Judgment affirmed. All the Justices concur.

(133 Ga. 830)

WALLER & CO., Inc., v. CLARKE.

(Supreme Court of Georgia. June 26, 1909.)

1. DISMISSAL AND NONSUIT (§ 79*)—ORDERS—TIME OF RENDITION.

On November 16, 1907, during the October term, which adjourned on November 26th, the court passed an order sustaining specified grounds of a demurrer to a petition, and ordered "that the petition be dismissed, unless the plaintiffs shall within 30 days amend to meet the grounds" sustained, and no amendment was offered during such 30 days. Held, the fact that the 30 days expired during the December term of the court, which began on the 2d day of December, 1907, did not make such order a December term order, or require or permit the dismissal of the case to be treated as having been made during the December term of the court.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 174, 175; Dec. Dig. § 79.*]

2. DISMISSAL AND NONSUIT (§ 81*)—REOPENING—REFUSAL.

The court committed no error in refusing the plaintiff's application to reopen the case and permit it to amend the petition during the December term after the expiration of the 30 days referred to in the order of November 16, 1907.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 182, 186; Dec. Dig. § 81.*]

8. APPEAL AND ERROR (§ 78*)—FINAL ORDER—EXCEPTIONS PENDENTE LITE.

Under the facts of this case, the order of November 16, 1907, was a final order, and no exceptions pendente lite could be filed thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 465, 471; Dec. Dig. § 78.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Walter G. Charlton, Judge.

Action by Waller & Co., Incorporated, against F. R. Clarke. Judgment for defendant, and plaintiff brings error. Affirmed.

Alexander & Edwards, for plaintiff in error. Edward S. Elliott, for defendant in error.

HOLDEN, J. The plaintiff brought an action for damages against the defendant, and to the petition the defendant filed a demurrer. In ruling upon the demurrer the court passed an order on November 16, 1907, during the October term, sustaining specified grounds of the demurrer, and ordering that "the petition be dismissed, unless the plaintiff shall within 30 days amend to meet the grounds" sustained. The October term adjourned on the 26th of November. No amendment was offered by the plaintiff within the 30 days. On the 21st of December, 1907, during the December term, the plaintiff filed an amendment to the petition and its motion asking the allowance thereof. On the 14th of January, 1908, during the December term, the plaintiff had certified exceptions pendente lite complaining of the ruling made in the order of November 16th. On the 15th of February, 1908, during the December term, the court passed an order stating that "the application to reopen and be permitted to amend is declined." The plaintiff filed its bill of exceptions, which was certified on March 26, 1908, complaining that the court committed error in passing the order refusing "the application to reopen and be permitted to amend," and also in passing the order of November 16, 1907. This bill of exceptions specifies the exceptions pendente lite filed on January 14, 1908, as a part of the record, and recites that the December term began on December 2, 1907, and did not adjourn within thirty days therefrom. One of the contentions of the plaintiff is that the order of November 16, 1907, passed during the October term, carried the case into and left it pending during the December term. Nothing was said in the order of November 16, 1907, passed at the October term, about the case being carried into another term, or giving the plaintiff the right to amend during any term. The 30 days given in that order within which the plaintiff might amend to prevent dismissal of its petition was liable to expire in vacation. The court could not definitely know when the order was passed that the

December term would be in session at the expiration of the 30 days. The December term began on the 2d day of December, and, as far as the court then knew, might finally adjourn before the thirty days expired. The plaintiff had the right to offer the amendment at any time before the expiration of the 30 days, and hence could have offered it before the December term began, and could have thus prevented the order from operating at a time occurring during the December term. The plaintiff could also have repudiated the offer of the court to allow amendment, and could have treated the petition as dismissed by refusing to amend and filing exceptions to the order before the December term began. The order said nothing about the plaintiff having the right to amend during the December term, or any other term, but simply fixed a number of days within which the plaintiff could amend. This order cannot be construed to be a December term order, nor can the dismissal be construed as a dismissal during the December term, simply because the 30 days happened to expire during the December term. Suppose the December term had adjourned before the 30 days expired, and a special term had been called, and the 30 days happened to expire during the special term; the order of November 16th could not, under such facts, be said to be a special term order, nor could the dismissal be said to be a special term dismissal, because the 30 days happened to expire during the special term. In this connection, see *Morehead v. Allen*, 131 Ga. 807, 813-815, 63 S. E. 507. The order of November 16th overruled the first five grounds of the demurrer, and on November 26th, the last day of the October term, the court passed an order revoking this ruling, and providing that: "The question of sustaining or overruling the said five grounds be and is hereby postponed until the coming in of the amendment of the plaintiff's petition, and their consideration shall be based on the petition as amended." No amendment was offered within the 30 days, and this order of November 26th did not in any way affect or modify the other provisions of the order of November 16th that "the petition be dismissed, unless the plaintiff shall within 30 days amend to meet the grounds" referred to in the order. After the expiration of the 30 days from the time the order of November 16th was passed, the plaintiff made a motion to reopen the case and be permitted to amend the petition during the December term of the court, and the motion was accordingly made at a term subsequent to the term at which the order was passed which had the effect of dismissing the case. The fact that the plaintiff made a motion to reinstate the case and excepted to the court's refusal to do so shows that the plaintiff considered and treated the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

case as having already been dismissed, and the fact that the court acted upon and refused such motion shows that the court so treated the case. The order of November 16th, passed during the October term, cannot be treated as an order of the December term simply because the 30 days therein referred to happened to expire during the December term. It nowhere appears that it was the intention of the court that such dismissal of the petition should be during the December term. Such dismissal of the case cannot be treated as a December term dismissal. Treating the permission given in the October term order to amend within 30 days as serving to keep open this term during this 30 days relatively to the right to amend and move to reinstate the case or vacate the order, the motion to reinstate under this view would not have been made during the October term because it was not made until this 30 days expired.

2. If the motion to reopen this case had been made during the term at which the dismissal was had, the granting of it would have been in the discretion of the court. But it was not made at that term. It was held in *Watkins v. Brizendine*, 111 Ga. 458, 36 S. E. 807: "A motion to reinstate a case, made after the expiration of the term at which the order of dismissal was entered, stands, as to excuses for delay, upon the same footing as an 'extraordinary motion' for a new trial." It does not appear in the present case that any sufficient excuses were offered by the plaintiff for its failure to amend within the 30 days, so as to make it the duty of the court to reopen the case and allow an amendment after the expiration of such thirty days. No good reason, if any at all, was shown why the case should have been reopened and plaintiff allowed to amend. The court committed no error in refusing to reopen the case and allow the plaintiff to amend.

3. When the order of November 16th was passed, that the petition be dismissed unless the plaintiff amended within 30 days, the plaintiff ought to have accepted or excepted, but it did neither. It did not accept the terms of the order by offering an amendment within 30 days, nor did it except by filing exceptions within the time required. The order merely gave the plaintiff the privilege to amend to prevent dismissal. If the plaintiff had submitted to the order requiring an amendment and amended its petition to conform thereto, it could not be heard thereafter to say that an amendment was not necessary. *Glover v. Savannah, etc., Ry. Co.*, 107 Ga. 34, 32 S. E. 876; *Atlantic Coast Line Ry. Co. v. Hart Lum. Co.*, 2 Ga. App. 88, 58 S. E. 316. The plaintiff in its exceptions pendente lite did not except to anything that happened during the December term of the court, but excepted to the order of November

16th, passed during the October term. Under the facts of this case, this order was a final order, and no exceptions pendente lite could be filed thereto. In *Harris v. Gano*, 117 Ga. 934, 936, 44 S. E. 11, 12, it was said that "no judgment or decree under our system can be said to be final until the time prescribed by law for setting aside the same by motion for a new trial or writ of error has expired." If, under the principle announced in this decision, a judgment sustaining a demurrer and dismissing a case is not final relatively to the right to file exceptions pendente lite until the time expires within which a motion to reinstate can be filed, it is a sufficient reply to say that no motion to reinstate was made during any term at which the case was dismissed. A judgment could not be said not to be final relatively to the right to file exceptions pendente lite until the time expires to file a motion to reinstate at a term other than the term of the final judgment, which would stand in a similar situation to that of an extraordinary motion for a new trial. The bill of exceptions bringing the case to this court was certified on the 26th of March, 1908. It does not appear when it was presented, but in it the order of February 15, 1908, refusing to reopen the case and allow the plaintiff to amend was assigned as error, and the bill of exceptions bringing the case to this court must have been presented after this date, which was too late to assign error on the order of November 16, 1907, passed during the October term, 1907, which adjourned on November 28, 1907.

As hereinbefore stated, the court committed no error in its judgment refusing to reopen the case and allow the plaintiff to amend after the expiration of the 30 days provided for in the order of November 16, 1907; and such judgment is affirmed.

(6 Ga. App. 315)

ATLANTA, B. & A. R. CO. v. N. EMANUEL & CO. (No. 1,664.)

(Court of Appeals of Georgia. June 15, 1909.)

CARRIERS (§ 177*)—LOSS OF FREIGHT—FAILURE OF DEFENDANT'S AGENT TO DELIVER.

No error of law appears, and under the agreed statement of the facts the finding of the court for the plaintiffs was demanded.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 775-803; Dec. Dig. § 177.*]

(Syllabus by the Court.)

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action by N. Emanuel & Co. against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Crovatt & Whitfield and Rosser & Brandon, for plaintiff in error. Twitty & Reese, for defendants in error.

HILL, C. J. Emanuel & Co. brought suit against the Atlanta, Birmingham & Atlantic Railroad Company and the Atlantic Coast Line Railroad Company to recover the value of one car load of cross-ties. By an amendment the Atlantic Coast Line Railroad Company was stricken as a defendant, and the case left pending against the Atlanta, Birmingham & Atlantic Railroad Company. The defendant filed a demurrer, which was overruled, and the case proceeded to trial before the judge without the intervention of a jury on an agreed statement of facts. The court rendered a judgment in favor of the plaintiffs, and the defendant excepted to both rulings.

It is not necessary to consider the exception to the judgment overruling its demurrer, for, if the agreed statement of facts did not authorize a recovery against the defendant, the assignment of error to the final judgment will have to be sustained, and that judgment set aside. From the agreed statement of the facts the following appears: The defendant received the car of ties referred to in the plaintiffs' declaration at Thalman, Ga., on or about April 16, 1907, for transportation and delivery to the plaintiffs at Brunswick, Ga., and transported the car to Brunswick, Ga., and on April 23, 1907, delivered it to the Atlantic Coast Line Railroad Company, with instructions to deliver it to the plaintiffs at their docks in Brunswick. The shipment originated at Bladen, in Glynn county, which is a competitive point as to Brunswick, since shipments originating there can be transported and delivered to Brunswick either over the Atlantic Coast Line or over the line of the Seaboard Air Line to Thalman, and thence from Thalman to Brunswick over the line of the defendant. The plaintiffs have sidetrack connections on their docks in Brunswick with the Atlantic Coast Line, and none with the line of defendant, and under instructions of the plaintiffs to defendant, unless otherwise ordered, shipments of cross-ties in car load lots, consigned to plaintiffs and transported by the defendant, are delivered to the plaintiffs on such side tracks, and such delivery is made under the following arrangement: The car is delivered by the defendant to the Atlantic Coast Line, with instructions to be side-switched or transferred from the tracks of the defendant to the docks of the plaintiffs. The freight on the car is collected from plaintiffs by the defendant. Whether the shipment originates at a competitive or noncompetitive point, there is a charge made by the Atlantic Coast Line for the switching service, and this is charged against and paid by the defendant to the Atlantic Coast Line Railroad Company. The car in question was handled in this manner, but was never delivered to plaintiffs. They paid the defendant the freight due on said car, \$14.10; and this was the full amount due thereon by the plaintiffs for delivery on the side tracks on the docks of the plaintiffs. The car was

loaded with 259 cross-ties, of the value of 58 cents each. Certain rules of the Railroad Commission are attached to this agreed statement as a part thereof; but this court does not consider them material to the decision of the questions. If so, they will be judicially recognized.

The suit is one arising on contract, and not in tort, as contended by the defendant in error. If in tort, the judgment would have to be reversed, as this remedy is against the actual wrongdoer; and according to the agreed facts, the car load of cross-ties was lost by the Atlantic Coast Line Railroad Company after having been delivered to it by the defendant. The present action is for a breach of the contract made by the defendant with the plaintiffs to transport the car load of cross-ties from the point of shipment and "deliver it to the plaintiffs at their docks in the city of Brunswick." Treating the action as one *ex contractu*, the defendant sets up two defenses: First, it contends that under the facts the Atlantic Coast Line Railroad Company was the agent of the plaintiffs, acting under direct authority to receive and handle the shipment at Brunswick, and that when the delivery was made by the defendant to the Coast Line at Brunswick the contract was fully performed, and it was released from any further responsibility. Second, if the Coast Line was not the agent of the plaintiffs, it was a common carrier required by law to receive the carload of cross-ties from the defendant as a connecting carrier and to carry it to the plaintiffs' docks, receiving therefor the compensation fixed by law, and in no view was the Coast Line the agent of the defendant. Either defense would be sufficient in law, if authorized by the facts. We think neither conclusion is supported by the evidence. The contract made by the defendant with the plaintiffs was to transport the car of ties to Brunswick, and there deliver it to the Atlantic Coast Line Railroad, with instructions that it be switched or transferred to the docks of the plaintiffs; and it is agreed that the car was transported by the defendant to Brunswick and there delivered by it to the Atlantic Coast Line Railroad, "with instructions to deliver it to the plaintiffs at their docks in the city of Brunswick." The instructions to deliver were given by the defendant to the Coast Line Railroad, for it had undertaken, not only to transport the ties to Brunswick, but to deliver them to the plaintiffs at their docks. The freight from point of shipment to point of delivery was paid to the defendant by the plaintiffs, and the defendant paid the Atlantic Coast Line Railroad its charges for hauling the freight from its tracks to the docks of the plaintiffs. The plaintiffs had no contractual relations whatever with the Atlantic Coast Line. Their contract was solely with the defendant, and the latter employed the Atlantic Coast Line in order to complete its contract with plaintiffs to deliv-

er "on their docks." The contract to deliver the ties to the plaintiffs "on their docks" was as plainly the duty of the defendant as the contract to transport from the receiving point to Brunswick.

That the foregoing conclusion is correct is further emphasized by the fact that the shipment was made from a competitive point. It might have been transported by the Atlantic Coast Line, and delivered to the plaintiffs on their docks at Brunswick, without any transfer or switching service at Brunswick. In order to successfully compete with the Atlantic Coast Line, the defendant would necessarily have been compelled to transport and deliver to the plaintiffs without imposing upon them the burden of transferring the car from its tracks to their side tracks on their docks. This is the reason why the defendant charged and collected the full amount of the freight from the point of shipment to the place of delivery on the side tracks on the plaintiffs' docks. The Atlantic Coast Line, under the facts, was neither the agent of the plaintiffs, nor was it a connecting carrier. It was simply performing a switching or transfer service for the defendant, acting under instructions given to it by the defendant, and paid for such service by the defendant. *W. & A. R. Co. v. Exposition Mills*, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; *Dixon v. Central of Ga. Ry. Co.*, 110 Ga. 173, 35 S. E. 369. The evidence demanded the finding of the court.

Judgment affirmed.

(6 Ga. App. 321)

SASSER v. PIERCE. (No. 1,745.)

(Court of Appeals of Georgia. June 15, 1909.)

1. EXCHANGE OF PROPERTY (§ 11*) — HORSE TRADE—RESCISSION.

Only actual fraud authorizes the ex parte rescission of a horse swap.

[Ed. Note.—For other cases, see *Exchange of Property*, Dec. Dig. § 11.*]

2. APPEAL AND ERROR (§ 807*) — DISMISSAL FOR LACK OF PROSECUTION — REINSTATEMENT.

Where a case pending in this court is assigned to the calendar for argument, and counsel receive the notice provided by rule 20 (57 S. E. xii), and fail to prosecute, it will be dismissed, and will not be reinstated, except for providential cause. However, the court may in its discretion reinstate during the same term a case which upon its call on the calendar has been dismissed for want of prosecution, if it appear that the failure to prosecute was due to no fault of counsel, but to the fact that the notice was not sent, or was lost in the mails.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3177-3188; Dec. Dig. § 807.*]

(Syllabus by the Court.)

Error from City Court of Millen; R. P. Jones, Judge.

Trover by J. B. Pierce against Frank

Sasser. Judgment for plaintiff, and defendant brings error. Reversed.

G. C. Dekle and Hill & Anderson, for plaintiff in error. Jos. Law and Jas. A. Dixon, for defendant in error.

POWELL, J. This is a horse-swapping case. It seems an anomaly that transactions so essentially sui generis should be subject to the ordinary law of the land and the common rules of jurisprudence; but we suppose they are. Pierce, the plaintiff, had a black mare mule, about five years old, named Nellie. Sasser, the defendant, also had a mule. A trade was proposed. Pierce said his mule was a little wild, and that he would like to trade for something that suited him better. Sasser said his mule was lame in her front foot, and a little old, and that he would like to trade for something younger. Sasser offered his mule and \$15 "to boot." Pierce made a counter proposition of \$25 to boot. Pierce went out to where the Sasser mule was hitched to the buggy and examined the lame foot. Sasser said that he thought the trouble with the foot was "sand gravel," and that if the mule were shod she would get all right. Finally they agreed to "split the difference," and Sasser gave his mule and \$20 "to boot" for the Pierce mule. After the trade was consummated, and the Pierce mule was being hitched to the buggy, Pierce "let the cat out of the bag" by telling old man Sasser (who was along with the party, and whom the witness spoke of as "grandpa") not to get in the buggy, for "that mule begins to climb oaks, and limbs begin to fall; you watch her climb the oaks and dodge the limbs." But "he who laughs last laughs best." Pierce's self-congratulation proved short-lived. He took the Sasser mule out for a drive next day, and soon persuaded himself that he had been swindled. It was not long until he was at Sasser's place desiring to "rue back." He tendered Sasser the mule he had obtained in the swap, and demanded Nellie in return. So far as the record shows he did not tender the \$20 which had been paid him. Sasser being very well satisfied with Nellie, even if she was a little wild, refused to rescind. Pierce sued in trover for the recovery of Nellie and her hire. At the trial the foregoing facts appeared substantially without contradiction and without conflict between the witnesses. Pierce freely admitted that he had been informed that the mule was lame before he traded. He testified that Sasser had told him of this fact, but had stated that he thought it was "sand gravel," and that shoeing would cure it. He was not able to say, at the time of the trial, what the trouble was; but he thought she was "stove up and swinnied." He had not had her shod. The jury found in favor of Pierce; and Sasser is here alleging

that the verdict is contrary to law and without evidence to support it.

It may be that, purely as a matter of fact, the conclusion of the jury is just or in a certain sense right, and we concede that they know far more as to matters of fact than we do; but as a matter of law (and, since the parties have appealed to the law, they must abide the rules) the verdict is wrong. "The right to rescind for fraud in a horse swap exists only when actual fraud has been committed. Rescission, where a right to rescind is not expressly reserved, cannot be had for constructive fraud, or merely on account of [a breach of] warranty, express or implied." *Barnett v. Speir*, 98 Ga. 762, 21 S. E. 168. The misrepresentation must relate to something already existent, as to which one party lies to the other. A false opinion given by the alleged offending party as to what will result in future from known conditions is not sufficient. *Fudge v. Kelly*, 4 Ga. App. 630, 62 S. E. 96. The plaintiff traded with his eyes open. He saw the mule was lame, and examined her foot. If he was swindled under such circumstances, his case falls within the province of a legal maxim known to the law for more than 600 years (see *Pollock & Maitland, History of English Law*, 196): "*Volenti non fit injuria*." Compare *Willy v. Gazan*, 69 Ga. 517. As Justice Hall said of the complainant in that case: "He took his course upon reasons that satisfied him of its propriety, and the consequences of his 'masterly inactivity' should not be visited upon others." Besides, it does not appear that Pierce offered back the \$20. "Restitution before absolution is as sound in law as in theology; and that doctrine prevents an *ex parte* rescission by the plaintiff without restoring the defendant to his original situation." *Summerall v. Graham*, 62 Ga. 731.

2. This case was placed upon the calendar for April 16th, and upon its call at that time it was dismissed for want of prosecution. On April 26th counsel for the plaintiff in error moved to reinstate, and made it appear to the court that, though counsel had signed the bill of exceptions by name and post office address, as required by rule 8 (57 S. E. x), the notice required by rule 20 (57 S. E. vii) had not reached them. After investigating the matter, the court became of the opinion that the failure to prosecute was not due to fault of the plaintiff in error or his counsel, and we therefore ordered the case reinstated. If a case is regularly assigned, and counsel are duly notified, and the case is dismissed for lack of prosecution, it will not be reinstated, except for providential cause. See rule 22 (57 S. E. xii). But the case at bar is different.

Judgment reversed.

(6 Ga. App. 336)

SESSIONS v. STATE. (No. 1,857.)

(Court of Appeals of Georgia. June 15, 1909.)

1. INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—EVIDENCE.

The evidence supports the verdict.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 300; Dec. Dig. § 236.*]

2. WITNESSES (§ 402*) — IMPEACHING OWN WITNESS.

The rule forbidding a party to impeach his own witness does not prevent that party from proving a state of facts inconsistent with the testimony of a witness who has testified on his side of the case.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1268; Dec. Dig. § 402.*]

3. INTOXICATING LIQUORS (§ 169*)—ILLEGAL SALE—PERSONS LIABLE—MIDDLEMEN.

The middleman in an illegal sale of intoxicating liquor, to be free from criminal responsibility, must act solely as agent of the buyer. If he induces the transaction, or if he acts as agent for both parties, or if he has a profit from the transaction, he is guilty of violating the law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 188; Dec. Dig. § 169.*]

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

L. J. Sessions was convicted of an illegal sale of liquor, and brings error. Affirmed.

Anderson & Speer, for plaintiff in error.
Fred T. Lanier, Sol., for the State.

POWELL, J. The defendant was convicted of the illegal sale of liquor. He approached two gentlemen by the names of Smith and Oglesby, and told them he could get them some liquor at \$1.25 per quart. They gave him the money, and he went off and returned. It is plain from the evidence that he never delivered any liquor to Oglesby. As to whether he made a delivery to Smith the testimony is conflicting. Smith himself testified that the defendant did not deliver it to him. It was proved, however, that he and the defendant went behind a door in a store, and that the defendant surreptitiously passed him something which he hid under his coat. One witness stated that he could not see both parties; that he saw the defendant's hand go out, and there was a pint of whisky in it; that he did not see Smith take hold of the package, but the defendant's hand came back empty. Another witness testified that he could not see what was in the package, but that Smith received it and put it under his coat. Smith himself says that the defendant handed him no package—that he only returned him the money. The defendant made a statement soon after his arrest, apparently freely and voluntarily, that he had delivered the whisky to Smith. He makes the further point that he was merely the agent for the purchaser, and cannot be convicted because he disclosed the person from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whom he purchased the whisky—one Love. The latter, however, was sworn as a witness, and testified that the defendant's statement in this respect was untrue. The court allowed different witnesses for the state to testify as to contradictory statements made by the defendant as to whether he had got the whisky from Love or not; and to this exception is taken. There is also an exception to the refusal of the court to allow counsel to ask a question, but it nowhere appears what answer he anticipated, and therefore the exception is not well taken. Exception is also taken to the following charge to the jury: "If the defendant bought whisky from some one for the buyer, and the defendant acted wholly as the agent for the buyer at the instance and request of the buyer, he would not be guilty of selling liquor, and you so find him in this case." This instruction is said to be erroneous, in that it is so qualified as to hold the defendant liable if he acted as agent both for the buyer and the seller.

1. The evidence is sufficient to authorize the conviction. The jury were authorized to find that the defendant in the transaction was not merely agent for the buyer, acting without benefit or consideration to himself, but that he was either the actual seller or was agent for the seller. *White v. State*, 93 Ga. 51, 19 S. E. 49. On the question of delivery the admission of the defendant, coupled with the corroborating circumstances appearing in the proof, was sufficient to make out this element of the offense. *Douglas v. State*, 6 Ga. App. —, 64 S. E. 490.

2. Even to allow a party to disprove facts testified to by his own witness is not a violation of the rule which prohibits a party from impeaching his own witness unless he has been entrapped. Much less so is it a violation of this rule to allow the state to prove that the defendant made different statements of the transaction to different witnesses. Hence the objection to allowing testimony of this nature was not well taken.

3. The instruction excepted to is not erroneous. The middleman in an illegal sale of liquor to be immune from liability must act wholly as the agent of the purchaser. If he induces the sale, or if he is acting for the seller in any wise, he cannot relieve himself from responsibility by getting the purchaser to create him his agent also.

Judgment affirmed.

(6 Ga. App. 306)

SHAW v. MAYOR, ETC., OF CITY OF MACON. (No. 1,630.)

(Court of Appeals of Georgia. June 15, 1909.)

MUNICIPAL CORPORATIONS (§ 816*)—OBSTRUCTIONS IN STREET—ACTIONS AGAINST CITY—PETITION.

The allegations of the petition clearly showing that the negligence charged against the defendant was not the main, controlling, prepon-

derating, or proximate cause of his injury, the court did right in sustaining a demurrer and dismissing the petition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1711; Dec. Dig. § 816.*]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by J. H. Shaw against the Mayor and Council of the City of Macon. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. Moore, for plaintiff in error. C. H. Hall, Jr., for defendant in error.

HILL, C. J. Shaw sued the mayor and council of the city of Macon to recover damages for personal injuries. A demurrer was filed by the city, which the court sustained, and this judgment is the error assigned.

The allegations of the petition, briefly stated, make the following case: On the day of plaintiff's injury he was riding a bicycle on Main street. When he was opposite the warehouse or place of business of A. T. Small, he found that two-thirds of the entire width of the street was blocked by farm wagons and by bales of cotton placed there by Small, leaving only a narrow driveway, barely sufficient for two ordinary vehicles to pass on the street. There was no other way for him to go to his destination than to proceed down Main street, and he was compelled to ride through the narrow space left between the cotton and wagons. Soon after he entered the north end of the street, he saw W. M. Guerry enter the south end, driving a horse hitched to a buggy, traveling in a fast trot; and, immediately upon observing Guerry approaching him, he stopped his wheel, drew himself close against the cotton, and caught hold upon the cotton with his left hand, intending to pull himself up against the cotton, so as to escape a collision with the horse and buggy, and before he had time to climb to the top of the bales of cotton the horse and buggy reached him, and the small end of one of the buggy shafts struck his right arm, and he received the injuries for which he brings suit. He charges that the defendant city caused his injury by reason of the fact that it had permitted the bales of cotton to be stacked in and upon the street, and allowed the street to be blocked and obstructed for weeks and months prior thereto, and neglected to require this obstruction removed from the street, and that the obstruction constituted a public nuisance, for the maintenance of which the defendant was responsible.

The demurrer attacked the petition on the grounds: (1) The allegations showed that the negligence alleged against the defendant was not the proximate cause of the plain-

tiff's injury. (2) Under the allegations of the petition, the direct and immediate cause of the injury was the collision of the plaintiff with the buggy driven by Guerry, in which collision the defendant is not charged with having any part. (3) The allegations show that the injuries received by the plaintiff were not the natural and probable consequences of the negligence charged against the defendant.

We think the demurrer was properly sustained. It seems clear from the allegations of the petition that the negligence charged against the defendant was not the proximate cause of the plaintiff's injury, but that the proximate cause of his injury was the act of the driver of the buggy. No inflexible rule of law can be laid down for determining what would be the proximate cause of an injury. The question must be resolved by the facts of each particular case. It may be stated generally that the negligence upon which a recovery can be predicated must be the chief, preponderating, and proximate cause of the injury. The doctrine is so fully covered and well settled by both the statute law of this state and the repeated rulings of this court and the Supreme Court that any elaboration is deemed profitless. Civ. Code 1895, §§ 3911, 3912, 3913; *Platt v. Southern Photo Co.*, 4 Ga. App. 159, 60 S. E. 1068; *Southern Ry. Co. v. Tankersley*, 3 Ga. App. 548, 60 S. E. 297; *Vinson v. Willingham Mills*, 2 Ga. App. 53, 58 S. E. 413; *Southern Ry. Co. v. Flynt*, 2 Ga. App. 162, 58 S. E. 874; *Shields v. Ga. Ry. & Electric Co.*, 1 Ga. App. 174, 57 S. E. 980; *Brown v. City of Atlanta*, 66 Ga. 71; *Rucker v. Athens Mfg. Co.*, 54 Ga. 84; *Mayor and Council of Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443, and citations.

Judgment affirmed.

(6 Ga. App. 299)

BOOTH v. I. H. BROOKE & CO. (No. 1,801.)

(Court of Appeals of Georgia. June 15, 1909.)

1. GARNISHMENT (§ 213*) — CLAIM OF THIRD PARTY—PROCEDURE.

In a garnishment proceeding, if the garnishee files an answer admitting indebtedness to the defendant, a claimant thereto under Civ. Code 1895, § 4720, cannot legally obtain judgment in his favor without filing a traverse to the answer of the garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 405; Dec. Dig. § 213.*]

2. GARNISHMENT (§ 209*)—CLAIMS OF THIRD PARTY.

No claim to the fund impounded by a garnishment can be entertained under Civ. Code 1895, § 4720, after there has been final judgment in favor of the plaintiff against the garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 401; Dec. Dig. § 209.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by O. D. Booth against I. H. Brooke & Co. Judgment for defendants, and plaintiff brings error. Reversed.

S. D. Johnson, for plaintiff in error. Robt. P. Jones, for defendants in error.

POWELL, J. Booth sued Lyon to the December, 1906, term of one of the justice's courts in Atlanta, and thereupon caused summons of garnishment to issue to Jones, requiring him to answer whether he was indebted to Lyon. On January 14, 1907, judgment was rendered in the principal action in favor of Booth against Lyon. On January 21st Jones answered the summons of garnishment under oath, stating that he owed Lyon, at the date of the service of the summons of garnishment, a sum in excess of that recovered by Booth against Lyon in the principal suit. On January 28th Brooke & Co. filed what purported to be a claim to the fund, reciting that the indebtedness of Lyon against Jones, which consisted of an open account, had been transferred to them before the institution of the suit and the service of the summons of garnishment. This paper, however, hardly operated as a statutory claim as it was not accompanied by the dissolving bond prescribed by the statute. At any rate, when the matter came on for hearing on February 26th, they withdrew it. No traverse was filed to the answer of the garnishee, which, as has been said above, admitted indebtedness to the principal defendant, and on February 26th the magistrate rendered judgment in favor of Booth, the plaintiff, against Jones, the garnishee, for the amount of the judgment which had been rendered in the main action. On February 27th Brooke & Co., without moving to open this judgment, filed a statutory claim in garnishment and gave the prescribed bond. At the March term of the court the plaintiff, Booth, in writing, set up the foregoing facts and moved that the claim be stricken. The magistrate overruled this motion, and, after hearing evidence going to show that the account of Lyon against Jones had been transferred to Brooke & Co. before the garnishment was served, awarded the money in controversy to the claimant. The plaintiff took the matter to the superior court by certiorari, and there, the foregoing facts appearing, the certiorari was overruled. To this judgment the plaintiff in error excepts.

1. Even if we should hold that the claimants had the right to intervene after the plaintiff had obtained final judgment against the garnishee, we should have to reverse the judgment, because, the answer having admitted an indebtedness from the garnishee to the defendant, the claimants could not legally have secured a judgment in their

favor upon their claim without traversing that answer. *Gordon v. Wilson*, 99 Ga. 354 (1), 27 S. E. 762; *Small v. Mendel*, 96 Ga. 532, 23 S. E. 834; *Davis v. Pringle*, 108 Ga. 93, 33 S. E. 815.

2. But we think that the claim came too late. Final judgment had been rendered against the garnishee. There was no garnishment to be dissolved by the filing of the claim; and it is for this that the statute (Civ. Code 1895, § 4720) provides. That proceeding was at an end. If what the claimants did in the first instance and before the judgment was rendered was not sufficient to bind them by that adjudication (and that question, not being before us, is not decided), their right of action thenceforth was by suit against Jones, the garnishee. *Rutherford v. Fullerton*, 89 Ga. 354, 15 S. E. 471 (2). If Jones owed the indebtedness to Brooke & Co., and not to Lyon, it was his duty so to answer; if he did not know to whom the debt was owing, he should have answered accordingly, under Civ. Code 1895, § 4727. Since he did neither of these things the court properly awarded judgment against him; and that judgment conclusively established the fact thenceforth that Jones did owe Lyon a debt in the sum admitted and that the same was subject to the garnishment, irrespective of whether he was also liable to Brooke & Co. for the same amount. *Rutherford v. Fullerton*, supra. See, generally on this subject 20 Cyc. 1097, 1080, 1131, 1133, 1149. The judgment against the garnishee was conclusive as to every defense which actually was made, or which might have been made. *Holbrook v. Evansville R. Co.*, 114 Ga. 1, 3, 39 S. E. 937.

Under Civ. Code 1895, § 4724, the money raised by the process of garnishment is, after final judgment, subject to distribution among the creditors of the main defendant, just as if it had been raised by the levy and sale of his property under execution. But the would-be claimant in this case can gain no comfort from this section, nor from the decisions which have been rendered under it, for he does not claim to be a creditor of the defendant, but of the garnishee.

Judgment reversed.

(6 Ga. App. 279)

BOOZE v. NEAL. (No. 1,476.)

(Court of Appeals of Georgia. June 15, 1909.)

1. SALES (§ 162*)—DELIVERY—TRANSFER OF WAREHOUSE RECEIPT.

The transferee of a warehouse receipt for cotton stands upon the same footing as if a physical transfer and delivery of the cotton itself had been made to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 383; Dec. Dig. § 162.*]

2. EXECUTION (§ 179*) — LIEN — CLAIM OF THIRD PARTY.

Where a creditor, whose debt is secured by a mortgage, in satisfaction of that debt takes a transfer of the title to the property mortgaged, such a transfer is not effectual to vest in him a title which would prevail on the trial of a claim afterwards filed by such creditor to prevent the sale of the property under an execution issued upon a judgment, the lien of which is junior to the mortgage, provided that the judgment was properly entered on the general execution docket prior to the date of the transfer of the title of the property to the claimant.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 179.*]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by J. W. Neal, executrix, against one Payne. Judgment for Payne on levy of execution. T. H. Booze filed a claim. Judgment for plaintiff in execution, and defendant brings error. Affirmed.

Dean & Dean, for plaintiff in error. W. J. Nunnally, for defendant in error.

POWELL, J. A common-law *fi. fa.* in favor of Mrs. Neal against one Payne was issued and properly recorded on the general execution docket on July 3, 1905, and on July 8, 1907, this *fi. fa.* was levied upon the cotton in dispute, to which Booze, the plaintiff in error, filed a statutory claim. It appears that in 1906 one Pyle furnished, or claims to have furnished, Payne money with which to make a crop for that year, and took a mortgage to secure the indebtedness. The claim of Booze is that this mortgage was taken under the act of 1899 (Laws Ga. 1899, p. 78), which provides, among other things, "The lien of mortgages on crops, which mortgages are given to secure the payment of debts for money, supplies and other articles of necessity, including live stock, to aid in making and gathering such crops, shall be superior to judgments of older date than such mortgages." In the fall of 1906 Payne brought the cotton in dispute to Pyle and turned it over to him in payment of this mortgage, and Pyle sold the cotton afterwards to Booze, the claimant. So far as material to the understanding of the controlling points in the case, this substantially states the evidence. The court found the property subject to Mrs. Neal's *fi. fa.*, and to this ruling exception is taken.

1. In the foregoing statement we have said that Booze bought the cotton from Pyle. As a matter of fact he bought the warehouse receipt representing the cotton; the warehouse receipt having been taken in the name of Pyle. We think, however, there is no difference in legal effect between these two statements of the transactions, and that the claimant's rights are just what they would be if the cotton had been physically delivered to him instead of the receipt. Un-

der section 2956 of our Civil Code of 1895, the transfer of warehouse receipts and other similar paper symbolic of property operates to transfer the title to the property when it is so intended; but it gives to the holder of the receipt no higher rights than if the property itself had been physically transferred, sold, or delivered. Bank of Sparta v. Butts, 4 Ga. App. 308, 61 S. E. 298. In no higher sense than this is Booze an innocent purchaser or an innocent holder. He stands in Pyle's shoes. He has all the rights which Pyle had prior to the sale; no more, no less.

2. This brings us to a consideration of the question as to whether Pyle could have maintained the claim to the property after he purchased it from Payne and before he sold it to Booze. Since his mortgage created merely a lien, and not a title, his immediate rights thereunder would not support a statutory claim; for in that action title is involved. Ward & Bro. v. Kennesaw Co., 127 Ga. 106, 58 S. E. 123. The claimant concedes this, but says that by reason of the fact that Payne turned the cotton over to Pyle as a payment of the mortgage there was thereby transferred to the latter such a title as authorizes the maintenance of the claim. This would have been true if the transfer or sale of the property had taken place before the lien of the judgment attached. However, as it is, the case falls squarely within the ruling in MacIntyre v. Ferst, 101 Ga. 682, 28 S. E. 989, in which it is held that "where a creditor, whose debt is secured by mortgage, in satisfaction of such debt takes a conveyance of the property mortgaged, such conveyance is not effectual to vest in him a title which would prevail upon the trial of a claim afterwards filed by such creditor to prevent the sale of such property under an execution issued from a judgment junior to the mortgage, but older than the deed." See, also, Deariso v. Lawrence, 3 Ga. App. 580, 60 S. E. 330.

The rationale of the rule is this: The purchase of the property by a lien creditor from his debtor is a novation. He stands just as if he had bought the property from the debtor and had paid him for it in cash, instead of crediting him with the value of it on the mortgage. Of course, if Pyle had bought the property from Payne in 1906, and had paid cash for it, his title would have been subject to Mrs. Neal's *fi. fa.*, which was obtained and recorded in 1906. His standing is no better, nor is his right larger, because he paid for it in something else than money—with a credit upon and a cancellation of the mortgage; for certainly one who parts with cash itself should stand as favorably in the eyes of the law as one who gives up merely the right to enforce some paper out of which he expects to make

cash. This works a hardship in some cases. But see Duncan v. Clark, 96 Ga. 286, 22 S. E. 927; Prince v. Walker, 1 Ga. App. 283, 58 S. E. 61.

Judgment affirmed.

(6 Ga. App. 339)

ALEXANDER v. CITY OF ATLANTA. (No. 1,834.)

(Court of Appeals of Georgia. June 15, 1909.)
INTOXICATING LIQUORS (§ 10*)—ILLEGAL SALE
—CITY ORDINANCES.

This case is controlled by Athens v. City of Atlanta, 6 Ga. App. —, 64 S. E. 711, Callaway v. Mims, 5 Ga. App. 9, 62 S. E. 654, and Sawyer v. City of Blakely, 2 Ga. App. 159, 58 S. E. 399.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]
(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Charles Alexander was convicted of an illegal sale of intoxicating liquors, and brings error. Affirmed.

Walter A. Sims and Burton Cloud, for plaintiff in error. W. P. Hill and Jas. L. Mayson, for defendant in error.

POWELL, J. Judgment affirmed.

(6 Ga. App. 339)

KEITH v. STATE. (No. 1,859.)

(Court of Appeals of Georgia. June 15, 1909.)
CRIMINAL LAW (§ 1103*)—APPEAL—BRIEF OF EVIDENCE.

The only exception is to the legal sufficiency of the evidence. What purports to be a brief of the evidence is not approved by the trial judge. There is an agreement of counsel as to its correctness; but as to this the statute requires, not the agreement of counsel, but the approval of the judge, and the one cannot dispense with the necessity for the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2881-2884; Dec. Dig. § 1103.*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Harry Keith was convicted of a crime, and brings error. Affirmed.

Wm. H. Boyd, for plaintiff in error. W. C. Hartridge, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(6 Ga. App. 354)

CALLAWAY v. CITY OF ATLANTA. (No. 1,870.)

(Court of Appeals of Georgia. June 15, 1909.)

1. PREVIOUS DECISIONS CONTROLLING.

This case is controlled by previous adjudications of the Supreme Court and of this court.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CRIMINAL LAW (§ 1129*)—ASSIGNMENT OF ERROR—SPECIFIC.

An assignment of error "that the judgment of conviction, sentence, and fine are contrary to law," not being specific, presents no question for adjudication.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956-2958, 2963; Dec. Dig. § 1129.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

C. M. Callaway was convicted in the recorder's court of the city of Atlanta of keeping liquor for unlawful sale, and, having tendered a petition for certiorari to the superior court, which it refused to sanction, he brings error. Affirmed.

Cox, Cox & Cox, for plaintiff in error. W. P. Hill and J. L. Mayson, for defendant in error.

POWELL, J. The plaintiff in error was convicted in the recorder's court of the city of Atlanta of violating section 1537 of the City Code, prohibiting the keeping of liquor on hand for unlawful sale. He tendered a petition for certiorari to the judge of the superior court, who refused to sanction it, and to this ruling exception is taken.

He presents only three points: (1) That the conviction is illegal, for lack of evidence to support it, because it appears that, while the defendant did have liquor on hand, he did not have it for the purpose of unlawful sale, but had it for individual consumption; (2) that the conviction is contrary to law, in that the liquor was kept on hand at his place of business, and that the offense is covered by the state law, in such a sense as to oust the municipality of jurisdiction; (3) that the fine imposed by the recorder was not in accordance with the provision of the ordinance, the ordinance providing that one convicted of violating it "shall be punished by fine not exceeding \$500, or imprisonment not exceeding 30 days, or both, in the discretion of the court," the sentence imposed being that the defendant should pay a fine of \$500 and costs, and "should work on the streets or public works of said city 30 days under the direction of the superintendent of public works."

As to the first point, the case is controlled by *Sawyer v. City of Blakely*, 2 Ga. App. 159, 58 S. E. 399. The defendant did contend that he had the liquors on hand for consumption, and not for sale; but there was proof that he had made at least one sale of it. The second point is controlled by *Athens v. City of Atlanta*, 6 Ga. App. —, 64 S. E. 711.

2. The third point is not made by the record. Counsel for the plaintiff in error contends that he is entitled to raise it under

the assignment of error that "the judgment of conviction, sentence, and fine are contrary to law." Assignments of error must be specific, whether contained in a bill of exceptions or in a petition for certiorari. Civ. Code 1895, § 4650; *Western & Atlantic R. Co. v. Jackson*, 81 Ga. 478, 8 S. E. 209; *Durham v. Cantrell*, 103 Ga. 166, 29 S. E. 708; *Clements v. McCormick Co.*, 115 Ga. 852, 42 S. E. 222; *Hayden v. State*, 69 Ga. 731; *Fleming v. State*, 67 Ga. 767. An assignment of error that the verdict and judgment "is contrary to law" is not a specific assignment of error, and cannot be considered by the court. *Newberry v. Tenant*, 121 Ga. 561, 49 S. E. 621; *Rogers v. Black*, 99 Ga. 142, 25 S. E. 20. Such an assignment cannot be considered, unless it is coupled with other assignments which specifically point out the reasons why the ruling, finding, judgment, or sentence complained of is contrary to law. It may be necessary to add that we are not speaking of the method of assigning error upon the action of the court in overruling motions for a new trial, demurrers, and similar pleadings, in which the specific grounds are definitely set up.

Judgment affirmed.

(6 Ga. App. 356)

TONEY v. CITY OF ATLANTA. (No. 1,871.) (Court of Appeals of Georgia. June 15, 1909.)

1. ANOTHER DECISION CONTROLLING.

For the most part this case is controlled by *Callaway v. City of Atlanta* (this day decided) 64 S. E. 1105.

2. INTOXICATING LIQUORS (§ 169*)—OFFENSES—PERSONS LIABLE—CLERK.

A clerk, who in a municipality sells intoxicating liquor kept by his employer in his place of business, may be convicted of violating the municipal ordinance forbidding the keeping of liquor on hand for the purposes of illegal sale. By analogy to the rule in misdemeanor cases, all who participate either directly or accessorially in the violation of a municipal ordinance may be held as principals. *Hendrix v. State*, 5 Ga. App. 519, 63 S. E. 939.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

W. V. Toney was convicted in the recorder's court of the city of Atlanta of keeping intoxicating liquor for unlawful sale, and, having tendered a petition for certiorari to the superior court, which it refused to sanction, he brings error. Affirmed.

Cox, Cox & Cox, for plaintiff in error. W. P. Hill and J. L. Mayson, for defendant in error.

POWELL, J. Judgment affirmed.

(6 Ga. App. 356)

COOK v. CITY OF ATLANTA. (No. 1,872.)

(Court of Appeals of Georgia. June 15, 1909.)

1. CRIMINAL LAW (§ 1189*)—CERTIORARI—REMAND FOR NEW TRIAL.

Where, on certiorari from the finding of the recorder of the city of Atlanta, it appears that there was no proof of the venue, the superior court can remand the case for another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3225-3227; Dec. Dig. § 1189.*]

2. CRIMINAL LAW (§ 1189*)—CERTIORARI—ERROR OF LAW—REMAND FOR NEW TRIAL.

Although the finding of the recorder of the city of Atlanta in a criminal case may be without any evidence to support it, this does not make the finding "an error in law which must finally govern the case," requiring the judge of the superior court on certiorari to render a final decision in the case; but he may send the case back for another trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1189.*]

3. PREVIOUS DECISIONS CONTROLLING.

The other assignment of error is controlled by the decisions of this court in *Callaway v. Mims*, 5 Ga. App. 9, 62 S. E. 654, and *Athens v. City of Atlanta*, 6 Ga. App. —, 64 S. E. 711.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

W. E. Cook was convicted in the recorder's court of the city of Atlanta of keeping intoxicating liquor for unlawful sale, and from the judgment of the superior court, remanding the case for a new trial, he brings error. **Affirmed.**

J. F. Gollightly, for plaintiff in error. W. P. Hill and Jas. L. Mayson, for defendant in error.

HILL, C. J. Judgment affirmed.

(6 Ga. App. 282)

SCHAEFFER v. CENTRAL OF GEORGIA RY. CO. (No. 1,501.)

(Court of Appeals of Georgia. June 15, 1909.)

1. APPEAL AND ERROR (§ 681*) — RECORD — SUFFICIENCY—REFUSAL OF AMENDMENT.

The alleged errors are not presented in such manner as to give this court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2884; Dec. Dig. § 681.*]

2. APPEAL AND ERROR (§ 518*) — RECORD — PLEADINGS.

Where a pleading is filed which the party may file as a matter of right, irrespective of the permission of the court to do so, and is subsequently stricken by the court for lack of legal sufficiency, it may be specified as record; but if it be such a pleading as requires the permission of the court for its filing, and if when it is presented to the court it is disallowed, it cannot be specified as record, although the party has gone through the formality of having it marked "Filed" by the clerk.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2342; Dec. Dig. § 518.*]

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by H. H. Schaeffer against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. **Dismissed.**

Garrard & Meldrim, for plaintiff in error. H. W. Johnson, for defendant in error.

POWELL, J. Schaeffer brought suit for damages against the railway company. The defendant demurred. On October 20, 1908, the judge passed an order sustaining the demurrer and providing that the case should stand dismissed unless the plaintiff by 10 o'clock a. m. on October 26th should amend in certain respects set out in the order. It is recited in the bill of exceptions that the plaintiff filed exceptions pendente lite to this judgment, and these exceptions were specified as a part of the record and have been duly sent here by the clerk; but no error has been assigned upon them, either in the main bill of exceptions or otherwise. It further appears from the bill of exceptions that on October 24th the plaintiff filed an amendment to his petition, but that on October 26th the judge passed an order disallowing the amendment on the ground that it was insufficient to meet the requirements of the order previously passed. To this judgment exception is taken, and error is assigned thereon. However, the proffered amendment is not set out in the bill of exceptions, or otherwise attached thereto or made a part thereof, though what purports to be a copy of the amendment has been sent up as a part of the record, under specification made in the bill of exceptions.

The plaintiff in error has not assigned error upon the final judgment, either in the bill of exceptions or upon his exceptions pendente lite. His only assignment of error is upon the subsidiary, though perhaps controlling, proposition that the court erred in not allowing the amendment to the petition. We think the recital in the bill of exceptions, that a final judgment was rendered and that the plaintiff excepted thereto pendente lite, while not sufficient to present for consideration the question whether the court erred in granting that judgment, nevertheless would be sufficient to give the court jurisdiction under the *Lyndon Case*, 129 Ga. 353, 58 S. E. 1047, provided there were a valid assignment of error upon the refusal to allow the amendment. However, we are not permitted to review the action of the court in rejecting the tendered amendment, because that paper is not set out, either literally or in substance, in the bill of exceptions; nor is it attached as an exhibit thereto, or otherwise made a part thereof. The rule is well settled that, where a party offers an amendment to his pleading and the judge declines to allow it,

the proffered amendment cannot be specified as record. *Branan v. A. B. Baxter & Co.*, 122 Ga. 224, 50 S. E. 45; *Taylor v. McLaughlin*, 120 Ga. 706, 48 S. E. 203; *Walker v. Equitable Mtg. Co.*, 114 Ga. 871, 40 S. E. 1010 (7); *Hays v. Clay*, 124 Ga. 908, 53 S. E. 399; *McGarry v. Seiz*, 129 Ga. 296, 58 S. E. 856. The fact that the party went through the formality of filing the amendment before the order of the judge was taken upon it does not change the matter. "A party, as a matter of right, cannot file an amendment without a previous order of the judge. When he offers the amendment, it is an application for it to be made a part of the record, and when the court denies the application it is no part of the record, and cannot be filed as such." *Branan v. A. B. Baxter & Co.*, 122 Ga. 224, 50 S. E. 45. In *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468, it is held that, if the amendment is filed under order of the judge, it becomes a part of the record, though the judge subsequently strikes it for its legal insufficiency, and that in such a case the amendment may be specified as a part of the record. This distinction is referred to in the case of *McGarry v. Seiz*, *supra*.

It follows that we are without jurisdiction to determine the questions which the plaintiff in error has attempted to present.

Writ of error dismissed.

(6 Ga. App. 339)

MCDONALD v. STATE (No. 1,867.)

(Court of Appeals of Georgia. June 15, 1909.)

1. CONVICTS (§ 12*)—CHAIN GANGS—EMPLOYMENT IN PRIVATE WORKS.

Under the law as it existed prior to September 19, 1908, the county authorities of the respective counties of this state had the legal right to employ the misdemeanor chain gangs in private works, but not to give the control of the convicts therein to private individuals. Prior to that date it was legal for the ordinary, having charge of county matters, to organize a chain gang, employ guards and other officers to manage it, and to contract with a private firm of persons that the chain gang should do labor in their private business, provided that the actual control of the prisoners was wholly in the county authorities, and was neither directly nor indirectly given to any private person.

[Ed. Note.—For other cases, see *Convicts*, Dec. Dig. § 12.*]

2. CONVICTS (§ 12*) — CHAIN GANG — WHIPPING OF INSUBORDINATE CONVICT.

The duly appointed whipping boss of a chain gang so organized and employed could justify the whipping of one of the convicts, if it appeared that the latter had been guilty of insubordination or an attempt to assault a guard, provided the whipping was not brutal or in excess of what was reasonable under all the circumstances.

[Ed. Note.—For other cases, see *Convicts*, Dec. Dig. § 12.*]

(Syllabus by the Court.)

3. CONVICTS (§ 10*)—"OTHER WORKS."

The words "other works," as used in Pen. Code 1895, § 1039, which provides that misde-

meanor convicts shall be sentenced to work on the public works, or on such other works as the county authorities may employ the chain gang, authorizes the employment of chain gangs on private works, providing the actual control of the prisoners is exercised by the county authorities.

[Ed. Note.—For other cases, see *Convicts*, Dec. Dig. § 10.*]

4. CONVICTS (§ 10*)—"MECHANICAL PURSUITS."

Work on a turpentine farm is not a "mechanical pursuit," within the meaning of that term as used in Pen. Code 1895, § 1039, providing that convicts shall not be employed by the county authorities in such mechanical pursuits as will bring the products of their labor into competition with the product of free labor (citing *Words and Phrases*, vol. 5, p. 4462).

[Ed. Note.—For other cases, see *Convicts*, Dec. Dig. § 10.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4462.]

Error from Superior Court, Turner County; Frank Park, Judge.

T. A. McDonald was convicted of assault and battery, and brings error. Reversed.

McDonald was convicted of assault and battery upon one Dave Cook, whom the testimony shows he had whipped. He attempted to justify the battery by showing that he was the whipping boss of the Turner county chain gang, in which Cook was a misdemeanor convict, and that the latter had been guilty of refusing to work and of acts of insubordination by attempting to take a gun from one of the guards. The place where the whipping occurred was spoken of in the evidence as being the chain gang of Conolly & Pinson. To show that it was a legally organized chain gang, and that he was the regular whipping boss, the defendant offered the following documents, which were excluded by the court as being irrelevant:

"Georgia, Turner County. This contract, made and entered into this the _____ day of January, 1908, by and between Turner County, Georgia, which contracts by and through W. A. Greer, ordinary thereof, party of the first part, and Conolly & Pinson, a partnership, composed of H. W. Conolly and T. J. Pinson, of Worth county, party of the second part, witnesseth, that the said party of the first part, for the consideration hereinafter named, hereby contracts to establish a chain gang upon the turpentine works of the said party of the second part on land lot No. 246 in the Sixteenth district of said county, for the purpose of working the misdemeanor convicts of said county and such other counties as do not work their own convicts, and to employ the said convicts assigned to and confined in the chain gang heretofore established as above stated, to be employed on the works of the said party of the second part, located in the said county, for and during the term beginning on February 1, 1908, and ending on such day as the said ordinary may designate between the date of

February 1, 1908, and January 1, 1909, and the said party of the second part to be given 15 days notice from the day thus fixed for this contract to expire. The said chain gang is to be established, maintained, and operated, and the said convicts to be worked in the manner provided by law, and in accordance with the rules and regulations of the prison commission of the said state, the ordinary of said county, and those having legal authority over the same; the same being at all times subject to any indorsements or changes that may be made in the law and rules and regulations governing the same by proper authorities. This contract shall apply to all convicts sentenced by the courts of said county as may be turned over to the parties of the second part by the party of the first part, and to such as may be hired by the said ordinary or his successors in office and assigned to the chain gang. It is further agreed that the said Conolly & Pinson shall have the right to hire any misdemeanor convicts from any county of this state or from any person, firm, or corporation who may have previously leased or hired said convicts, and maintain said convicts in camp No. 3 established upon the work of said Conolly & Pinson in land lot No. 246, upon the approval of the ordinary. It is expressly understood and provided hereby that no person directly or indirectly interested in the works of the said party of the second part shall exercise any authority or control over them in any way. This chain gang to be established under and be at all times subject to any order passed by said ordinary on the 1st day of January, 1906, with reference to the establishment and operation of chain gangs, which order is of file and record in the office of said ordinary.

"Now, therefore, pursuant to and in consideration of the foregoing terms and conditions, all of which are hereby agreed to, the party of the second part obligates and binds itself as follows, to wit: The party of the second part leases to the said party of the first part the convict premises located upon their turpentine works upon land lot No. 246 in said county, together with the bedding, cooking utensils, guns for guards, and all other equipments and supplies, and hereby delivers over the same to the management and control of the said party of the first part, and the proper authorities under law for the term of this contract, and further obligates to keep up and maintain said camp and keep it supplied with all necessary and proper equipment for and during the term of this contract, and, in addition to all this, to pay to the said party of the first part for the labor of said convicts the following net sum per month, to wit: Such price as may be agreed upon from time to time; the word 'month' as above used to mean 28 working days and the amount to be due and payable on the 1st day of each month. The said party of the second part further contracts to

furnish upon the order of said ordinary, all regulation clothing and rations, and have the cooking done for said convicts, all in accordance with the rules and regulations of the prison commission of this state, this being subject to any change or changes that may be made from time to time in the regulations now of force for \$10 per month; the word 'month' here used to mean calendar month, this to be due and payable from the party of the first part to the party of the second part on the same day of each month that the net hire of said convicts becomes due and payable from the said party of the second part to the said party of the first part as above designated, statement to be made up and filed with said ordinary after being certified and corrected by the superintendent of the chain gang, showing credits and debits accordingly. The said party of the second part hereby agrees and binds itself to give a good and sufficient bond, if required by said ordinary at any time, conditioned for the prompt and faithful discharge herein and hereby contracted on its part, the amount of said bond to be fixed by, and the same to be approved by, said ordinary.

"In witness whereof both the said parties have hereunto affixed their hands and seals the day and year first above written." [Signed and sealed by the parties.]

"Georgia, Turner County. This contract, made and entered into this the 1st day of May, 1908, by and between T. A. McDonald, of said county and state, party of the first part, and Turner county, Georgia, which contracts by and through W. A. Greer, ordinary for said county, party of the second part, witnesseth, that the party of the first part hereby contracts to perform well and faithfully all of the duties of superintendent and whipping boss of chain gang No. 3, located on lot of land No. 246 in the Sixteenth district of originally Worth county, now Turner county, Georgia, for and during the term of said appointment to said position for the sum of \$40 per month, which the said party of the second part hereby agrees to pay, the same to be due and payable on the 1st day of each month and the month to be a calendar month. This contract is to be operative and to be of force from the 1st day of May, 1908, until the 1st day of January, 1909, unless sooner terminated as follows: The ordinary reserving the right to revoke the appointment of the said party of the second part for sufficient cause in his discretion, and the said party of the first part shall have the right to resign said position upon 15 days' notice to the party of the second part if he should so desire." [Signed and sealed by the parties.]

The court charged the jury as follows: "All convict camps in Georgia at this time, or in ten years prior to this time, were illegal, where the work done by convicts was done for private parties, or working turpentine or at lumber mills, etc.; the convict be-

ing required to work on the public works of the state and not in private camps." To this exception is taken.

John B. Hutcheson and Claude Payton, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

POWELL, J. (after stating the facts as above): It will be seen by reference to the action of the court in excluding from evidence the contract between Turner county and Conolly & Pinson, and also the order of the ordinary of the county appointing the defendant whipping boss of the convict camp, and in instructing the jury in the manner set out above, that the judge took the view that all misdemeanor convicts in this state in 1908 and prior thereto could not be employed otherwise than upon public works; that to employ them otherwise would be so wrongful that the officials of the county chain gang who attempted to carry out the direction of the ordinary (or other tribunal having county matters in charge) could not justify their acts in enforcing discipline. We think that the judge erred in his view of the law. By Pen. Code 1895, § 1039, persons convicted of a misdemeanor are punishable "by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain gang on the public works, or on such other works as the county authorities may employ the chain gang, not to exceed twelve months, and any one or more of these punishments may be ordered in the discretion of the judge." In this same section there is a proviso as follows: "That nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county authorities in such mechanical pursuits as will bring the products of their labor into competition with the products of free labor." By Pen. Code 1895, §§ 1146-1149, the county authorities are authorized to appoint a whipping boss for misdemeanor convicts, to fix his compensation, and to define his duties. This officer is authorized to administer punishment upon the convicts in cases where it is reasonably necessary to enforce discipline and to compel work and labor; and the county authorities are empowered to adopt rules governing these things. By Pen. Code 1895, § 1149, no personal liability attaches to the whipping boss for any injury or damage done to a convict, if he acts in accordance with the rules thus adopted. This section seems to be broad enough in its terms to include an exemption from both civil and criminal responsibility.

By looking to the contract between the ordinary of Turner county and Conolly & Pinson, it will be seen that the proper authority in that county had organized a chain gang; that the convicts were not to be given into the control of private persons; that the chain gang was to be managed exclusively by

the county authorities, through regularly appointed guards and officers under the supervision, rules, and regulations of the prison commission; but that the convicts were to be worked, not on public works, but upon what may be called private works—that is to say, upon the turpentine farm of Conolly & Pinson. The ordinary did not hire or lease the convicts to that firm, but did contract that the labor of the convicts should be employed for their use and benefit. This presents the question squarely whether, prior to September 19, 1908, it was lawful for the county authorities to employ the county chain gangs in doing work for private persons, where the control of the prisoners was fully retained by the county authorities, and where no private person, directly or indirectly, had any authority over the convicts themselves. The statute (Pen. Code 1895, § 1039) provides that the misdemeanor convicts shall be sentenced to work on the public works or on such other works as the county authorities may employ the chain gang; and the Supreme Court has held that the trial court should follow this formula in sentencing prisoners to the chain gang. *Screen v. State*, 107 Ga. 715, 33 S. E. 393.

Since works are usually either public or private, it would seem that there is but little need to resort to construction to determine the meaning of the statute. A person looking merely to the language of the Code section itself would easily and naturally reach the conclusion that the legislative intent was that convicts should be put to labor on the public works unless the county authorities should see fit to employ them in other work; and as works other than public are usually private, he would naturally draw the inference that the county authorities might employ them on private works. This, we say, is the plain, normal, ordinary meaning which the words would convey. But sometimes words get a strained or unnatural meaning from the context, or from the history of the legislation. The word "other" is a term that frequently tends to limit that which otherwise would have a broader meaning. Its use here might therefore justify a court in saying that the words "other works," from the context, mean other like works, and include only quasi public works. We shall therefore look into the history of the legislation on the subject to see if any such construction is proper in the particular instance.

The rule is well recognized, of course, that the history of a statute may give to its words a meaning they otherwise might not have, and, on the other hand, that it may emphasize the fact that the words are to retain their common and ordinary sense. See *Acree v. State*, 122 Ga. 144, 50 S. E. 180. We shall first look to see whether these words, "on such other works," etc., were in the statute originally or were added by amendment. Going back to the Code of 1873, we find section 4310 (corresponding to

section 1039 of the Penal Code of 1895) providing, as to this subject, only for work in a chain gang on the "public works." By cognate sections of the Code of 1873 (sections 4814, 4815, 4820) the ordinaries of the counties of the state were given authority to organize chain gangs, and to cause the prisoners to be put to work on the public roads, or to turn over the county convicts to the Governor to be employed on the Western & Atlantic Railroad, or to hire them out to private individuals and other contractors engaged in doing public work. Under this plan, while the convicts were to be employed only in public works, their physical custody and control might be delivered into the hands of private persons, engaged in that form of work.

In 1874 two acts were passed. One of them, approved February 28, 1874 (Acts 1874, p. 24), amended section 4814 of the Code of 1873, and authorized the ordinary or other county authorities to work the convicts on the public works of the county, in chain gangs or otherwise, "or to hire out such convicts, upon such terms and restrictions as may subserve the ends of justice." This act, after having been subject to certain mutations, now appears in Pen. Code 1895, § 1137. See *Binns v. Ficklen*, 130 Ga. 379, 60 S. E. 1051. Since, however, the trial judge, whose power to punish was fixed by section 4310 of the Code of 1873, could sentence the defendant only to public works, it is doubtful whether the county authorities could have hired the convicts out to any private individual who was not engaged in doing some form of public work. This question was presented to the Supreme Court in a slightly different form at a little later date, as we shall soon see. However, this attempt to change the law, though it may have been futile for technical reasons, shows the trend of the legislative mind toward the allowing of misdemeanor convicts to be put to private labor in such cases as the county authorities deemed best. In the same year an act (Acts 1874, p. 29) was passed allowing any misdemeanor convict, with the approval of the trial judge, to hire himself to a private individual to do private labor, and the status of the convict under these circumstances was defined. The system which required the counties to employ the misdemeanor convicts on the public works had evidently become unsatisfactory or burdensome.

In 1875 a local law was passed providing that, where persons were convicted and sentenced by any court in Quitman county to work on the public roads or public works, "the board of county commissioners of said county may and are hereby authorized to hire out such convicts within the limits of the state upon such terms and under such restrictions as may, in the opinion of such commissioners, best subserve the ends of

justice and promote the interests of the county." Laws 1875, p. 263. In 1877 Oliver Moore was convicted in the county court of Quitman county, and sentenced to work in the chain gang. The county commissioners hired him to one Ogletree to work on the latter's farm. Ogletree demanded the prisoner of the sheriff and upon the latter's refusal to deliver brought habeas corpus. The case came in due time to the Supreme Court and was decided at the August term, 1877. See *Ogletree v. Dozier*, 59 Ga. 800. The Supreme Court, after quoting the local act of 1875, said: "It will be observed that this act does not provide that the court shall sentence the prisoner to be hired out on a private plantation in certain contingencies, but it empowers the commissioners to hire him out after the sentence of the court—in other words, to hire him out for private work, instead of working in the chain gang, or being confined in jail, or paying a fine as he was sentenced. It therefore empowers the commissioners to change or commute the sentence of the court. But the Constitution declares that the Governor shall have power to commute penalties. Code 1873, § 5075. To commute means to change; and as the Constitution vests this power in the executive, the Legislature, we think, cannot take it away and give it to county commissioners." It will be remembered that at this time the judge's power to sentence for misdemeanors was limited "to work in the chain gang on the public works." There must have been at that time some considerable sentiment against putting prisoners to what was evidently regarded as especially hard and degrading punishment, namely, to labor in the chain gang on the public works, for the court in the course of the opinion says: "In a legal sense, to commute would mean to change from a higher to a lower punishment—to change a penalty from the hard work of a chain gang to work on a farm, for instance; and we hold that this power belongs, if it be exercised at all, to the Governor." At the close of the opinion, Judge Jackson, who wrote it, threw out this suggestion: "We do not mean to say that the Legislature could not empower the courts to punish and sentence to work on a farm, or to any work or penalty not prohibited by the Constitution."

At the next session of the Legislature this suggestion was acted upon. The manifest legislative intent that misdemeanor convicts might be placed at private labor, instead of public work, having been thwarted because in its previous enactments the General Assembly had sought to confer the power so to work them upon the county authorities, irrespective of the language of the sentence of the court, and had not, as it should have done, changed the nature of the sentence to be imposed, that body in 1879 undertook an amendment of section 4310 of the Code

of 1873, which related to the form of sentences. It will be found by reference to the legislative journals that the bill for that purpose originated in the House of Representatives, and, as it passed that body, merely added to the language already found in the Code sections the words, "or such other works as the county authorities may employ the chain gang," and that when it reached the Senate that body further amended by inserting the word "on" before the word "such" in the quotation just given (probably to make it clearer that this was a distinct provision, and that neither the word "such" nor the word "other" was to be limited in meaning by reason of close association with the language of the previous clause) and also by adding the provisos "that nothing herein contained shall authorize the giving the control of convicts to private persons or their employment by the county authorities in such mechanical pursuits as will bring their products of their labor into competition with the products of free labor." And in this shape the act was passed. Acts 1878-79, p. 54.

We cannot escape the obvious conclusion that this legislation, thus circumstanced, originated, limited, and enacted, evinced a clear legislative intent that the county authorities might employ the convicts in the doing of private work, provided that the custody of prisoners, their management and control, was not put into private hands, but was kept under the regular appointed officers, guards, bosses, etc., which by other sections of the Code the county authorities were authorized to appoint. If this had not been the intention of the General Assembly, it would not likely have gone to the trouble of passing the act in the form they did. If the Legislature, by using the words "other works," had intended merely quasi public works, the amendment would have been wholly unnecessary—would have been merely a piece of supererogation, for there had been no tendency to construe the words "public works" strictly, but, on the contrary, the Supreme Court had construed them broadly and liberally. See *Lark v. State*, 55 Ga. 436 (decided in 1875). Section 4310 of the Code of 1873, as amended by the act of 1879, retained its form until September 19, 1906, and is now incorporated in section 1039 of the Penal Code of 1895.

If it had not been for the proviso created by the Senate amendment to the act of 1879, the county authorities, under other Code sections and statutes then in existence (see Code 1882, §§ 4814, 4815, 4820, 4821 [e]), might not only have employed the convicts upon private works, but also have turned over the physical custody of the prisoners to private hirers. The effect of this proviso was to repeal so much of those laws as authorized the hiring out of the convicts and the delivery of their custody and control to private persons. *County of Walton v. Franklin*, 95

Ga. 538, 22 S. E. 279. The legal effect of the changes made in the law by the act of 1879 was to require the judges, in imposing chain gang sentences, to direct that the prisoners be employed either on public works or such other works as the county authorities might direct (*Screen v. State*, 107 Ga. 715, 33 S. E. 393), and to authorize the county authorities so to work them. The ordinaries and other authorities having in charge county matters were required by law to organize the chain gangs and to direct where they should be put to labor upon either public roads, city streets, or private work.

There is nothing to which we are unaccustomed in the retention of the control of convicts by the public authorities while their labor is sold to private persons. This plan was pursued as to the felony convicts from 1897 to April 1, 1906. *Mason v. Hamby*, (Ga.) 64 S. E. 569. See Acts 1897, p. 71; Acts 1903, p. 65. Under these acts the prison commission organized the penitentiary system, employed wardens, guards, etc., who had the immediate control of the prisoners, but leased the labor of the felony convicts to private lessees. Under the acts of 1897 and 1903 cited above, the prison commission was given general supervisory powers over the misdemeanor chain gangs, but the particular control was left with the county authorities and the officers by them employed.

In no case (if we except the palpable obiter in the case of *Rountree v. Durden*, 95 Ga. 221, 22 S. E. 149), has the Supreme Court ever held that a bona fide arrangement by which the county authorities organized the chain gang, employed the proper officers, and through them retained actual control of the men, but employed their labor for private individuals, was illegal. Such work in a very fair sense is indeed quasi public work, for the county receives the benefit of the labor, as the amounts realized from the contracts to do the labor for individuals is paid into the county treasury and is used for public purposes. In all of the opinions rendered by the Supreme Court on the subject there is a negative pregnant that such an arrangement would be legal. In *Russell v. Tatum*, 104 Ga. 332, 30 S. E. 812, it is said: "That convicts cannot be worked in chain gangs controlled by private individuals is well-settled law of this state." Also, in the same case: "The detention of the convict by the private individual who had him in custody was therefore illegal." In that case the county judge had hired the convict to Tatum, and Tatum had organized and was controlling the chain gang. In *Simmons v. Ga. Iron & Coal Co.*, 117 Ga. 306, 43 S. E. 780, 61 L. R. A. 739 (9), the Supreme Court said: "Convicts cannot be worked in private chain gangs controlled by private individuals." In the course of the opinion it is stated: "The right to have the prisoner discharged is based on the further

ground that he is held in custody, under sentence of the superior court, in a private chain gang under the control and management of private individuals, acting for a private corporation."

In *Daniel v. State*, 114 Ga. 537, 40 S. E. 806, it was said: "It appears from the evidence that the accused, after his conviction of the offense of larceny in the city court of Jefferson, was hired by the county authorities of Jackson county to the board of commissioners of roads and revenues of Elbert county, and that the Elbert county authorities in turn hired him, with other misdemeanor convicts, to Swift Bros., a firm doing business in Elbert county. Swift Bros. were private parties. They made a bond with sureties, 'to hold the county of Elbert blameless and free from damage and cost and expense for the management, control, and detention' of the convicts hired to them. The officers of the camp, while appointed by the county, were paid by Swift Bros. The convicts were worked on a farm. Beyond the appointment of guards and bosses, who, as before stated, were paid by Swift Bros., *the county authorities had no control whatever over the convicts.* All this is uncontroverted. We are constrained to hold that under the law of this state the accused was not, at the time of his escape, in a lawful place of confinement, and cannot be punished for escaping therefrom, under the provisions of Pen. Code 1895, § 314. The law regulating the punishment of misdemeanor convicts (Pen. Code, 1895, § 1039) expressly provides 'that nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county authorities in such mechanical pursuits as will bring the products of their labor into competition with the products of free labor.' *It would be absurd to hold that the mere appointment by the county of guards, without more, is such an assertion of control, management, and authority by it as to save the hiring of its misdemeanor convicts to private persons from repugnance to the proviso quoted.*" The italics in the foregoing quotations are ours, and are used to emphasize the fact that in each case the decision of the court was directed to the fact that the convicts were given into private control, and that there is not the slightest intimation that the confinement was illegal because the work was private work.

It would be remarkable, indeed, if the employment of convicts on private work were of itself illegal, that the Supreme Court should not have given some intimation of that fact in some of the cases cited, instead of placing the decisions solely and alone upon the question of whether the control was individual or official. For instance, in the *Daniel Case*, if the court had held the view that the employment of the chain gang in the doing of private work was illegal, a

ruling to that effect would have prevented the necessity of going into the more complex question as to whether, under the particular arrangement appearing in that case, the control of the convicts was delivered to private persons, or was retained by the county authorities.

The General Assembly seems to have recognized that the language of section 1039 of the Penal Code allowed the county authorities to employ the convicts in private works; for at the special session of 1908, after a lengthy report had been received from a special investigating committee, inveighing against the employment of convicts otherwise than upon public works, an act was adopted striking the words "or on such other works," etc., from that section and leaving it so that the sentence of the court should read in future "to work in the chain gang on the public roads, or in such other public works as the county or state authorities may employ the chain gang." Laws Ga. 1908, p. 1119.

One other point deserves attention. One of the provisos in section 1039 of the Penal Code is that the convicts shall not be employed by the county authorities "in such mechanical pursuits as will bring the products of their labor into competition with the products of free labor." The contract between the ordinary of Turner county and Conolly & Pinson provided that the chain gang should work on the turpentine business of that firm. The court charged the jury that convicts could not be employed in the turpentine business. We hardly think that work on a turpentine farm is a "mechanical pursuit," according to the definitions which have been given that phrase. See the definitions of this phrase collected in 5 Words & Phrases, 4462. However, be this as it may, the employment of the chain gang in all mechanical pursuits was not forbidden. It might be so employed if the products of the convicts' labor was not brought into competition with the products of free labor. This was a question for the determination of the county authorities, under the supervision of the prison commission; and their decision in the matter was not subject to be brought into question by the whipping boss, or other official employed to conduct the chain gang under the direction of the county authorities; nor is their decision subject to collateral attack in this proceeding. This much of the statute is necessarily largely directory.

A similar provision was inserted into the act authorizing the prison commission to let out the felony convicts, prior to the present year; and it is a matter of current history and general information that they employed a large number of the men on turpentine farms, presumably because they would be brought less into competition with free labor there than in other ordinary employ-

ments. This proviso was inserted into the law for the benefit of free laborers, not for the benefit of the convicts. Neither the prisoners nor the guards or whipping bosses were legally interested in the question as to whether the products of the work done by the chain gang came into competition with the products of free labor or not. The question of the legality of the particular employment would be before the court if some free laborer (or perhaps some officer authorized to act on behalf of the state itself) had made the complaint. *Mayor v. Simmons*, 96 Ga. 480, 23 S. E. 508; *Reid v. Mayor of Eatonton*, 80 Ga. 755, 6 S. E. 602; *Fincher v. Colum*, 2 Ga. App. 743, 59 S. E. 22.

2. It follows from what we have said above that the court erred in excluding the documents tendered by the defendant, and in giving the instruction complained of. Exception is also taken to the action of the court in admitting, over objection, certain testimony tending to show the convict's bad physical condition at the time of the whipping. This was clearly admissible. While the "boss" might have had the right to whip the convict, he had no immunity from any liability for brutality arising from his going beyond what was reasonable under the circumstances. It does not clearly appear that the defendant was guilty of doing more than the circumstances and his authority in the premises authorized. This question should be submitted to the jury under proper instructions, and all testimony fairly tending to illustrate this question will be relevant.

If the eyes of one, a citizen of another state, or yet of a future generation, should chance to fall upon these pages, he will perhaps wonder why questions of such apparent juristic simplicity should have engaged the pains of the court to such a length. However, we have deemed it necessary to go into the question lengthily and with much painstaking. Indeed, we may state, in fairness to the trial judge, that the view of the law presented in the rulings complained of is in accord with that current largely among the bench and bar of the state. A cognate phase of this great question, its legislative aspect, held the General Assembly of this state in extraordinary session for many days last year. Outcry, resolutions, investigation, and even the able report of the investigating committee (see *Laws Ga.* 1908, p. 1059 et seq.), have tended to raise the question to such importance as to make the research we have given it worth the while. The old system is gone; a new system is in vogue. Any word as to the wisdom of either is not within our province to say. The case arose under the old law, and must be administered accordingly.

Judgment reversed.

(6 Ga. App. 270;

ALBANY & N. RY. CO. v. WHEELER.

WHEELER v. ALBANY & N. RY. CO.

(Nos. 1,449, 1,450.)

(Court of Appeals of Georgia. June 15, 1909.)

1. APPEAL AND ERROR (§ 588*) — BRIEF OF EVIDENCE—CONCISE STATEMENT.

The law requires that the brief of the evidence shall not consist of a report of all the testimony, but shall be a succinct, concise statement of only so much of the evidence as is material to an understanding of the errors complained of. To convert the full stenographic report into narrative form is not a compliance with the law. Abridgment and condensation are as essential to the legality of a brief of the evidence as is the approval of the trial judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2609; Dec. Dig. § 538.*]

2. NEW TRIAL (§ 132*)—BRIEF OF EVIDENCE—FILING.

A motion for a new trial was duly filed in term time. No brief of evidence was then filed, but the hearing of the motion was continued to a day in future (less than 30 days from the date of the trial), and it was directed in the order that movant should present the brief of the evidence 3 days before the time set for the hearing. The movant did not present the brief of the evidence until the day which had been set for the hearing. However, when that day arrived, the term of the court at which the trial was had was still in session. Upon presentation of the brief of the evidence the respondent objected that it had not been filed within the time allowed by the judge, and moved to dismiss the motion for a new trial. The judge, nevertheless, approved the brief of the evidence and heard the motion for new trial on its merits. *Held*, that this was not error. *Broadway National Bank v. Kendrick*, 124 Ga. 1053, 53 S. E. 576; *Eady v. Atlanta Coast Line R. Co.*, 129 Ga. 363, 58 S. E. 895 (2).

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 132.*]

3. NEW TRIAL (§ 11*)—SUCCESSIVE VERDICTS—SLIGHT ERROR.

The trial under review being the third trial of the case, and the verdict in favor of the prevailing party being the second finding in his favor, a new trial will not be granted on account of slight error. See *Albany & Northern Ry. Co. v. Wheeler*, 3 Ga. App. 414, 59 S. E. 1116, and *Wheeler v. Albany & Northern Ry. Co.*, 4 Ga. App. 439, 61 S. E. 839.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 14-16; Dec. Dig. § 11.*]

4. CHARGE FAIR AND ACCURATE.

The charge of the court fairly and accurately presented to the jury the degree of diligence required of a railway company as to the prevention of the communication of fire from its locomotives to adjacent property.

5. RAILROADS (§ 465*) — FIRE — PROXIMATE CAUSE.

Wind, unless extraordinary, is not to be regarded as an intervening proximate cause, where a railway company negligently allows fire to escape from its locomotive and it is communicated to adjacent property. *East Tennessee Ry. Co. v. Hesters*, 90 Ga. 12, 15 S. E. 828 (3).

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1692; Dec. Dig. § 465.*]

6. NEW TRIAL (§ 41*)—HARMLESS ERROR—INAPPLICABLE INSTRUCTION.

The charge of the court upon the duty of the railway company to take cognizance of the

combustible nature of grass and other things on its right of way, and to adopt means to prevent fire from being started on its right of way and carried to other property, does not seem to be directly and immediately applicable to the facts of the case; but a new trial will not be granted for this, as it is highly improbable that the plaintiff in error suffered any prejudice therefrom.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 66; Dec. Dig. § 41.*]

7. RAILROADS (§ 453*)—FIRE—LIABILITY.

One who owns property adjacent to a railroad, and builds his houses or otherwise locates his property near to the right of way, takes upon himself the risk of injury through fires occasioned by the running of the locomotives with ordinary care and diligence; but he does not take upon himself the risk of fires caused by negligence of the company or its servants. A charge substantially to this effect was, therefore, not erroneous. See *M. & W. R. Co. v. McConnell*, 31 Ga. 133, 138, 76 Am. Dec. 685, as explained and modified in *Brown Store Co. v. Chattahoochee Co.*, 121 Ga. 809, 49 S. E. 839. See, also, *Cincinnati, etc., R. Co. v. Barker*, 94 Ky. 71, 21 S. W. 347; 56 Am. & Eng. R. Cases, 106.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657–1659; Dec. Dig. § 453.*]

8. DAMAGES (§ 69*)—TORTS—INTEREST.

The court properly instructed the jury that they might, in assessing the aggregate of damages awarded to the plaintiff for the negligent destruction of his property by fire, include interest upon the value of the property so destroyed from the date of the fire to the date of the trial at 7 per cent. per annum. *Tifton, Thomasville & Gulf R. Co. v. Butler*, 4 Ga. App. 191, 60 S. E. 1087. See *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. 44, and notes thereto as reported in 18 L. R. A. 449, and 31 Am. St. Rep. 817. See, also, *King v. So. Pac. Co.*, 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 137; Dec. Dig. § 69.*]

(Syllabus by the Court.)

Error from City Court of Cordele; E. F. Strozler, Judge.

Action by H. C. Wheeler against the Albany & Northern Railway Company. Judgment for plaintiff, and defendant brings error, and plaintiff assigns cross-error. Affirmed on both the main and cross bill.

See, also, 3 Ga. App. 414, 59 S. E. 1116; 4 Ga. App. 439, 61 S. E. 839.

J. T. Hill and Maynard & Hooper, for plaintiff in error. Crum & Jones, for defendant in error.

POWELL, J. One of the grounds of the motion to dismiss the bill of exceptions is that the document filed as the brief of the evidence is not such a brief of the evidence as is required by law. We do not care to elaborate the propositions announced generally in the headnotes, but we wish to take this occasion to say a few words upon the subject of the proper method of preparing a brief of the evidence. In the beginning, let us say that what we are about to express is not to be taken as a particular reflection upon the able counsel for plaintiff in error. The delinquen-

cy to which we shall refer is one to which nearly every member of the bar may plead guilty. It is a fault, nevertheless—even more than a fault. It is a plain violation of the letter and the spirit of the law. The so-called brief of the evidence in this case is plainly an unabridged copy of the stenographer's report of the trial. It consists of about 65 pages of closely written typewritten matter. The substance of it, so far as material to a consideration of the error complained of, could easily be condensed within 5, or at most 10, pages. The remaining 60 pages is either repetition or purely immaterial surplusage. Now, section 5488 of the Civil Code of 1895 provides: "The brief of the evidence required in motions for new trials shall be a condensed and succinct brief of the material portions of the oral testimony, including a similar brief of interrogatories read on the trial. In such brief there shall be included the substance of all material portions of all documentary evidence. Documentary evidence copied as an exhibit or set out in the pleadings, and introduced in evidence, shall not be set out in the brief except by reference to the same. In all cases in which the testimony has been stenographically reported, the same may be reduced to narrative form, or the stenographic report may be used in whole or in part in making up the brief, with immaterial questions and answers and parts thereof stricken, so as in every case to shorten the brief, and include therein only material evidence." See, also, Civ. Code 1895, §§ 5528 (1, 2), 5529, and 5530.

The plain policy of the law is that the reviewing courts shall not be burdened with the duty of going through a full report of the testimony and sorting the material from the immaterial. It is a serious hindrance to the judges, in the process of attempting to apprehend the points involved in a proper decision of the case, that they must search for the relevant throughout an overwhelming and naturally obscuring volume of the irrelevant. If, when a record is thus thrust upon a busy court, the judges fail to catch a clear and accurate conception of the material points, the blame in justice should fall upon counsel who prepared the record, and the trial judge who approved it without requiring its abridgment, rather than upon the members of the reviewing court. We may call attention to some of the more palpable violations of the law in this respect which have been imposed upon us. We have had to review personal injury cases in which the exception was to the granting of a nonsuit, and in the report of the evidence would appear page after page devoted to a description of the plaintiff's injuries as detailed by himself, his physicians, and others, on direct and then on cross-examination. Of course, on exception to nonsuit, the extent of the plaintiff's injuries is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not involved, and is an utterly immaterial question. A simple statement in the brief of the evidence to the effect that the plaintiff and others testified that he had been injured in one or more of the respects indicated in his petition would be all that was necessary. All in excess of this tended to obscure the actual points involved, added to the costs, and entailed a great deal of unnecessary labor upon the reviewing court. Take a trespass case, in which the point involved is whether the plaintiff has shown title, and in which there has been much testimony as to the extent of the damage. In the brief of the evidence no reference need be made to the testimony as to the extent of the damage, except a general statement that there was evidence supporting this element of the case, and, if there has been a verdict for the plaintiff, that the amount of the damages as shown by the testimony ranged between such sums as the witnesses in fact gave. It is utterly unnecessary to repeat and reiterate facts developed in the evidence. The reviewing court has nothing to do with the preponderance in cases of dispute. If one witness testifies to a fact, and a dozen others support him in it, it is profitless to set out the testimony of each of them. It is only necessary to give a brief statement of what the first witness swore and to say that the dozen others testified substantially to the same thing.

The trial judge ought never to put his approval to a brief of the evidence until it has been abridged in accordance with the spirit and purpose of the law. It is his duty to compel the obedience of counsel to this salutary rule. To change the verbatim report of the court stenographer into narrative form is not a compliance with the statute. It is not a brief of the evidence, and entitled to approval, unless all immaterial questions and answers are stricken. Reasonable brevity is as much a cardinal essential of a legal brief of the evidence as is the approval of the trial judge. Such great laxity has prevailed and has been tolerated in the enforcement of this statute (only in the most flagrant cases has the court hitherto declined to consider the so-called briefs of evidence on the ground that they were not in fact briefs of the evidence) that we do not deem it proper to begin a rigid enforcement of the law without notice to the profession. But this is to give the notice and the warning that hereafter the law must be obeyed in this respect. It is not our intention to be harsh or capricious in the enforcement of the rule, but we feel it our duty to ourselves and to the law itself to enforce the statute with greater strictness than we have done hitherto. We have been practicing lawyers in our time, of course; and we recognize that counsel for the movant is frequently deterred from an attempt to brief the evidence to the extent it should be briefed by reason of the

fact that opposing counsel may object to any brief of the evidence which consists of less than a statement of the whole testimony. In this connection we may say that when an improperly prepared brief of the evidence appears in the record, without any explanation or contrary statement, it is presumed to be work of counsel for the movant. Hence, if counsel for the movant has not in fact been derelict in this respect, and desires to save himself from this imputation, he should present what he conceives to be a correct brief to the judge. If opposing counsel objects, and the judge sustains the objection and causes additions to be made, it is the privilege of moving counsel to cause this fact to appear, either by a note or memorandum attached to the brief of the evidence and verified as a part of it, or by a recital in the bill of exceptions; and if when the case reaches this court it appears that the brief has been improperly added to at the instance of counsel for the respondent, it is within the discretion of this court to give such direction to the matter, by taxing the costs, or otherwise, as will protect the party not at fault.

As we have said above, our object in entering upon this discussion in the present case is not to single out the attorneys immediately involved for criticism (for, indeed, they are even less offending than many others have been), but to take the opportunity of announcing the future policy of this court. We are sincere when we say that we prefer to decide cases upon their merits, rather than upon technicalities; but the law is law, and must be obeyed.

Judgment affirmed, on both bills of exception.

(6 Ga. App. 308)

PELHAM MFG. CO. v. POWELL.
(No. 1,636.)

(Court of Appeals of Georgia. June 15, 1909.)

1. MASTER AND SERVANT (§ 101*)—INJURIES TO SERVANT—CARE REQUIRED.

Actionable negligence by the master, with reference to his servant, is the failure to exercise ordinary care to provide a reasonably safe place to work and reasonably safe appliances with which to work, and the failure to exercise ordinary care to keep the place and appliances in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171-184; Dec. Dig. § 101.*]

2. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

A charge which fails to qualify the care required to be exercised by the master as that of "ordinary care," or to qualify the condition of the place and appliance furnished by the master as that of "reasonable safety," but instructs the jury without qualification that "the master is charged with the necessity of furnishing such machinery as will be safe," incorrectly states the rule of law defining the mas-

ter's duty, and in effect makes him an insurer of the servant's safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

3. TRIAL (§ 296*)—ERROR IN INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

The vice of a wrong rule in a charge is not extracted by the fact that the right rule is also given, because it is impossible to tell which rule the jury accepted. Especially is this true where the charge makes a concrete application of the wrong rule to the issuable facts and states the right rule as an abstract proposition of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY WITHDRAWAL.

Where an erroneous instruction is given on a material issue, the error is not rendered harmless by a subsequent statement of the judge that he had given the correct rule in another part of his charge. He must make it plain and clear to the jury that the first instruction was incorrect and is expressly retracted, and that the subsequent statement was correct and is substituted for the incorrect one; and it must appear, therefore, that the jury could not have been misled or confused by the two inconsistent statements.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

5. APPEAL AND ERROR (§§ 730, 1031*)—ASSIGNMENT OF ERROR—SUFFICIENCY—PRESUMPTION OF PREJUDICIAL EFFECT OF ERROR.

Grounds of a motion for a new trial which expressly allege that extracts from a charge are erroneous because they contain incorrect statements of the law applicable to the facts in issue, and were confusing, misleading, and prejudicial, are sufficient to raise the question of the legal correctness of such statements; and if such extracts are incorrect statements of the law, they will be considered in connection with the evidence for the purpose of ascertaining whether the movant has been injured by the giving of such incorrect instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016, 4038-4046; Dec. Dig. §§ 730, 1031.*]

(Syllabus by the Court.)

Error from City Court of Camilla; J. H. Scaife, Judge.

Action by Z. L. Powell, by next friend, against the Pelham Manufacturing Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jesse W. Walters & Sons, J. J. Hill, and Payne, Little & Jones, for plaintiff in error. Bennet & Cox and Pope & Bennet, for defendant in error.

HILL, C. J. This was a suit by a servant against his master to recover damages for personal injuries caused by the negligence of the master in the use and maintenance of inferior and defective machinery. Negligence was also alleged in the failure of the master to instruct the servant, who was a minor and inexperienced, of the dangerous character of the machinery and in its safe and proper use. The view we entertain of certain instructions to the jury on the law of the case, which are specially excepted to,

makes unnecessary any detailed statement of the issues made by the pleadings and the evidence. A general statement of the evidence will be sufficient to illustrate the questions of law involved. The master was a corporation engaged in the manufacture of cotton goods. The servant was a boy about 17 years of age. He had had some experience as an operative in a cotton mill, but, according to his testimony, none in the particular work he was called upon by the master to do at the time of his injury. When he was injured he was engaged in cleaning the fronts of the card machines, by picking and removing with his hands the cotton lint and fibers which had gathered on the shelves below the doors of the machines and on the scavenger rollers. In this manner he had successfully cleaned 14 of the machines, and when he came to the fifteenth machine he discovered that the cotton had accumulated on the shelf below the door to such an extent as to prevent him from discovering that the door which opened into the chamber or case where the revolving cylinders were inclosed, and which was intended to remain closed as a protection from the danger incident to the operation of the machine, had fallen down from its position; and being ignorant of this fact, as well as the consequent danger, due to his want of experience and instructions, he put his right hand out to remove the accumulation of cotton, and it went through the open door space, came in contact with the revolving cylinder, and was so mangled as to necessitate amputation. The evidence in his behalf proved that the hinges or latches to the door, which had fallen, and which were intended to keep it in its place, had become defective by wear and tear, and were for this reason wholly insufficient for the purpose, as the door, with its hinges or latches in that condition, would fall from its position by the vibration of the machinery. It was also alleged that the machine in question was of an inferior and dangerous character, not equal to such as was in general use in cotton mills, and that in this respect the defendant was negligent. All the allegations of negligence were specifically denied. The evidence, considered as a whole on the various issues of negligence, was in conflict, the question of liability under the law applicable thereto was not free from doubt, and a verdict either way would not have been without support. This condition of equilibrium in the evidence makes any error of law presumptively prejudicial.

We have given the case the most careful study, and we have concluded that the court committed material and prejudicial error in his instructions to the jury, as shown by the excerpts objected to, on the rule of law declaratory of the master's duty to his servants. The excerpts from the charge, and the charge as a whole, require of the master a

greater degree of diligence than that imposed by law. The jury was instructed, in effect, that the law made the master an insurer of his servants' safety; that his duty of diligence was absolute and unqualified, both as to instrumentalities and inspection; that he was bound to furnish and maintain safe places and safe appliances. Of course, this is not the correct rule of law, in Georgia or elsewhere. "The limit of the master's duty to his servant regarding places and appliances is to exercise ordinary care, having regard to the hazards of the service, to provide the servant with reasonably safe working places, machinery, tools, and appliances, and to exercise ordinary care to maintain them in a reasonably safe condition of repair." *Armour & Co. v. Russell* (C. C. A.) 6 L. R. A. (N. S.) 602, note. This states the law tersely and comprehensively. Civ. Code 1895, § 2811, embodies the same rule, and there are numerous decisions of this court and the Supreme Court to the same effect. The master does not insure or guarantee that the place or appliance furnished to his servant is even reasonably safe. He is required to exercise ordinary care to have them reasonably safe, and to maintain them in a reasonably safe condition.

We are aware that courts frequently, in declaring the rule of diligence applicable to the relation of master and servant, omit either the qualifying words "ordinary or reasonable" as expressive of the master's duty, or the word "reasonably" as qualifying the condition of safety of the place or appliance. And in cases where the evidence of the master's negligence was clear and convincing, the omission of either the one or the other qualifying word might not be reversible error. But the true rule of law demands that both qualifying words, or words of similar import, be used, and in a case where the question of the master's negligence was not manifest from the evidence, it would be presumptively prejudicial to the master's rights under the law to omit either qualifying word. If any principle of law in this age of mutation and progress even in law can be regarded as *stare decisis*, the one above discussed is in that class. It has its source in the common law, and runs harmoniously through the decisions of all courts of authority and the texts of law writers. Besides, it is the statute law of this state. Civ. Code 1895, § 2811.

Let us see how completely this principle was eliminated by the trial judge in his instructions to the jury. We will group several excerpts from the charge, involving substantially the same question and continuing the same error. From the third ground of motion for new trial: "The master is charged with the necessity of furnishing such machinery as will be safe for the operator to work around. If the machinery is not in proper condition, or if it is improperly constructed, to the extent that it results in the injury inflicted on the plaintiff, then you would

find the defendant liable." From the fourth ground: "If you believe that the defect in the machinery was the proximate cause of the injury, then it would be your duty to find against the defendant." From the fifth ground: "Now the issue reduces itself to the fact as to whether or not—as to whether the proximate cause of the injury was the defect in the machinery in not having proper fastenings to the doors. If you believe that that was the proximate cause of the accident, then you will find the defendant liable; but if you believe from the testimony in the case that the proximate cause of the injury resulted from the want of diligence and proper precaution on the part of the plaintiff, then you would find in favor of the defendant. But if you should find that the proximate cause of the injury was the defective machinery, and that that caused the injury to the plaintiff, then you would address yourselves to the amount that you think would compensate the plaintiff for the loss of his hand."

The only possible construction that can be given to these excerpts from the charge is that the court, in making the concrete application of the law to the vital and controlling issues in the case, entirely eliminated from the consideration of the jury the question of the master's diligence. The existence of ordinary care which qualifies and determines the master's liability, and the further qualifying condition of the reasonable safety of the machinery, were both conspicuously absent from the charge. The hurtful and erroneous statement was three times made that, "if the defect in the machinery was the proximate cause of the plaintiff's injury, the defendant would be liable," although the master may have exercised ordinary care in furnishing reasonably safe machinery and have exercised ordinary diligence in keeping it in a reasonably safe condition. In other words, the jury was told that the master was under an absolute duty to furnish absolutely safe machinery and under the absolute duty to keep it in an absolutely safe condition. The court explicitly tells the jury that "the master is charged with the necessity of furnishing such machinery as will be safe," and if they found from the evidence that he had not discharged this necessary duty, and "the defective machinery was the proximate cause of plaintiff's injury," then the only question that could interest them further would be the amount of compensation that they would give the plaintiff for the loss of his hand. It is manifest from the excerpts quoted that the court instructed the jury that the master was an insurer of the servants' safety; and it is equally manifest that this was most harmful error, in view of the close conflict in the evidence in this case on the vital issue of the master's negligence.

It is true that the court in another part of the charge stated the correct rule on this subject to the jury. This statement of the true

rule was given in the form of an abstract proposition of law, after the concrete application of the wrong rule had been thrice made, and after the method of computing the damages (determined by the application of the wrong rule) had been given in lengthy detail as laid down in *Florida Cent. & P. R. Co. v. Burney*, 98 Ga. 1, 26 S. E. 730. The vice of a wrong rule in a charge is not extracted by the fact that the right rule is also given therein, because it is impossible to tell which rule the jury adopted, or that they could distinguish the right from the wrong; and especially would this be true in a case where the wrong rule was concretely applied to the facts, and the right rule abstractly stated. Peradventure, the jury may not have heard the statement of the right rule, or understood it after the trying ordeal of the mortality and annuity tables had been endured. The wrong rule was three times given in the beginning of the charge and before the minds of the jurors had been burdened and exhausted as just suggested.

It is also insisted by learned counsel that the court corrected the error made in the beginning of his charge on the question of the master's duty. At the conclusion of the charge counsel called the court's attention to this error, stated the true rule, and asked the court to specifically so charge. The court, in response to this request, stated: "The rule that I read is the correct rule, gentlemen." The record does not show that he then re-read to the jury the correct rule which had been previously read to them, and the fair inference is that he did not. But, if he had then read to them the correct rule, we do not think it would have been a sufficient correction of an error repeatedly made in the beginning of the charge; and especially did it fall far short in this respect, when the court did not expressly call the attention of the jury to the incorrect statement of the rule and expressly retract it. *Atlanta Ry. Co. v. McManus*, 1 Ga. App. 306, 58 S. E. 258 (5), and cases cited.

There are other meritorious attacks made on the charge of the court, notably that some of the excerpts contain an intimation or expression of opinion on the evidence; but we do not care to prolong this opinion, and doubtless there will not be a recurrence of these errors on a second trial.

Objection is made to the sufficiency of the assignments of error on the excerpts from the charge of the court above discussed. We think they are sufficient. They raise clearly and specifically the question that the propositions of law charged, and which are fully set out in the assignments, were erroneous, and, as applied to the facts material to the issues, misled the jury, and were prejudicial to the movant. If the propositions of law are erroneous, the error is presumably prejudicial, and the entire record will be reviewed,

to ascertain if the plaintiff in error has been injured by the giving of such erroneous instructions. *Wiley v. State*, 3 Ga. App. 120, 59 S. E. 438; *Anderson v. Southern Ry. Co.*, 107 Ga. 500, 33 S. E. 644; *Binion v. Georgia Southern Ry. Co.*, 118 Ga. 282, 45 S. E. 276.

We do not deem it necessary to decide any of the questions made in the other assignments of error. Because of the errors contained in the assignments considered, we reverse the judgment refusing a new trial.

Judgment reversed.

(6 Ga. App. 356)

BROWN v. STATE. (No. 1,875.)

(Court of Appeals of Georgia. June 15, 1909.)

CRIMINAL LAW (§ 770*)—CHARGE OF COURT.

It is no valid objection to a charge of the court that it presents the issues of the case vividly and graphically, if it is fair, is not argumentative, does not sum up the testimony, and does not express or intimate any opinion as to what has or has not been proved.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1806; Dec. Dig. § 770.*]

(Syllabus by the Court.)

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Jim Brown was convicted of arson, and brings error. Affirmed.

Pierce Bros., for plaintiff in error. J. S. Reynolds, Sol. Gen., and Jno. M. Graham, for the State.

POWELL, J. Brown was convicted of arson, and to the overruling of his motion for a new trial he brings error. In addition to the general grounds, he specifically assigns error upon the following charge of the judge to the jury: "The state contends that on the 6th day of last December, in this county, on a plantation belonging to Judge E. H. Callaway, known as the 'Mays' Place,' there resided an old darkey by the name of Brandon Gordon, with his family; that near his dwelling house was located his stable and his barn, in which he had his mule, wagon, buggy, and some fodder and some corn; that about daybreak on Sunday morning, the 6th day of December, he was awakened by a light coming between the boards in his house; that he and his family arose, and soon afterwards his neighbors assembled around his barn and stable which was being consumed by fire, and that the flames had gone to such extent as to make it impossible for him to save his mule, wagon, corn, and forage stored therein; that his property was destroyed. The state contends that it was through a human agency that the said barn was set upon fire; that it was not an accident; that the time of day, and the fact that some parties who went to a certain place in reference to the burning detected the odor of kerosene, establishes what is known in law as the corpus delicti—that is, that there was a crime committed. The state contends that

the defendant had a motive and an incentive to commit this crime; that he had been last year (1908) a tenant on Judge Callaway's place; that there was some trouble between him and his landlord as to his working and payment of amounts due by him; that he had been removed from the plantation; and that his property had been levied upon, and that the crops that he had formerly planted and tended were turned over to this old darkey Gordon, whose stable and barn were burned. The state contends that the defendant had a feeling of vindictiveness against Callaway and against this brother tenant of his who had been put in charge of his property, and to whom it is claimed he attributed his troubles with his landlord. The state contends that the defendant made threats on various occasions as to what he would do by way of having vengeance upon the prosecutor in this case, Gordon. The state contends that, in furtherance of that malicious motive and purpose on his part, he committed this act. The state contends that it has submitted testimony tending to show that the tracks leading from that burning went in the direction of the defendant's house, and led up toward his house; that those tracks were first made with a shoe of a certain character; that at a certain point in the course of the tracks the party making the tracks stopped and took his shoe off, and then walked in bare feet for a distance; that he went down to the creek and attempted to jump across the creek; but it was too far, and he went back and crossed at another point; that, after making a considerable number of tracks with bare feet, he replaced his shoes. The state contends that the tracks upon comparison with the bare foot of the defendant showed a close resemblance to his feet, if it was not identical with it. The state contends that these various circumstances, taken together with the alleged threats, show that the house was burned by human agency, and that the defendant at the bar was the man who burned it."

In order that the matter may be clearly understood, we deem it proper to complete the context from which this excerpt is taken. To the foregoing language the judge added the following: "Now, gentlemen of the jury, the defendant denies that. He contends that he had no motive for burning the house; that he had no hard feeling against his landlord, nor against this man Gordon; that, while he had no property, he was able to go into the field and make an honest living, as he had done before; that he had no ill feeling against Gordon; and that Gordon had done nothing to provoke such feeling. He contends that he went back on the place to get two guinea fowls that belonged to him, and that he took his gun and shot them; that at the time he and Gordon had a very pleasant talk, and he invited him to come to his house, and he said he would meet him at church and be as good friends as they had ever been.

The defendant claims that, with a negro named Malord, he went that night down to Richmond county, and was not near the fire, and knows nothing about it. He says he never made any threats, and that these parties misrepresented him in their testimony. He contends that, as to those tracks, he said at the time, 'You see, gentlemen, I can't make a track of that sort,' and he asked somebody to take off his shoe, his hands being tied, and that he put his foot in the track, and it did not correspond at all. He says he is absolutely innocent. He contends that he has established the affirmative defense that he was not there, and did not commit the crime charged against him. Now, gentlemen of the jury, in stating these contentions to you, I do it only that you may the better apply the principles of law which I have given you in charge, and without meaning to say that I have recalled all of the many contentions in the case, or that I have stated them in the order of their importance. The duty rests upon you to remember the testimony, and to draw such inferences and conclusions from the testimony as men, acting under their oaths, can properly do. It is not my purpose to intrude upon your prerogative in determining the facts in this case. I give you the law in charge, and you are to decide what the facts are, and then return a verdict of guilty or not guilty."

The following objections are taken to the foregoing instructions to the jury: "That it was argumentative and calculated to impress the jury that the testimony introduced in behalf of the state was entitled to more weight and credit than that introduced in behalf of the defense—defendant's statement—that it militated against the defendant, in that it was such a sympathetic and graphical portrayal of the old darkey's loss and damage, couched in such fascinating and tragic language as was calculated to dissipate the dispassionate equanimity of the jury, and have a greater weight in the estimation of the jury than the testimony for the state; that it was such a summary as the jury could not have accepted it other than as an expression of an opinion upon the proven facts; the court nowhere throughout the entire summary having disclaimed to the jury any intention of expressing an opinion upon the proven facts." Two other minor exceptions are in the record, but they are clearly not well taken.

The evidence is sufficient to support the verdict, and there is no reason for reversing the judgment of the court overruling the motion for a new trial unless the exception to the foregoing portion of the charge is well taken. "The office of a charge by the court is to give to the jury such instruction touching the rules of law pertinent to the issues involved in the pending trial as will enable them intelligently to apply thereto the evidence submitted, and from the two constituents law and fact make a verdict. In deliv-

ering his charge, the trial judge should carefully avoid an invasion of the province of the jury. He should refer to the evidence only so far as is necessary to present the leading issues of the cause, leaving the minor contentions of opposing counsel to the consideration of the jury under appropriate general instructions. It should contain no such summary of the evidence as might to a jury seem either to be an argument or amount to the expression or intimation of an opinion thereon." *Thomas v. State*, 95 Ga. 484, 22 S. E. 815; *Nelson v. State*, 124 Ga. 8, 52 S. E. 20. In the case just cited, it was held error for the trial judge to repeat to the jury the substance of the testimony of the state's witnesses and submit this, together with argumentative deductions therefrom as issues in the case. It is further stated in this case and in *McVicker v. Conkle*, 96 Ga. 597, 24 S. E. 23, that the judge should not recapitulate in detail the testimony of the witnesses in such a way as is likely to leave the impression on their minds that the testimony of a particular witness is to have more credit than that of another witness or any other evidence in the case. In *Suddeth v. State*, 112 Ga. 409, 37 S. E. 747, it is held to be reversible error for the judge to state to the jury what a particular witness has testified toward the establishment of a particular issue in the case. The charge must not be argumentative. It is not saved from error by the use of such phrases and expressions as "the state contends" or "it is contended," etc. *Smith v. Hazlehurst*, 122 Ga. 792, 50 S. E. 917. Upon the subject generally see *Rouse v. State*, 2 Ga. App. 184, 58 S. E. 416; *Butler v. State*, 2 Ga. App. 397, 58 S. E. 685; *Fulton v. State*, 2 Ga. App. 397, 58 S. E. 685; *Waters v. State*, 3 Ga. App. 649, 60 S. E. 335; *Scott v. State*, 4 Ga. App. 73, 60 S. E. 803.

When the charge excepted to is viewed in connection with its context, which is also set out above, it will be seen that it is not argumentative, and that it does not stress the state's contentions to the exclusion of those of the defendant, but that the contentions of both are fairly and accurately presented; that it was not such a summary of the testimony as to convey the impression that the judge was expressing an opinion on the facts proved in the case. It was a very fair presentation, not of the testimony, but of the issues raised by the testimony. It draws the issues clearly and correctly, but it makes no reference to the particular testimony by which these issues are supported. We concede the insistence that it is graphic, but we do not concede that it is erroneous for the judge to charge the jury graphically. It is a rare faculty to be able to array the leading issues of a long trial before the jury graphically and vividly without violating some of those rules which have been built up to keep the judge from encroaching upon the prov-

ince of the jury; but Judge Hammond seems to be one of the few men who can do so, and this power is to his credit as a trial judge, and not to his discredit. But even one of his ability in this respect should keep himself under the closest surveillance, lest he by inadvertence step over the sharply drawn border line beyond which no judge can tread. See *Sharpton v. State*, 1 Ga. App. 542, 57 S. E. 929. The charge before us with all its vividness, clearness of expression, comes clearly up to the rule laid down in the *Thomas Case*, supra: "He should refer to the evidence only so far as necessary to present the leading issues of the case, leaving to the jury the consideration of the minor contentions of opposing counsel under appropriate general instructions." The excerpt from the charge taken as a whole is not subject to the exceptions taken to it. *City Railway v. Findley*, 76 Ga. 311 (8); *Whitlow v. State*, 74 Ga. 819 (3); *Elder v. Cozart*, 59 Ga. 200.

Judgment affirmed.

(6 Ga. App. 324)

GREEN v. STATE. (No. 1,766.)

(Court of Appeals of Georgia. June 15, 1909.)

1. CRIMINAL LAW (§ 254*)—MISDEMEANOR—TRIAL BY JUDGE.

A defendant in a misdemeanor case pending in a city court, having the right to waive trial by jury, by such waiver gains the right to demand trial by the judge. The judge of the city court of Americus has permissive grant of power to try civil cases, but he is not compelled to exercise this power.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 254.*]

2. CRIMINAL LAW (§ 254*)—TRIAL BY JUDGE.

In the trial of criminal cases, where the defendant, having the right to make a choice, prefers to waive trial by jury and to be tried by the judge, the duty of the judge to try such a defendant is obligatory. Trial by a jury, where a defendant objects to a jury trial, deprives the defendant of the exercise of his right to be tried by the judge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 254.*]

3. CRIMINAL LAW (§ 252*)—PLEADING AND PROOF—VARIANCE.

Where, upon a prosecution under the act of 1903 (Acts 1903, p. 90), the accusation or indictment charges, as a part of the description of the contract, that it was made on a named definite date, and the proof shows that such contract was in fact made on a different date, a variance exists which forbids the conviction of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 252.*]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Bam Green was convicted of a violation of the labor contract law, and brings error. Reversed.

Blalock & Cobb, for plaintiff in error. Zach Childers, Sol., for the State.

RUSSELL, J. The plaintiff in error presents two reasons why his conviction of a violation of the labor contract law of 1903 (Acts 1903, p. 90) was contrary to law.

1. 2. By exceptions duly preserved pendente lite, as well as in his motion for new trial, the plaintiff in error insists that his trial before the jury, whose verdict found him guilty, is a nullity, and the verdict consequently void. It appears from the record that when the case was called for trial the defendant in the court below waived trial by jury and demanded a trial before the court without a jury. The court ignored the waiver and refused the demand of the defendant to be tried without a jury, and required the defendant, over his objection, to strike a jury and try the case before the jury thus selected. The point presented for decision is whether one who is being prosecuted for a misdemeanor has in any case the right, by waiving trial by jury, to demand that he shall be tried by the presiding judge. The learned judge of the city court of Americus, upon the authority of the ruling in *Travelers' Ins. Co. v. Thornton*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99 (2), held, as appears from his opinion which is in the record, that it was optional with the judge as to whether he would decline to try the prisoner.

The ruling in the *Thornton Case*, supra, followed the older case of *Central of Ga. Ry. Co. v. Gleason*, 69 Ga. 201 (3), in which it was held that the judge of the city court of Savannah had power to determine all civil cases of which said court had jurisdiction, without a jury, where no jury was demanded, but that it was not obligatory upon him to do so. It will be noted, however, that the rulings in both the *Gleason* and *Thornton Cases* have express reference to civil cases. In the *Gleason Case* Judge Crawford, delivering the opinion of the court, only ruled that it was not mandatory upon the judge of the city court of Savannah, under the authority given him, to hear and determine civil cases where no demand for a jury has been made by either of the parties. The ruling rested solely upon the particular verbiage of the act then under consideration; for Justice Crawford proceeded to say: "If it had been the purpose of the Legislature to have required him to try all causes in his court where there was no demand for a jury, then the act would have read: 'The judge of said city court shall hear and determine all civil causes of which the said court has jurisdiction. * * *'. But the act simply says that the judge shall 'have power and authority to hear,' etc., which words in our judgment might, and doubtless would, have been omitted, had it have been the purpose of the act to repeal the law as it stood before, and have made it the imperative duty of the judge to hear and determine the cases brought to his court wherever a jury was not demanded. As the words used confer a mere

permissive grant of power to the judge, we are not authorized to extend their meaning and legal effect, to the end that they shall be made compulsory upon him."

In the *Thornton Case*, Judge Cobb was expressly dealing only with the fourteenth section of the act creating the city court of Americus (Acts 1900, p. 97), which relates to civil cases alone, and which section employs the same language as the portion of the act creating the city court of Savannah, which had been construed by Judge Crawford in the *Gleason Case*; and therefore he very properly held, under the wording of the fourteenth section, that while the judge of the city court of Americus has authority to try civil cases without a jury in certain instances, "he is not required to do this, if, in his discretion, a jury trial is to be preferred." As the *Gleason Case* is cited as authority in the *Thornton Case*, and as Judge Crawford, in the former case, clearly indicates that it is clearly within the power of the Legislature to impose upon a judge of a city court the mandatory duty of trying causes in which there is no demand for jury trial, it becomes necessary for us to determine what difference, if any, exists between the provision of the act creating the city court of Americus with reference to the trial of civil cases, as contained in section 14 of that act, which was construed in the *Thornton Case*, and the provisions as to the trials of criminal cases, embodied in section 30 of the same act.

It is unnecessary to consider that portion of section 30 which relates to defendants confined in jail because of their failure to give bond, or to refer to possible differences in conditions between the cases of defendants arraigned during the regular term of the court when juries are present or those when the court is not sitting at regular term. In the case now before us it does not appear whether the defendant was or was not under bond, and the defendant was arraigned, so far as appears from the record, at the regular term of the court when juries were impaneled qualified to try him. In our opinion, the latter fact does not affect the merits of the case, because the defendant, in writing, waived trial by jury and demanded to be tried by the court. As we construe section 30 of the act establishing the city court of Americus, when the defendant waived jury trial and, by writing entered upon the accusation, demanded a trial before the court without a jury, the court had no discretion, but it became his duty to hear and determine this defendant's case. After making provision for various contingencies likely to arise upon the arraignment of the prisoner, the Legislature declared in the concluding sentence of the section just referred to that "if the defendant waives trial by jury then the said judge shall proceed to hear and determine such criminal cases," etc. In this provision the Legislature seems to have intentionally adopted the suggestion of Judge

Crawford in the Gleason Case, by using identically the language which would make the duty of the judge, as to a trial of cases in city courts, mandatory, instead of discretionary.

There may be instances in which the right to trial by a learned and upright judge is as substantial as the right of trial by jury. At any rate, it is manifest from the language employed in the act now before us that when a prisoner emphasizes his waiver of jury trial, by demanding to be tried by the judge, he is exercising a right of choice which it is the duty of the judge to respect. In delivering the opinion in *Logan v. State*, 86 Ga. 266, 12 S. E. 406, Judge Simmons says: "There is no reason why a prisoner in a case of this kind should not have the right to be tried by a conscientious and intelligent judge, if he prefers it, as well as the right to be tried by a jury. There may be reasons, indeed, why he should prefer the former to the latter, especially as it may often conduce to the speedy trial which it is the policy of the law to accord him." We apprehend that the waiver of trial by jury, when the court is not in regular term, may in some degree be influenced by the desire for a speedy trial, and yet, on the other hand, the fact that, even though a jury is present, still the defendant prefers to be tried by the judge, does not tend to delay the trial of the case.

3. The second assignment of error insisted upon is that the court erred in admitting, over the defendant's objection, testimony that the prosecutor made a verbal contract with the defendant on the 11th day of September, 1908, when the accusation charged that the contract was made on the 29th day of December, 1908. We think that the objection to the testimony was well taken and should have been sustained. A clear and definite description of the contract, by means of which the defendant has defrauded his employer, is essential in prosecution of violation of the labor contract act of 1903. As men may make many contracts within a limited time, it is necessary that the identity of the contract which is the basis of the prosecution should be clearly established, not only for the purpose of protecting the defendant against a subsequent prosecution upon the same charge, but also to enable him to prepare his defense. If the contract had been alleged to have been made in writing, it could not be contended that proof of an oral contract would not be inadmissible. In the trial of misdemeanors the state may prove that the alleged offense was committed at any time within two years; that is, the act which in itself is unlawful may be alleged to have been done upon a certain date, and may be proved to have been actually committed upon an entirely different day, and yet no variance would arise. But the violation of the labor contract act (Acts

1903, p. 90) does not consist in the act of making a contract. The making of the contract is only one of the essential antecedents to the actual violation, which is the intent to defraud by obtaining advances upon the contemporaneous or pre-existing contract with the intention of not performing the definite contract. To illustrate: It would be permissible to charge that the advances were made upon the 29th of December, 1908, and to prove that they were in fact obtained (and the coexistent fraudulent intent was present) on September 18, 1908; but there would be a fatal variance if the accusation alleged that the contract was made orally and the proof showed that the contract was in writing, and there would be a failure of proof of the contract if it was alleged that the contract was in writing and the original written contract was neither produced nor its loss accounted for. It might be proved that the fraudulent intent was manifest by the obtaining of advances at any date within two years; but, if the advances were made more than two years prior to the finding of the accusation, evidence upon the subject would be inadmissible. On the contrary, the contract on the faith of which the advances were made, if reduced to writing, might have been entered into and executed three or more years prior to the finding of the indictment, and still have related solely to the year in which the advances were made and the accusation was found. The contract of labor by means of which fraud may be perpetrated, when reliance upon its terms affords a basis of credit, must not only be unambiguous, but definite; and the fact that one may have defrauded by means of one contract would not authorize conviction for a fraud perpetrated by means of an entirely different contract. The descriptive averments as to the contract in the proof must correspond with those in the indictment or accusation. It would not do to convict upon the allegation that the accused had made a contract with A. B., by proof that the contract was made with C. D. And for the same reason a contract identified in an accusation as having been made in September cannot be the same as one made in December.

For these reasons, we think that the judge erred in not granting a new trial.

Judgment reversed.

(5 Ga. App. 280)

WESTERN UNION TELEGRAPH CO. v.
HARRIS. (No. 1,408.)

(Court of Appeals of Georgia. June 15, 1909.)

1. DEATH (§ 77*)—ACTIONS—EVIDENCE—SUFFICIENCY.

The evidence authorized the verdict, which was not immoderate in amount.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 77.*]

2. NEGLIGENCE (§ 119*)—PLEADING (§ 49*)—PROVING NEGLIGENCE AS ALLEGED—NATURE OF ACTION.

Although the negligence with which a defendant is charged may be characterized in the plaintiff's petition as willful and wanton, if the specific facts alleged do not warrant such conclusion, the rule of duty which merely requires the exercise of ordinary care and diligence is not affected thereby, nor does it in such a case become incumbent upon the plaintiff, by reason of such allegation, to prove more than is required by law to entitle him to recover. The legal conclusions of the court are to be drawn from the statements of fact contained in the pleadings unaffected by the conclusions of the pleader. *Seaboard Air Line Ry. v. Shigg*, 117 Ga. 454, 43 S. E. 706; *Central of Ga. Ry. Co. v. Moore*, 5 Ga. App. 562, 63 S. E. 642.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 200-216; Dec. Dig. § 119; **Pleading*, Dec. Dig. § 49.*]

3. ELECTRICITY (§ 19*)—DEATH—ACTIONS—EVIDENCE—SUFFICIENCY.

The fact that the death of a person resulted from an electric current conveyed by a metallic wire is evidence of the fact that such wire is capable of transmitting a current likely to produce death.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

4. TRIAL (§ 241*)—INSTRUCTIONS—CODE PROVISIONS—EXPLANATION OF CONSTRUCTION.

It is not error to give in charge a section of the Code in its exact language, even though such language may have been construed as having a meaning somewhat different from the popular acceptance of the terms employed, if the language of the statute is thereafter fully explained to the jury in accordance with the construction placed upon it by the Supreme Court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 562, 563; Dec. Dig. § 241.*]

5. DEATH (§ 104*)—ACTIONS—INSTRUCTIONS.

The fact that a parent is entitled to the earnings of his minor child may be a circumstance tending to corroborate other evidence of the parent's dependence on such child, and of the fact that the child substantially contributed towards the parent's support. The well-recognized interdependence of parent and child upon each other during minority, and the right of a parent to the assistance of his minor child, might also tend to repel any inference arising from evidence tending to show that dependence and contribution shown to have existed in the past had been terminated.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. § 104.*]

6. TRIAL (§ 192*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

It is not violative of section 4334 of the Civil Code of 1895 for a trial judge to instruct the jury that a material fact which is expressly conceded or virtually admitted is a fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Coosland, Judge.

Action by Ellen Harris against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. H. Hall, Warren Roberts, and Mann & Milner, for plaintiff in error. O. J. Wimberly, J. L. Pollard, and Cruger Westbrook, for defendant in error.

RUSSELL, J. The plaintiff in the lower court obtained a verdict of \$2,500 for the value of the life of her minor son whose death was alleged to have been caused by the negligence of the defendant telegraph company. It appears that, while on his way to church or returning therefrom, the plaintiff's son, John Harris, came in contact with a telegraph wire of the defendant company which was so heavily charged with electricity that his death resulted. It is undisputed in the evidence that John Harris was the minor son of the plaintiff, and that death resulted from contact with the wire of the company. It is insisted in the brief of learned counsel for plaintiff in error that there was no evidence that the plaintiff was at the time of the death of John Harris dependent upon him, nor any evidence that he contributed to her support, and that the verdict should be set aside because it is in other material respects unsupported by the evidence. It is also contended that the court erred in his charge to the jury in the several respects to which reference will hereafter be made. Upon careful consideration of the record, we find no error of such materiality as to require the grant of a new trial.

1. As to the complaint that the verdict is without evidence to support it in the very essential particulars of dependence and contribution, we need only say that no proof was submitted on the part of the defendant, nor did any evidence drop from any of the witnesses for the plaintiff tending to dispute the uncontradicted testimony that John Harris materially aided in the support of his mother, who, according to the evidence, was necessarily dependent upon him for this assistance. And it appears that even a very few days prior to his death he had made such contribution to her support. It is true that the deceased had left his mother and his home in Alabama about a week before his death, but there is evidence in the record that he had previously done the same thing and that during both absences he had sent at least a part of his earnings to his mother, who depended upon him in part for her livelihood. It is well settled that the dependence of the parent upon the child, referred to in section 3828 of the Civil Code of 1895, need be only a partial dependence, and that it is sufficient if the contribution made by the child in aid of the parent's necessities be a substantial contribution. *Daniels v. Savannah, Florida Railway Co.*, 86 Ga. 236, 12 S. E. 365; *Central of Georgia Railway Co. v. Henson*, 121 Ga. 462, 49 S. E. 278, and authorities therein cited. The only support which the contention of the plaintiff in er-

ror finds in the evidence is from the inference suggested by the fact that John Harris had run away from home and had abandoned his mother at the time of his death, and this inference is fully rebutted. It is true that testimony was introduced for the purpose of impeaching the evidence of some of the witnesses, but it is evident from the verdict that the jury preferred not to discredit the witnesses sought to be impeached by proof of contradictory statements.

2. In the first ground of the amendment to the motion it is insisted that the court erred in instructing the jury that if the plaintiff showed negligence on the part of the defendant, and further showed that that negligence caused injury, it would not be necessary for the plaintiff to show willful and wanton negligence. The plaintiff in error insists that the plaintiff, having charged in her declaration that the negligence was willful, was compelled, if she recovered at all, to recover under the allegations of her petition. It is, of course, true as a general rule that a plaintiff can recover only upon the allegations of negligence averred, and upon no other than those allegations. But, as this court has several times held, a cause of action, an averment, or an allegation is to be classified with regard to the substance of the statements therein contained and without regard to the nomenclature attributed thereto, even though it be in the pleadings themselves. Especially when inquiry is being directed to the nature of a right to be established or defense sought to be raised and when there is a plain statement of the facts must the mere conclusion and denomination of the pleader be disregarded. In the present case the facts which constituted the alleged negligence are fully and plainly set forth in the petition, and whether, according to the conclusion of the pleader, these facts constituted willful and wanton negligence, or did not, was entirely immaterial, and did not in the least affect either the plaintiff's right to recover or the absence of such right. The petition set out such facts as invoked the rule of ordinary diligence, and the gist of the action and the plaintiff's rights thereunder depended upon whether there was a failure to use such diligence as the law required. The fact that a pleader may in some portion of his petition characterize a defendant's conduct as grossly negligent does not change the rule of evidence upon the subject of the defendant's duty. It was proper for the court after having read the averments of the plaintiff's petition, which the defendant denied, and having stated that the burden of proof was upon the plaintiff to prove the averments of her petition, to state to the jury by way of qualification, that the case was not an exceptional one, and that the plaintiff was not required to prove any greater degree of negligence than was involved in the failure to exercise ordinary diligence.

3. It is insisted that the instruction: "I

charge you, gentlemen, that if you find from the evidence that the defendant, the Western Union Telegraph Company, maintained at the place alleged in this declaration wires and poles along which was conducted an electric current, and if you further believe from the evidence that such wires were capable of transmitting a current sufficient to endanger or destroy human life, then I charge you that a duty existed upon the part of the defendant telegraph company towards the public and towards the deceased"—was not authorized by the evidence. We are not exactly clear that we fully apprehend this assignment of error. It would seem to be too indefinite to raise any point for consideration, but if, as suggested, a complaint is sought to be made that there was no evidence which would have authorized the court to refer to the jury the question whether the telegraph company's wires were capable of transmitting a current sufficient to destroy human life, then we have no hesitation in holding that the charge, which is otherwise sound and unobjectionable, was authorized by the evidence, because there is no dispute in the record that the boy's death was caused by an electric current of some kind transmitted by the very wires in question.

4. The third and fourth grounds of the amended motion will be considered together because they present the same point in a different form by excepting to two detached portions of the court's instructions to the jury relative to the provision of section 3823 of the Civil Code of 1895. The complaint made is that the court's statement of the law is incorrect, and that the court erroneously charged the jury that this mother could recover for the homicide of her minor son if she was dependent upon him or if he contributed to her support, whereas the plaintiff was not entitled by law to recover unless she was both dependent upon the minor son and he contributed to her support. To properly determine the merit of this exception, we will consider all that the trial judge said upon the subject and the connection in which the language was used. The court first charged the law as it appears in the Code. In other words, he substantially quoted the statute which gave birth to the plaintiff's right of action, the excerpt to which exception is taken in the third ground of the motion for new trial being: "I charge you that a mother, or, if no mother, a father, may recover for the homicide of a child, a minor upon whom he or she is dependent, or who contributes to his or her support unless such person left a wife, husband, or child." It is true that, following the ruling in *Clay v. Central Railroad Co.*, 84 Ga. 345, 10 S. E. 967, our Supreme Court has several times held that the Legislature intended to use in the statute the word "and" instead of the word "or," but certainly it cannot be said to be erroneous to give in charge in its identical terms the statutory provision of law which is

the basis of a plaintiff's action if its real meaning is thereafter fully explained to the jury. Indeed, this is the proper method of instruction upon the law. We may say in passing that the construction placed upon the word "or" in the act of 1887 (now embodied in section 3828 of the Code) was somewhat surprising to the writer, as a member of the Legislature of 1887 which passed that act, as it no doubt was to the author of the original bill and others interested in its passage. But conceding that Judge Blanford properly construed the intention of the Legislature when he changed "or" into "and" in the Clay Case, *supra*, it must be considered that this was no doubt done because the two phrases "upon whom he or she is dependent," and "who contributes to his or her support," were assumed to have such an identity of meaning as to render them well-nigh synonymous, or such an identity as would cause the thought of dependence and contribution to be included, the one within the other. The language used was construed somewhat as if one should say four cows or quadrupeds. Naturally, the quadrupeds would have to be cows, and all cows are quadrupeds. Therefore the language could be construed as four cows and quadrupeds.

After placing before the jury the section of the Code upon which the plaintiff's right of action depended, the judge proceeded next to state the plaintiff's contentions as contained in the averments of the petition. "The plaintiff in this case, Ellen Harris, sued as the mother, alleging that she is the mother of John Harris, a minor; that he was killed; that she was dependent upon him, or that he contributed to her support; and that the minor left no wife, husband, or living child. Look into the evidence, gentlemen, and see whether or not those facts be true. Is this a minor? Was John Harris her minor son? Was he killed? Did he leave a wife, husband, or child surviving him? If you find all those things to be true, then look into the evidence, and see whether or not this plaintiff, Ellen Harris, was dependent upon the deceased, John Harris, or whether the deceased, John Harris, contributed to her support." The judge then charged the jury properly that by the word "dependent" the law does not mean absolutely and exclusively dependent, and that the plaintiff would be dependent upon her minor son, in a legal sense, if she was dependent upon him in any appreciable degree, and explained that by the term "contribute to her support" is meant a substantial contribution to her support. The court next informed the jury that though, where there is no father, the mother would be entitled to the earnings of her minor son as a matter of law, yet this was not the basis of the suit then pending. Having thus first repeated, in its identical language, the section of the Code which authorized the suit to be brought, and having stated the contentions of the plaintiff, and having

relieved the minds of the jury of any possible confusion by informing them that this was not a mere suit for the value of the services of a minor child until he reached his majority, the court proceeds to define the meaning of the statute in exact accordance with the decisions of the Supreme Court upon the subject by saying: "But what the law contemplates, gentlemen, is not simply a right to earnings, but the law contemplates the situation in which the minor is actually contributing to his parent's support, and that the parent is at the time dependent in an appreciable degree on the minor. If you find these things to be true, all of them, and further believe that the homicide happened through the negligence of the defendant telegraph company and without fault on the part of the deceased, as I shall hereafter refer to them more at large, then the plaintiff would be entitled to recover, and, under such circumstances, she would be entitled to recover the full value of the life of her child; that is to say, not merely an amount which the deceased may have contributed to her support, but for the full value of the life of the deceased." When fragments of the charge detached from their settings are viewed separately, there may appear ground for criticism; but, when the charge of the court upon this subject is read as a whole, it is impossible to conclude that the jury could have misunderstood the lucid and correct exposition of the law given upon this subject by the trial judge. Though the court necessarily used the word "or" in quoting the statute, and repeated it in his statements of the contentions of the plaintiff, he finally concluded, when giving the law authoritatively, by using the conjunction "and," and not the disjunction "or," and the jury were told in addition that "all of them," including not only contribution and dependency, but the other essential facts to which allusion was made, must be found by the jury to be true before the plaintiff would be entitled to recover. It is interesting to note that in *Central of Georgia Ry. Co. v. Motz*, 130 Ga. 414, 61 S. E. 1 (and, the writer thinks, more in accord with the true intention of the General Assembly in the passage of the original act, which was a decided innovation), the petition, which contained, as to this point, only the averment that "the plaintiff's son was a strong, healthy boy, and was rendering to him, prior to the time of the son's death, services of the value of \$5 per month, and the earning capacity would increase," was held good against a general demurrer. This decision would seem to indicate that, while in deference to precedent "or" may still be interpreted "and," for the reason that it is perhaps true that in all cases of substantial contribution to a parent's support the parent is appreciably dependent upon the minor for support to the extent of such contribution, the latter clause, "or who contributed to," may be treated as intended merely to qualify and limit the term "de-

pendent," so as to indicate a legislative intent that only a very slight dependence, such as is found in an actual contribution for a parent's support, is all that the statute contemplated.

5. In the fifth ground of the amendment to the motion complaint is made that the court erred in charging that the mother, if there is no father, would be entitled to the earnings of her minor son until such time as that she had relinquished her control; the assignment of error being that it was not a correct and true statement of the law applicable to the case, inasmuch as the plaintiff was seeking to recover the full value of her son's life, and the suit not being one to recover for the services of a minor child. At first sight the complaint might seem not to be without merit. But this impression is removed when the excerpt of which complaint is made is read in its connection, and it appears that the court was about to draw the distinction between the mere right of the parent to have the earnings of her minor son and the absolute necessity of proving that, regardless of the child's legal obligation, he was actually contributing to his mother's support. After stating that while it was true that the mother, as a matter of right, was entitled to the earnings of her minor son, the court proceeded to say that "the law contemplates the situation in which the minor is actually contributing to his parent's support, and that the parent is, at the time, dependent in an appreciable degree upon the minor." We consider the instruction of which complaint is made in the connection in which it was given as being favorable to the plaintiff in error rather than hurtful. It in effect told the jury that they could not award damages to the plaintiff merely because she was entitled to the value of her minor son's services, but that, in order for the plaintiff to recover, it must appear that the deceased was actually contributing to his mother's support, and that the mother was dependent upon that assistance. In other words, the jury were told that in the action pending before them it mattered not how valuable the services of the deceased might have been, nor that the mother was entitled, as a matter of right, to the value of the services of the minor son, she could not recover against the defendant unless she was dependent upon the son (which would not affect her right to recover for services) and unless he contributed to her support (which likewise would not defeat a recovery in an action brought by a mother for mere value of services of her minor son). As well argued by counsel for defendant in error in their brief, the statute is broader than the right which the law gives the parent to contribution from the child. It reaches not only the cases where the child is under legal obligation to the parent, but extends to cases where there is no such legal obligation. The greater includes the less, and the fact that the parent is entitled to

his earnings is powerful circumstance bearing upon the question. See Savannah Electric Railway Co. v. Bell, 124 Ga. 664, 665, 53 S. E. 109, and citations. The well-recognized interdependence of parent and child upon each other during minority, and the right of the parent to the assistance of his minor child, might tend to repel any inference that the dependence and contribution shown to have existed in the past growing out of the relation had been terminated as long as the relation itself existed, and in view of the fact that there was no evidence of a relinquishment of the parental control. As we said above, we think the reference to the right of the mother to the earnings of her minor child tended rather to accentuate the necessity for proof on the plaintiff's part of dependence on her minor son and of actual contribution to her support made by him, and for that reason was favorable to the plaintiff in error. But, if we should be wrong in this view, we are quite sure that it was not such an error as would authorize the grant of a new trial.

6. Further complaint is made that the court erred in expressing an opinion upon the facts in the case, in stating to the jury that the deceased, John Harris, was not a trespasser, for the reason that he had a right to be where he was at the time of his death. We do not think that the error here assigned is such as would warrant a reversal. It is uncontradicted in the evidence that John Harris met his death on one of the public streets of the city of Albany. The petition alleged that the point where the deceased lost his life by reason of the defendant's wires hanging too near the ground was in North street, a public street in the city of Albany. The answer of the defendant was not sufficient to raise any issue upon this subject. The answer says that "this defendant owns, controls, and operates an electric wire within the limits of the city of Albany, said state and county, but says that after said wire leaves said North street the poles that carry said wire are on the right of way of the Central of Georgia Railway Company, and that then said wire is not in any public street, except where said Central of Georgia Railway Company is in said street." According to the answer, the Central of Georgia Railway Company runs along North street, but the occupancy of the street by the railway company, especially in view of the fact that there is no evidence of any specific grant of authority to the railway company for that purpose, does not give the railway company any right to the use and occupancy of the street superior to that of a pedestrian who may desire to use a highway dedicated to the whole public. It thus being conceded that the deceased met his death in a public street, there was no impropriety in the judge stating to the jury as a matter of law that "John Harris had a right to be there." While the provisions of

section 4334 are to be strictly enforced, the application of this section must necessarily be confined to facts as to which there is an issue, and it has been recognized that there is a difference between words which amount to a legal conclusion rather than to an expression of opinion. Furthermore, it has been held that an intimation of opinion on a matter conceded, or even the statement of facts admitted to be such, is not improper. Facts conceded may be characterized as conceded facts in charging the jury. Judge Bleckley in *Brantly v. Huff*, 62 Ga. 536, in ruling upon this subject, says: "What is not conceded either in the pleadings or by the parties or their counsel in the presence of the court cannot be recited to the jury from the bench as conceded; but, where a matter has been stated in the charge as a concession, and it does not appear, on the authority of the judge himself, that no such concession was in fact made, the presumption is that it was made." In *Savannah, Fla. & Western Ry. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 163, the complaint that the judge expressed an opinion upon the facts was again overruled because it appeared that the matters in question were admitted or conceded. See, also, *Wilson v. Atlanta & Charlotte Ry. Co.*, 82 Ga. 390, 392, 9 S. E. 1076. In *East Tennessee Ry. Co. v. Marklens*, 88 Ga. 61, 13 S. E. 855, 14 L. R. A. 281, Judge Lumpkin, delivering the opinion of the court, says: "While a judge is forbidden to express or intimate his opinion concerning a question of fact about which there is any doubt whatever, he may, with propriety, say to the jury that there is no evidence to support an alleged fact when such statement is undoubtedly true. The object of section 3248 of the Code of 1882 [now section 4334] is to prevent judges from interfering with the functions of juries in determining contested issues of fact when there is proof on both sides; but, when an alleged fact is entirely unsupported by evidence, the judge may aid the jury by so informing them, thus relieving them of that much difficulty in reaching the correct conclusion in the case." The case at bar is not unlike the case of *Hollfield v. White*, 52 Ga. 567, 569. See, also, *Underwood v. American Mortgage Company*, 97 Ga. 238, 24 S. E. 847; *Southern Ry. Co. v. Chitwood*, 119 Ga. 28, 45 S. E. 706; *Shields v. Georgia Ry. & Elec. Co.*, 1 Ga. App. 175, 57 S. E. 980. The legal effect of the undisputed evidence in this case was to show that John Harris was not a trespasser, but had a right to be where he was at the time of his death, and the statement of which complaint was made is not strictly speaking an expression of opinion as to what facts had or had not been proved, but the statement of a necessary legal conclusion arising from undisputed facts, and consequently not erroneous. It cannot be contended that the telegraph company

had the right to block a highway in the city of Albany so as to prevent the passage of pedestrians, nor did it have any right to leave its wires so close to the ground as to be a menace to the safety of passers-by. It being undisputed that the point where the death of John Harris occurred was in a public street, it is, in fact, immaterial whether the poles and wires of the defendant company were on the so-called right of way of the Central of Georgia Railway or not, because, as we have heretofore held in *Cordray v. Savannah Electric Company*, 5 Ga. App. 626, 68 S. E. 710, the pedestrian had as much right to the public thoroughfare as either the railroad or the telegraph company. It appears that the wires were down at this particular point for about 18 days. Under all authorities, this was negligence on the part of the telegraph company. See *Jones on Tel.* §§ 185, 188, 194; 27 Am. & Eng. Enc. of Law, 1015, 1016; *Haynes v. Gas Co.*, 114 N. C. 208, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Atlanta Con. Street Ry. Co. v. Owings*, 97 Ga. 663, 667, 25 S. E. 377, 33 L. R. A. 798; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56, 30 S. E. 420. Whether the wire was surcharged with electricity by contact with the wire from power plant or whether it was the conductor of a bolt of lightning, it is very plain from the evidence that, if due diligence had been used in repairing the line within the period of eighteen days which had transpired, the plaintiff's son would not have been killed by contact with the wire. The jury were authorized, under the evidence, to find in favor of the plaintiff, and might have found a larger verdict than that rendered.

Taken as a whole, the charge of the court is without error; and the judgment refusing a new trial is affirmed.

(6 Ga. App. 254)

CENTRAL OF GEORGIA RY. CO. v. MANCHESTER MFG. CO. (No. 1,265.)

(Court of Appeals of Georgia. June 15, 1909.)

1. CARRIERS (§ 134*)—CARRIAGE OF GOODS—FAILURE TO DELIVER—SUFFICIENCY OF EVIDENCE.

The evidence authorized the finding in favor of the plaintiff in the lower court, and the amount of the verdict is not excessive.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 588-592, 607; Dec. Dig. § 134*.]

2. APPEAL AND ERROR (§ 216*)—TRIAL (§ 256*)—HARMLESS ERROR—OMISSION TO CHARGE—BURDEN OF PROOF.

In the absence of a request in writing, it is not reversible error for the court to omit to charge upon the burden of proof. In the absence of a request for more specific instructions, it was not error to instruct the jury, upon the subject of the burden of proof, that "it is essential for the plaintiff in this case, in order for the plaintiff to recover, that the evidence shall show, by a preponderance thereof, that the plaintiff is entitled to recover," although the court may not thereafter have specified or

particularized each of the special points at issue as to which the burden of proof devolved upon the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 627, 628, 630-641, 680, 662-676; Dec. Dig. § 216*; Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

2. CARRIERS (§ 137*) — CARRIAGE OF GOODS — ACTIONS FOR LOSS — INSTRUCTIONS.

There being evidence that the cotton which was the basis of the present suit was delivered to the carrier, and that said cotton was never delivered by the carrier to the consignee, it was not error to instruct the jury that a common carrier is bound to exercise extraordinary diligence, and that in case of loss the presumption of law is against a common carrier, and no excuse avails the common carrier, unless it is occasioned by the act of God or the public enemies of the state.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 137.*]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Manchester Manufacturing Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed, with damages for delay.

Wimberly & Jordan, for plaintiff in error.
John P. Ross, for defendant in error.

RUSSELL, J. The plaintiff in error excepts to the judgment overruling its motion for new trial. In addition to the usual assignment that the verdict was contrary to the evidence and without evidence to support it, exception is taken to the instructions to the jury contained in the charge of the court which are stated below. The suit was brought by the Manchester Manufacturing Company to recover the value of eight bales of cotton which it alleged had been delivered to the defendant as a common carrier for transportation from Forsyth to Macon, Ga., and which the carrier failed to deliver. It was not denied that the cotton was the property of the consignee, the plaintiff. The weights and value of the cotton were not disputed, and this disposes of the complaint contained in the original motion that the verdict is excessive. So far as the facts are concerned, the only questions to be determined are whether the plaintiff in error received the cotton and whether thereafter it was delivered to the defendant in error.

As we view the record, there is practically no dispute that the cotton alleged to have been lost was received by the carrier company. The date of the bill of lading introduced in evidence, which acknowledged receipt by the carrier of 50 bales of cotton from B. F. Hill, consigned to "order notify Manchester Mills, Macon, Ga.," the cotton being marked "MAN," together with the oral testimony showing that only 42 bales of this lot of cotton were shipped in a separate car, and that the 8 remaining bales were

shipped in a different car, establishes clearly that the carrier received the 8 bales of cotton identified by the witnesses by marks and weights. The real issue in the case was whether or not the carrier had delivered the cotton to the Manchester Mills. It is undisputed that it is the custom of the Central of Georgia Railway Company to effect delivery to the Manchester Manufacturing Company by means of a side track and the delivery of shipments consigned to the cotton factory at its own warehouse on that side track. Three witnesses testified that the 8 bales of cotton in question were never delivered to the manufacturing company at its warehouse. We think this would have authorized the finding on the part of the jury that the carrier did not deliver the cotton to the consignee, even if there had been evidence directly in conflict, if the jury judged these witnesses to be credible. To rebut this testimony the railway company proved that the 8 bales of cotton were taken from the car in which they reached Macon and deposited in another car, and directions were given that this car should be carried to the manufacturing company's side track. There was, however, no evidence on the part of any employé of the carrier that the car was transferred to the usual place of delivery at the warehouse of the Manchester Manufacturing Company while it contained the cotton; in other words, no evidence that the cotton was ever carried to the side track of the manufacturing company.

The circumstance that the 8 bales of cotton were reloaded into car I. C. 24703 on Saturday, September 29th, and that switching instructions in regard to it were given, and that the same car was used on October 2d, by the Manchester Manufacturing Company, which loaded it with yarn consigned to Philadelphia, would show that the car was switched from the depot to the side track at Vineville some time between Saturday, September 29th, and Tuesday, October 2d, a period of three days, and might support the inference that the car, when it reached the Manchester Mills and went into the possession of the manufacturing company, contained the 8 bales of cotton. But to rebut this inference the employé of the manufacturing company who made and received shipments in its behalf testified that he not only did not receive the 8 bales of cotton from the car, but when he examined the car, with a view of using it to make the shipment of yarn, he found it empty; and the jury may have considered it as a circumstance of considerable significance that no witness was introduced in behalf of the defendant carrier to show when the car in question was shifted to the manufacturing company's side track, or to show whether it was empty, or what it contained, at the time that it was delivered upon that track.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The burden of proof was upon the plaintiff to show affirmatively, by the preponderance of the evidence, that the cotton was never delivered to it by the defendant company. There was no presumption either way as to this. It seems to us, in the absence of any evidence that when the car was shifted to the usual place of delivery it contained the cotton, that the positive evidence of the witnesses whose duty it was to unload all shipments consigned to the manufacturing company, and who testified that the 8 bales of cotton were not delivered, either in the car in question or any other, was entitled to that preponderance attributed to it by the jury, in preference to the inference that the 8 bales of cotton, having been once placed in that car, would be presumed to have been carried therein to the place of delivery, especially as the testimony developed that the car, when found at the Manchester Manufacturing Company's place, was not at the usual and customary place for the reception of cotton. Viewing the testimony in behalf of the defendant in its strongest light, the most that can be said is that a clear issue of fact was raised as to whether the carrier had ever delivered the 8 bales of cotton in question, which it was the province of the jury to determine, and their judgment upon the credibility of the testimony is not to be questioned here.

2. In the amendment to the motion for new trial it is insisted that the court erred in charging the jury: "Now, it is essential for the plaintiff in this case, in order for the plaintiff to recover, that the evidence shall show, by a preponderance thereof, that the plaintiff is entitled to recover"—for the reason that the court did not explain what evidence would entitle the plaintiff to recover. This exception affords an illustration of the truth that a fragmentary segment of a charge can generally not be justly criticised, when disassociated from its setting. It has frequently been held that it is not reversible error to omit entirely to instruct the jury upon the subject of the burden of proof. But, of course, if instructions are attempted to be made upon any subject, those instructions should be correct and pertinent.

Error is further assigned upon this excerpt, in that it is insisted that the court should have charged that the burden was upon the plaintiff to show (1) that the cotton in dispute was delivered to the defendant railway company, and (2) that the cotton had never been delivered by the railway company to the plaintiff. A reading of the instructions of the trial judge, as a whole, demonstrates that the exception is without merit, for the reason that it was made perfectly plain to the jury that the plaintiff, in order to recover, must show both of the facts insisted upon by the plaintiff in error. However, viewing the excerpt alone, inasmuch as the court charged that the plaintiff would

not be entitled to recover unless it showed that it was so entitled by the preponderance of the evidence, this was tantamount to an instruction that the burden was on the plaintiff to maintain its case by the preponderance of the evidence, and if more particular or specific instructions were desired, to the end that the court should point out specifically to the jury the particular points at issue (each one of which should be maintained by the plaintiff by the preponderance of evidence), then the attention of the court should have been thereto directed by an appropriate request.

3. Exception is also taken in the second ground of the amended motion for new trial to the following charge: "Under our law, one who pursues the business constantly or continuously for any period of time or any distance of transportation is a common carrier, and as such is bound to use extraordinary diligence. In cases of loss the presumption of law is against the common carrier, and no excuse avails the common carrier, unless it was occasioned by the act of God or the public enemies of the state." The plaintiff in error insists that this charge was misleading, and that the court should have charged that, before any presumption would arise against the common carrier, the burden of proof was upon the plaintiff to show affirmatively that the cotton in dispute was never delivered by the carrier to the plaintiff. We do not think that this instruction misled the jury, and upon a review of the whole charge it is clear that the jury were made to understand that the principle which is abstractly a correct statement of section 2264 of the Civil Code of 1895 was not applicable, unless the jury were first satisfied that the cotton in question was never delivered by the carrier to the plaintiff. Indeed, no other meaning can be drawn from the very language as contained in the Code and as used by the trial judge. Whether this section should have been charged or not, it is manifest that the plaintiff in error could not have been injured, because it is only in cases of loss that the presumption that there was a failure to use extraordinary diligence arises against the common carrier, and the jury would well understand that the cotton could not be said to be lost in any sense in the present case unless it had been first made apparent that it had never been delivered to the consignee.

This writ of error appears to us so entirely without merit as to constrain the belief that its only purpose, legally speaking, was to procure delay. It is therefore the judgment of the court that not only should the judgment of the lower court be affirmed, but that the motion of the defendant in error that damages be awarded should also be granted.

Judgment affirmed, with damages.

(6 Ga. App. 286)

ILLINOIS LIFE INS. CO. v. McKAY.**McKAY v. ILLINOIS LIFE INS. CO.**

(Nos. 1,569, 1,570.)

(Court of Appeals of Georgia. June 15, 1909.)

1. INSURANCE (§ 349*)—PREMIUMS—DEFAULT IN PAYMENT—FORFEITURE OF POLICY.

The provision for the punctual payment of the premium when due is of the essence and substance of life insurance, and a failure to comply therewith in strict accordance with the requirements of the contract, in the absence of any waiver, express or implied, inevitably results in the forfeiture of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891-904; Dec. Dig. § 349.*]

2. INSURANCE (§ 186*) — PAYMENT OF PREMIUM.

Where an insurance company expressly or by implication authorizes the policy holders to transmit a premium by mail, if the remittance is made in apt time to reach the company in due course on or before the date when the premium falls due, this will be a sufficient payment.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 186.*]

3. INSURANCE (§ 360*) — LIFE INSURANCE — PAYMENT OF PREMIUM.

Where by the express terms of a policy of insurance a premium was due to be paid to the insurance company at its home office in Chicago, Ill., on May 21, 1907, and a letter containing the amount of the premium was deposited in the post office at Americus, Ga., properly stamped and addressed, at 4:30 p. m. on May 20, 1907, this did not constitute payment of the premium, since the remittance could not reach its destination in due course of mail on or before the date of payment, and the company had the right under the policy to refuse to accept it as payment when received the day after it was due, and to forfeit the policy for a failure to pay the premium. The company could waive the forfeiture and reinstate the insured on the conditions stated in his application for reinstatement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 917; Dec. Dig. § 360.*]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by Ida McKay against the Illinois Life Insurance Company. Verdict for plaintiff for less than the amount claimed, and it brings error, and plaintiff assigns cross-error. Reversed.

Long & Price, R. L. Greer, and Jule Felton, for plaintiff in error. E. A. Hawkins, for defendant in error.

HILL, C. J. On October 25, 1904, a policy of insurance was issued by the Illinois Life Insurance Company upon the life of Wright Douglas McKay in the sum of \$1,000, payable to his wife, Ida McKay, immediately upon receipt and approval of proofs of the death of the insured, provided the policy is in force at the time of the death of the insured. The policy was in the usual form. The consideration for its issue was the payment to the insurance company of the quarterly premiums on the 21st days of October, January, April, and July of each year. The

policy contained the following provision:

"The premiums herein are due and payable in advance at the home office of the company at Chicago, Ill., but may be paid to the agents of the company in advance in exchange for the company's official receipt, signed by the president or secretary, and countersigned by the agent. * * * Failure to pay any premium, or premium note, or interest thereon, when due, will void this policy and forfeit all premiums paid thereon to the company, except as herein otherwise provided." The policy also provided for a grace of one month in the payment of all premiums, subject to an interest charge at the rate of 5 per cent. per annum. The insured died on the 31st of October, 1907, and proofs of death were duly furnished to the company. Payment was refused, and the widow brought suit against the company for the principal amount of the policy besides interest, damages, and attorney's fees. A demurrer was filed by the company to the claim for damages and attorney's fees. The court sustained the demurrer as to the claim for damages, and overruled it as to the claim for attorney's fees. The plaintiff filed exceptions pendente lite to the sustaining of the demurrer as to the claim for damages, and brings a cross-bill of exceptions assigning error on this judgment. A verdict was directed against the company for \$1,000 principal and \$250 attorney's fees, and the defendant's motion for a new trial was overruled.

The defense relied upon was that the insured had failed to comply with the condition of the policy, in not paying the premium due to the company on April 21, 1907, on the date when due, or before the expiration of the 30 days of grace allowed by the policy for such payment, and that, therefore, the policy was forfeited by its express terms. On the question of the payment of premiums on the policy, the following is the undisputed evidence: The insured paid all the premiums at or before the time when they were due until the premium due April 21, 1907, with the 30 days of grace, due May 21, 1907. On March 20, 1907, the company, through its home office at Chicago, Ill., sent notice to the insured, notifying him that his premium would be due on April 21, 1907, and inclosed in the envelope containing the notice was a return envelope, addressed to the company at Chicago, Ill., for a remittance of the premium. On April 26, 1907, the premium not having been received by the company, it again wrote to the insured and notified him that his premium due on April 21, 1907, was past due, but that the policy would remain in force for one month from the due date of the premium, subject to the interest charged at the rate of 5 per cent. per annum, and that during such time the premium could be paid without his being required to furnish evi-

dence of good health. On May 20, 1907, a letter was deposited in the post office at Americus, Ga., addressed to the Illinois Life Insurance Co., Chicago, Ill., containing a check for \$11.76, the amount of the premium due, without interest thereon. The letter containing the check was mailed at Americus, Ga., 1,000 miles from Chicago, at 4:30 p. m. on May 20, 1907. The letter containing the premium was received by the company by due course of mail on May 22, 1907, one day after it was due according to its terms.

On May 24, 1907, the company wrote to the insured, acknowledging receipt of his check for \$11.76, informing him that the remittance had reached the company one day after the due date, and would only be accepted by the company upon its approval of an application for reinstatement, and inclosing in the letter a blank on which he was to make such application. The application for reinstatement was duly filled out and signed on June 4, 1907, and was received and accepted by the company. It was as follows: "I, the undersigned, having forfeited all claim under policy No. 35,264 in the Illinois Life Insurance Co., which policy has lapsed for non-payment of premiums, hereby apply for reinstatement of insurance, and to induce said company to revive my said policy and reinstate the same I do declare and warrant that I am now in good health." The application made other specific statements by the insured in regard to his use of alcoholic liquors and other matters. The proofs of death as furnished to the company contained statements which led it to believe that the applicant was not in good health at the time when he made his application to have his policy reinstated, and that his statement contained in such application that he was then in good health was untrue. Thereupon the company tendered to the beneficiary named in the policy the premiums that had been paid on the policy, with interest, and denied liability thereon. The company had no local agent at Americus, and the payment of the premiums had been made by the insured by transmitting through the mail the quarterly premiums, and he had always done so, before the premium due April 21, 1907, in time for the letter containing the premium to reach the company at Chicago at or before the date when due. The two premiums subsequent to the reinstatement of the policy were also paid to the company in the same way. There was no evidence that the company had ever received or accepted any premium at Chicago, Ill., after its due date, according to the terms of the policy. The evidence as to the insured's condition of health when he made his application for reinstatement was in conflict, but this question is not now material in this case.

The verdict was directed by the court on the legal ground that the deposit of the letter containing the check in payment of the premium due April 21, 1907 (with 30 days'

grace, due May 21, 1907), in the post office at Americus, Ga., on May 20, 1907, at 4:30 p. m., was a payment then and there to the company, and consequently there was no default in the payment of the premium. It will therefore appear that the only question under the facts stated and not controverted is as to the correctness of this view of the law by the trial court. It must be conceded that the company had the right to declare a forfeiture of the policy for non-payment of the premium when due; for this was a condition precedent to the life of the contract. It is settled beyond all question that a stipulation in a policy as to the payment of premiums must be strictly and literally complied with, in the absence of any waiver, constructive or actual, and the premium must be paid when, where and in what manner the policy provides. In the leading case of *Klein v. New York Life Insurance Co.*, 104 U. S. 88, 28 L. Ed. 662, the Supreme Court of the United States declares that "the provision for the release of an insurance company from liability on the failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance, and to hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract." And the same learned court, in *Insurance Company v. Statham*, 93 U. S. 24, 23 L. Ed. 789, says, on the subject of default in the payment of premiums, that "forfeiture for nonpayment is a necessary means by the insurance companies of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed, except at the option of the company." This court knows of no exception to this rule of law, and further authority on this point is deemed wholly unnecessary.

Was there a default, therefore, in the payment of the premium under the facts of this case? There was an admitted default, unless the deposit of the letter in the post office at Americus at 4:30 p. m. on May 20, 1907, with the check inclosed for the amount of the premium, without interest, was a payment of the premium due to the company on May 21, 1907. The policy provides expressly that "the premiums are due and payable in advance at the home office of the company at Chicago, Ill.," and that "failure to pay any premium, or premium note, or interest thereon, when due, will void this policy." If these words are to have their usual and ordinary significance, it would seem that the premium must be received at the office of the company within the time specified, in order to constitute a payment of the premium and prevent a forfeiture of the policy, unless the company has by its conduct waived in some way this provision of the policy, and that, as the letter containing the check for the premium was not received by the company in

Chicago at its head office until one day after the premium was by its terms due to be received there, the policy was forfeited. We are of the opinion that the deposit of the letter containing the check for the principal amount of the premium due in Chicago on May 21, 1907, in the post office at Americus, Ga., at 4:30 p. m. on May 20, 1907, did not constitute a valid payment in apt time within the terms of the contract; in other words, that the deposit of the letter with the check in the post office at Americus, not in time to reach its destination in Chicago and to be received there by the addressee at the time stipulated, was not a payment of the premium according to the express language of the contract.

In view of the practice by this company of permitting its policy holders to transmit through the mail premiums to it in Chicago, if the insured had deposited the letter containing the check for the premium (and we refer now to the principal, without interest on the premium) in apt time to have reached its destination in Chicago before the expiration of May 21, 1907, it would have been a sufficient payment of the premium in compliance with the terms of the contract. "Where an insurance company invites its patrons to transmit premiums by mail and gives express directions in relation thereto, it will be inferred that the company intends to accept as payment funds mailed to it in time to reach its office in due course on or before the day the premium falls due." 3 Cooley's Briefs on Insurance, 2316; Hartford Life & Annuity Insurance Co. v. Eastman, 54 Neb. 90, 74 N. W. 394; Protective Life Insurance Co. v. Palmer, 81 Ill. 88. In several New York cases it is held that, when the letter containing the remittance is deposited in the post office, the payment of the premium is made; but these decisions, we think, are contrary to the great weight of authority and are not in harmony with the reasons for the strictest and most liberal compliance with these stipulations of contracts of insurance. Primeau v. National Life Association, 77 Hun. 418, 28 N. Y. Supp. 794; McCluskey v. National Life Association, 77 Hun. 536, 28 N. Y. Supp. 931. In Hartford Life Ins. Co. v. Eastman, supra, the court says, in connection with the custom of receiving premiums through the mail: "Having invited its patrons to use the mail in making payment of premiums, it is but reasonable and just to infer that the company intended to accept as payment funds sent by mail in time to reach it in due course on or before the day such premiums would become due."

On this question we think the law, briefly stated, to be this: Where the insured has been accustomed to remit premiums by mail, and such remittances have been accepted by the insurance company, the latter cannot refuse to accept the remittance mailed in ample

time to reach its destination on or before the date when due, even though the remittance was not actually received until after the premium became due. But, when the remittance has not been mailed in ample time to reach its destination by due course of mail by the date when due, it is not a payment of the premium, and the company can refuse to receive it, and can, at its option, enforce by forfeiture the stipulation of the policy as to punctual payment. "When a life insurance policy expressly provides that the premium thereon shall be paid on or before a certain date and in default thereof the policy shall be void, the nonpayment of the premium on the date named works a forfeiture, even if the premium is tendered on the next day." Fowler v. Metropolitan Life Insurance Co., 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 806, and citations. This court knows of no excuse, not even the act of God, for a failure to comply strictly and literally with the stipulations of a policy contract on the subject of the payment of premiums. We mean, of course, where there is no waiver by the company, either express or implied. In this case there is no evidence whatever of any waiver by the company. The premiums had theretofore all been received by the company in Chicago on or before the due date. When the insured in this particular instance failed to pay this premium, which was due on April 21, 1907, the company, shortly thereafter, called his attention to his failure to pay the premium according to his contract and notified him of his 30 days of grace. When the premium was received by the company on May 22d, it refused to receive it as payment, and at once notified the insured that it would only receive it subject to its approval of its application for reinstatement, and the insured himself, in his application for reinstatement, fully recognized the fact that he was in default in the payment of his premium. Without the power of enforcing a forfeiture for a failure to pay premiums punctually, there would be no efficient means of enforcing such payments, and the business of insurance could not long survive.

We therefore conclude that the learned judge of the trial court, under the undisputed facts, erred in his view of the law on this subject and in the direction of a verdict for the plaintiff. We think that there should be another trial on the issue of the validity and binding effect of the reinstatement of the insured by the company on his application made for that purpose.

The ruling complained of in the cross-bill of exceptions is controlled by Harp v. Firemen's Fund Ins. Co., 130 Ga. 726, 61 S. E. 704 (5), and Missouri Life Ins. Co. v. Lovelace, 1 Ga. App. 447, 58 S. E. 98.

Judgment reversed on each bill of exceptions.

(6 Ga. App. 385)

MOCK et al. v. FIRST NAT. BANK OF COLQUITT. (No. 1,684.)

(Court of Appeals of Georgia. June 29, 1909.)

REVIEW ON APPEAL.

This was a suit on a promissory note, defended on the ground of payment. The question was purely one of fact, and was fairly submitted to the jury, who solved the conflict in the evidence in favor of the plaintiff, and there is no merit in any of the assignments of error of law.

(Syllabus by the Court.)

Error from City Court, Miller County; C. C. Bush, Judge.

Action by the First National Bank of Colquitt, against W. W. Mock and others. Judgment for plaintiff, and defendants bring error. Affirmed.

R. W. Grow and Pottle & Glessner, for plaintiffs in error. W. I. Geer, for defendant in error.

HILL, C. J. Judgment affirmed.

POWELL, J., disqualified.

(6 Ga. App. 390)

LOUISVILLE & N. R. CO. et al. v. MITCHELL. (No. 1,837.)

(Court of Appeals of Georgia. June 29, 1909.)

CORPORATIONS (§ 507*)—ACTIONS AGAINST—SERVICE OF SUMMONS.

It appears that the summons was served upon one who was chief clerk in the Atlanta offices of the defendant corporation. *Held*, although it appears that there was another person who was superior in rank to the one upon whom service was made, and who bore the official designation of "agent," the service was nevertheless good, under Civ. Code 1895, § 1899. Southern Bell Tel. Co. v. Parker, 119 Ga. 721, 47 S. E. 194. This ruling renders it unnecessary to consider the other assignments of error presented in the petition for certiorari.

[Ed. Note.—For other cases, see Corporations. Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Robert Mitchell against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Philip H. Alston, for plaintiffs in error. Ben J. Conyers, for defendant in error.

POWELL, J. Judgment affirmed.

(6 Ga. App. 385)

KNOX v. LEXINGTON TERMINAL CO. (No. 1,717.)

(Court of Appeals of Georgia. June 29, 1909.)

APPEAL AND ERROR (§ 588*)—BRIEF OF EVIDENCE—ABBREVIATION OF EVIDENCE—APPROVAL BY TRIAL JUDGE.

The sole exception is to the overruling of a motion for a new trial. There is no legal

brief of the evidence. What purports to be a brief of the evidence is fatally defective in two respects: It is not abridged, but consists of the full stenographic report of the oral testimony (that which was excluded, as well as that which was admitted, together with a statement of objections of counsel and rulings of the court), to which has been added a full verbatim copy of the interrogatories and answers, and of the documentary exhibits thereto; also it is not approved by the trial judge. The assignments of error cannot be considered. Civ. Code 1895, § 5488; Madison v. State, 4 Ga. App. 218, 60 S. E. 1068.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610; Dec. Dig. § 588.*]

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; J. N. Worley, Judge.

Action between John Knox and the Lexington Terminal Company. From the judgment, Knox brings error. Affirmed.

J. G. Faust, for plaintiff in error. Jos. B. & Bryan Cumming and Hamilton McWhorter, Jr., for defendant in error.

POWELL, J. Judgment affirmed.

MEMORANDUM DECISIONS.

CASHMAR-KING SUPPLY CO. v. DOWD & KING. (Supreme Court of North Carolina. April 28, 1909.) Appeal from Superior Court, Mecklenburg County; Justice, Judge. Action by the Cashmar-King Supply Company against Dowd & King. Judgment for defendant, and plaintiff appeals. Affirmed. Stewart & McRea, for appellant. T. C. Guthrie and Pharr & Bell, for appellee.

PER CURIAM. This cause was before this court at fall term, 1907 (146 N. C. 191, 59 S. E. 685), and a new trial granted. The majority of the court are of opinion that the evidence introduced on the second trial is substantially the same as that introduced on the first and that the questions now presented are covered by the former opinion. Mr. Justice HOKE is of opinion that there is some new evidence which should have been submitted upon the issue as to the statute of limitations. The judgment is affirmed.

GILBERT et al. v. HOWARD et al. (Supreme Court of North Carolina. April 7, 1909.) Appeal from Superior Court, Durham County; E. B. Jones, Judge. Action by A. P. Gilbert and another against J. H. Howard and others. Judgment for plaintiffs, and defendants appeal. Affirmed. Bramham & Brawley, for appellants. Fuller & Reade, Aycok & Winston, and Bryant & Brogden, for appellees.

PER CURIAM. We agree with counsel for appellants that the matter involved "is largely a question of construction and interpretation of the written agreement" between the parties. We further agree with counsel for appellees that, "when this case came before the court (147 N. C. 314, 61 S. E. 176) before, the contract sued on was interpreted" and the rights of the parties to it were determined. The matters presented on this appeal are entirely of fact, and in the trial we find no error.

MAUNEY v. UNITED STATES LEATHER CO. (Supreme Court of North Carolina. May 13, 1909.) Appeal from Superior Court, McDowell County; Ferguson, Judge. Action by S. F. Mauney against the United States Leather Company. From a judgment for plaintiff, defendant appeals. Affirmed. Pless & Winborne and E. J. Justice, for appellant. Hudgins, Watson & Johnston, for appellee.

PER CURIAM. The court is of opinion, on examination of the record in this appeal, that there is evidence of negligence to be submitted to the jury, and that the case was fairly presented by the judge in the court below. We find nothing in the record which warrants a new trial. No error.

NEWTON et al. v. BROWN et al. (Supreme Court of North Carolina. May 13, 1909.) Appeal from Superior Court, Pender County; Lyon, Judge. Action by H. B. Newton and another against H. A. Brown, Jr., and others. From a judgment for plaintiffs, defendants appeal. Affirmed. Mears & Ruark, Stevens, Beasley & Weeks, and J. T. Bland, for appellants. E. K. Bryan and C. E. McCullen, for appellees.

PER CURIAM. The plaintiffs claimed title to the land in controversy by color and possession. Upon an examination of the record we find no error in his honor's rulings upon the evidence. The contested matters were largely of fact, and they were submitted to the jury in a charge following well-settled principles and free from error. No error.

WEBB v. W. M. RITTER LUMBER CO. (Supreme Court of North Carolina. May 5, 1909.) Appeal from Superior Court, Caldwell County; Murphey, Judge. Action by J. B. Webb against the W. M. Ritter Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed. Jones & Whisnant, for appellant. W. C. Newland and M. N. Harshaw, for appellee.

PER CURIAM. The court is of opinion, upon an examination of this case, that the matters involved are almost entirely of fact, and that no error was committed upon the trial. No error.

GAMBRELL et al. v. GAMBRELL et al. (Supreme Court of South Carolina. April 9, 1909.) Appeal from Common Pleas Circuit Court of Anderson County; D. E. Hydrick, Judge. Action by Henry Calvin Gambrell and others against Mrs. Lena Gambrell and others. From the judgment, plaintiffs appeal. Affirmed. Martin & Earle, for appellants. Bonham, Watkins & Allen, for respondents.

WOODS, J. After careful consideration of the able and elaborate arguments of counsel, we are convinced that the reasoning of the circuit decree is sound, and its conclusions correct. The judgment of this court is that the judgment of the circuit court be affirmed.

RAY v. COUNTS. (Supreme Court of South Carolina. May 19, 1909.) Appeal from Common Pleas Circuit Court of Bamberg County; B. W. Memminger, Judge. Action by F. M.

Ray against S. H. Counts. Judgment for defendant, and plaintiff appeals. Affirmed. B. T. Rice, for appellant. S. G. Mayfield, for respondent.

WOODS, J. After careful consideration of the evidence and argument, we think the reasoning of the circuit judge is conclusive. His conclusions of law are in accord with the most recent decisions of this court on the subject. *Moseley v. Witt*, 79 S. C. 141, 60 S. E. 520; *Lewis v. Cooley*, 81 S. C. 461, 62 S. E. 868. This court adopts the decree of the circuit court, and affirms the judgment for the reasons therein stated.

LAMBERT v. PETERS. (Supreme Court of Appeals of Virginia. June 17, 1909.) Error to Circuit Court of City of Richmond. Action by R. L. Peters against G. W. Lambert. There was a judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial. Wm. L. Royall, for plaintiff in error. John A. Lamb, for defendant in error.

BUCHANAN, J. This case was heard with the case of *Lambert v. Phillips & Son*, 64 S. E. 945, upon the same record, and involves the same questions. For the reasons stated in the opinion in that case, handed down at this term of the court, the judgment in this case must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in that opinion.

MURPHY v. MURPHY. (Supreme Court of Appeals of West Virginia. March 23, 1909.) Appeal from Circuit Court, Wood County. Divorce by Leota Grace Murphy against Lawrence D. Murphy. Decree for defendant, and complainant appeals. Reversed and rendered. James Watson and J. D. Cutlip, for appellant.

BRANNON, J. The circuit court of Wood county dismissed a bill for divorce filed by Leota Grace Murphy against Lawrence D. Murphy, based on adultery, and the wife appeals. No defense was made by the defendant. We think that the fact of adultery is sustained by proof of the actual act, and by proof by other witnesses of his visiting houses of ill fame and going to rooms with the female inmates and his having them in their night-clothes on his lap. We therefore reverse the decree of dismissal, and enter a decree that the bond of matrimony between Leota Grace Murphy and Lawrence D. Murphy be dissolved, and they be absolutely divorced from each other.

BRITT v. CAROLINA & N. R. CO. (Supreme Court of North Carolina. Fall Term, 1908.) Action by O. M. Britt against the Carolina & Northern Railroad Company. For former opinion, see 148 N. C. 37, 61 S. E. 601.

PER CURIAM. The defendant comes into court and declares that since the petition to rehear was docketed the cause of action has been settled and discharged, and asks leave to withdraw the petition to rehear. Thereupon it is ordered that the petition to rehear be dismissed without prejudice.

